NOTE: This determination is subject to an order prohibiting publication of some evidence disclosing client and commercial information.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 142
5592424

	BETWEEN	METROPOLITAN GLASS & GLAZING LIMITED Applicant
	A N D	PAUL MEIRING Respondent

Member of Authority:	Robin Arthur
Representatives:	John Rooney and Courtney Walker, for Applicant Gillian Service and Francesca Ryff, for Respondent
Investigation Meeting:	6, 7 and 8 April 2016
Date of Determination:	12 May 2016

DETERMINATION OF THE AUTHORITY

A. The geographical scope of Paul Meiring's restraint of trade in his employment agreement with Metropolitan Glass and Glazing Limited (Metro) was the North Island, not all of New Zealand.

B. Mr Meiring had not breached terms of his employment agreement with Metro regarding confidentiality, intellectual property and restraint of trade. Metro's application for a compliance order is declined.

C. Mr Meiring breached his duty of good faith to Metro prior to the end of his employment. The breach was deliberate, serious and

sustained. Under s 4A of the Employment Relations Act 2000 (the Act) he must pay a penalty of $8000 for the breach.

D. Mr Meiring must pay the penalty directly to Metro.

E. Costs are reserved with a timetable for memoranda set if an Authority determination on costs is necessary.

Employment relationship problem

[1] Paul Meiring worked for Metropolitan Glass & Glazing Limited (Metro) from 4 April 2011 until 31 August 2015. His employment ended by resignation. He gave notice of resignation on 8 May 2015.

[2] During his employment with Metro Mr Meiring had worked in various positions as Customer Projects Manager, Bay of Plenty Manager and National Key Account Lead. From mid-2013 he was appointed as its acting regional manager for the lower North Island in addition to his role as manager of the Bay of Plenty branch. Through the regional manager role he also became a member of Metro's Senior Leadership Team (SLT), a national grouping with five or six members.

[3] Three weeks after his employment with Metro ended, Mr Meiring began work for its largest competitor, Viridian Glass Limited Partnership (Viridian). He was appointed as Viridian's Canterbury Regional Manager, a role based in Christchurch. Mr Meiring arranged to commute weekly from his home in Tauranga to carry out that role.

[4] Mr Meiring's employment agreement with Metro required a six month notice period. When Mr Meiring gave his notice of resignation he asked Metro's Chief Executive Officer, Nigel Rigby to agree to reduce the notice period to three months so he could leave earlier. Around mid-June Metro's chief executive officer Nigel Rigby agreed to a reduced notice period. Mr Rigby's agreement resulted in Mr Meiring ending his employment with Metro on 31 August 2015, around 10 weeks sooner than he otherwise would have done. During the notice period, Mr Rigby also, at his own volition, arranged for payment to Mr Meiring of a bonus of $59,328 (the bonus).

[5] At no stage during his notice period did Mr Meiring advise Mr Rigby or anyone else at Metro that there was any prospect of him taking up a role with Viridian. Earlier in 2015 Mr Meiring had twice met with Lars Bloch-Kristensen, Viridian's Chief Executive Officer. During those discussions Mr Meiring mentioned the restraint of trade in his Metro employment agreement. The restraint meant he could not work for a competitor business anywhere in the North Island for a six month period once he left Metro. It also restrained him from soliciting customers and employees of Metro for a post-employment period of three months.

[6] After their second meeting Mr Bloch-Kristensen sought approval from Viridian's board for a salary package that he described Mr Meiring as "looking for" if he was to take up a position working for Viridian in the South Island. By email on 4 May 2015 Mr Bloch-Kristensen advised Mr Meiring that Viridian intended to "move forward" with Mr Meiring as its Southern Region Manager based in Christchurch. The base salary Viridian agreed to pay Mr Meiring was around 50 per cent higher than his base salary at Metro. Mr Meiring's reply on the same day said he was looking forward to working with Mr Bloch-Kristensen. Mr Meiring also wrote that he would "work through my exit from my current employment over the next few days" and keep Mr Bloch-Kristensen "posted".

[7] Metro applied to the Authority for a range of remedies and orders that related to what Mr Meiring had done during his notice period with Metro and by subsequently starting work for Viridian in the South Island. Its application raised three broad issues for determination by the Authority.

[8] Firstly, Metro alleged Mr Meiring had breached his restraint of trade because members of the SLT had agreed during a meeting in September 2014 that they would be covered by a nationwide restraint. Metro said it had relied on what it understood was his earlier verbal agreement to such a restraint and wanted Mr Meiring estopped from denying it was enforceable.

[9] Secondly, Metro said Mr Meiring had breached contractual obligations to protect its confidential information and its intellectual property by sending to his home email address a range of its sales, marketing, pricing and personnel information during his notice period.

[10] Thirdly, Metro said Mr Meiring had breached his duty of good faith by giving misleading descriptions of what he might do after his employment with Metro ended. Mr Meiring told Mr Rigby of some options he was considering but omitted any reference to the prospect of working for Viridian. The prospect was clearly established by his exchange of emails with Mr Bloch-Kristensen on 4 May 2015, only a few days before Mr Meiring submitted his notice of resignation to Mr Rigby.

[11] Metro sought a declaration that the restraint area in Mr Meiring's employment agreement with it applied to the whole of New Zealand, not just the North Island; an order requiring Mr Meiring to comply with enduring contractual obligations of confidentiality and the protection of Metro's intellectual property; a declaration that Mr Meiring had breached the confidentiality, intellectual property and restraint of trade terms of his employment agreement with Metro; an order requiring Mr Meiring to repay the bonus plus interest; and orders requiring Mr Meiring to pay penalties for breaches of good faith and his employment agreement.

The investigation

[12] For the investigation I received written witness statements and heard oral evidence, given under oath or affirmation, in answer to questions asked by me and the parties' representatives from:

- Mr Rigby;
- Metro's human resources manager Rebecca Phillips;
- Metro's general manager of operations Geoffrey Rasmussen;
- Metro's South Island contracts manager Barry Paterson;
- Metro's IT manager, Keith Glover;
- Metro's product manager, Michael Stanford;
- Mr Meiring;
- Mr Bloch-Kristensen;
- Viridian director Robert Famularo;
- Vanessa Joynt, a former human resources contractor at Metro; and
- Darryl Mac, Metro's former Upper North Island regional manager.

[13] Mr Paterson gave evidence by telephone. All other witnesses attended the investigation meeting in person.

[14] The two-and-a-half day long investigation meeting ended with oral submissions from counsel, speaking to detailed written submissions, addressing the factual and legal issues for determination.

[15] As permitted by s174E of the Employment Relations Act 2000 (the Act), this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made, but has not recorded all evidence and submissions received. Conclusions are drawn from the evidence on the basis of the civil standard of the balance of probabilities, that is, what was more likely than not to have been the case.

Reliability

[16] On one important area of fact there was a significant conflict of evidence between Mr Meiring and Mr Rigby about what they each said in conversations during Mr Meiring's notice period. There were also some differences in what Mr Meiring and other witnesses who were present at the September 2014 SLT meeting recalled about what was said when they discussed restraints of trade.

[17] In weighing those different accounts I concluded the evidence of Mr Rigby and other Metro witnesses was probably more reliable than that of Mr Meiring. I did so because evidence given by Mr Meiring during two earlier stages of the Authority's investigation had proved to be less than frank.

[18] Metro had sought an interim injunction to prevent Mr Meiring working for Viridian, an application determined by the Authority on 25 November 2015.[1] In his affidavit sworn for the Authority's investigation of that application, Mr Meiring had set out an account of events in an order that implied he had not met Mr Bloch-Kristensen until September 2015 to discuss the prospect of working for Viridian. Documents subsequently disclosed for the purposes of the Authority's substantive investigation showed the two men had certainly met to talk about that topic in April 2015. Mr Bloch-Kristensen's witness statement also revealed an earlier meeting in February 2015.

[1] *Metropolitan Glass and Glazing Limited v Meiring* [2015] NZERA Auckland 369.

[19] The Authority's investigation also included a meeting held on 5 February 2016 to consider some issues over the disclosure of relevant documents. Mr Meiring and Mr Bloch-Kristensen attended that investigation meeting under witness summons. Those summonses required them to bring and provide certain documents and also (in Mr Meiring's case) records held on electronic devices. In answer to questions at that meeting Mr Meiring suggested he had not replied by email to Mr Block-Kristensen's 4 May email to him. However documents revealed through the disclosure process showed Mr Meiring had, on the same day, replied positively to Viridian's stated intention to have him work for it.

[20] In that light, I considered Mr Meiring's recall on certain points was limited or selective to such a degree that in reaching the conclusions set out in the remainder of this determination I should generally, but not entirely, place more weight on the evidence of the Metro witnesses than of Mr Meiring.

Order prohibiting publication of some information in evidence

[21] Under clause 10 of Schedule 2 of the Act, publication is prohibited of the following information disclosed in the affidavits, witness statements and documents lodged by the parties and in the oral evidence of the witnesses:[2]

(a) The names of clients of Metro and Viridian; and

(b) Financial and confidential information of Metro and Viridian not otherwise already in the public domain.

[22] This determination has not included any of that prohibited information.

The geographical scope of the restraint of trade

[23] Mr Meiring signed his first employment agreement with Metro in April 2011. At the time his position was described as Customer Projects Manager. Its terms included a three month non-competition clause with the restraint area set as "New Zealand".

[24] This was replaced by a new employment agreement he signed in April 2012 when he held the position of Bay of Plenty Manager. It was the written agreement

[2] *H v A Ltd* [2014] NZEmpC 92 at [80].

still in place at the time he gave notice – with the six month non-competition period and the restraint area stated to be the North Island.

[25] I have not accepted Ms Phillips' evidence that the reference to the North Island was a mistake because it was "inconceivable" Metro would have agreed in 2012 to a non-compete clause for Mr Meiring that covered anything less than the whole country. The agreement was signed by Metro's CEO at that time, Andrew Bailey. Mr Meiring gave evidence that he had discussed the restraint terms with Mr Bailey before signing the 2012 agreement. Neither Ms Phillips nor Mr Rigby worked for Metro at the time. Neither had made inquiries of Mr Bailey, who had since left Metro, about the issue. Consequently there was no real challenge to Mr Meiring's evidence on that point or anything to support Ms Phillips' assertion that Mr Bailey must have mistakenly agreed to the stated restraint area of the North Island. Neither was it "inconceivable" Metro would only have sought that area of restraint for someone who was a manager of a branch within its upper North Island region and who was not, at that stage, a member of its SLT.

[26] Metro's argument that Mr Meiring should nevertheless be subject to a nationwide restraint, due to his apparent agreement to such a term at the September 2014 SLT meeting, failed for four reasons:

(i) The supposed acceptance of a nationwide restraint was, objectively analysed, no more than a decision by the managers at that meeting about what Metro should seek to have included its employment agreements with them and other managers; and

(ii) If there was sufficient in that discussion to amount to an oral agreement to a variation of terms of restraint, Metro then failed to comply with its own express contractual obligation as well as the general statutory obligation to record any such agreement in a written employment agreement; and

(iii) Even if an oral agreement to such a variation could be binding, Metro provided no discernible consideration for such a change; and

(iv) Use of the estoppel rule to nevertheless hold Mr Meiring to the obligations of a nationwide restraint was not warranted because Metro was not sufficiently vigilant in protecting its own interests and Mr Meiring's conduct in relying on his written terms of restraint was not unconscionable.

The September 2014 meeting

[27] The evidence of Mr Rigby, Mr Rasmussen, Mr Paterson and Ms Phillips established that Mr Rigby, during the September 2014 SLT meeting, described nationwide restraints as appropriate for members of the SLT and that no one present, including Mr Meiring, spoke against that proposition.

[28] Mr Rigby's comments at the September meeting were made in the context of a company-wide review of employment agreements, including those of Metro's 'top 50' managers. The SLT members were each involved, either before their September meeting or subsequently, in their own discussions with some of those 'top 50' managers who reported to them, about why restraint terms were being sought in Metro's employment agreements with those managers. It was a process guided by Ms Phillips and Ms Joynt, both part of Metro's human resources personnel at the time. Ms Phillips' evidence established that the review was co-ordinated with Metro's pay review process so that any new employment agreements (including any varied terms) would be associated with salary changes. Those pay changes then amounted to the necessary consideration for any variations included in the new agreements.

[29] However no similar changes, to record any agreed variations in their written terms of employment, were carried out for SLT members. The evidence of Mr Rigby and Ms Phillips suggested the task was either overlooked or never sufficiently prioritised to have been carried out during a very busy period for the company. As Mr Rigby put it in his oral evidence, "we should have done it and we didn't." He described it as something "muffed up" by the company.

[30] In that context the apparent consensus among SLT members at the September meeting about a nationwide restraint being appropriate for their roles amounted to no more than a decision by them that Metro should take the steps necessary to have such a term included in each of their employment agreements. It was, at best, a statement of policy or intention. It could not reasonably be taken to amount to agreement by

each participant at the meeting to waive the statutory requirement for any such variation to be recorded in writing.

[31] I was not dissuaded from that conclusion by oral and written evidence from Mr Paterson and Mr Rasmussen to the effect that they nevertheless considered themselves bound to a nationwide restraint as a result of the discussion at the September 2014 meeting. Their declared adherence to that position did not negate Mr Meiring's contractual right to have proper steps taken to reach and record such a variation.

The requirement for a written record of variation

[32] Mr Meiring's employment agreement had a standard completeness clause. It also included this variation clause:

> No variation to this employment shall be effective unless it is recorded in writing and signed by us both.

[33] His agreement was also subject to the requirements of s 63A of the Act requiring four steps from Metro in relation to any variation of his terms and conditions – provision of a copy of proposed change, advice that he was entitled to seek independent advice, a reasonable opportunity to seek that advice and then consideration by the employer of any issues raised by the employee about the change.

[34] Ms Phillips accepted in her oral evidence that s 63A applied to the circumstance of a supposed variation of the restraint terms at the September meeting. She also accepted none of those statutory requirements were complied with by Metro in respect of whatever change was said to have been agreed that day.

[35] However s 63A(4) of the Act also provides that the validity of an employment agreement is not affected by failure to comply with the section's other requirements. Metro submitted case law was to the same effect regarding the potential enforceability of an orally-agreed term.[3] By way of example Metro pointed to an Authority determination in another matter that discussed evidence about a supposed oral variation to a restraint term. In that determination the Authority accepted the notion

[3] *Designlink Limited t/a Rodney Wayne Hairdressing Whangaparaoa v Raymond* (EC unreported AC 24/06, 1 May 2006) at [9], relying on *Warwick Henderson Gallery Limited v Weston* [2005] ERNZ 921 (CA) at [16].

that breach of an employment agreement term that required any variation to the agreement to be in writing "does not in itself make an oral agreement ineffective".[4] On the particular facts of that case however there was insufficient evidence of the alleged oral variation so the notion was not applied.

[36] Significant policy reasons support the proposition that restraint terms more restrictive than those originally bargained for (and then recorded in a written employment agreement) should not be considered effective unless any actually agreed variation to those written terms is then also recorded in writing. A written record is what the statute requires and frequently, as it did in Mr Meiring's case, employment agreements also expressly require it.

[37] As a matter of legal policy restraints of trade are unlawful.[5] In a market economy they fetter both competition and the freedom of individuals to move jobs and to use their skills and experience. Such restraints are justified and enforceable only to the extent they are in the public interest and are reasonable and necessary to protect specific proprietary interests of an employer.[6]

[38] The special and limited application of such restraints creates a further public interest in having the precise scope of such terms properly recorded in writing rather than open to dispute due to what will often be conflicting recall of the nature and content of oral variations to such terms. A written record assists both the parties and, if called upon to do so in litigation over the issue, the Authority and the Court.

[39] The obligation to ensure such terms, where agreed, are properly recorded is reasonably borne by the employer seeking the benefit of such restrictions.

[40] In Metro's case it had human resources professionals aware of the need to follow such a process and who were, at the time, involved in carrying out exactly such an exercise for other senior managers. Metro's failure to complete the same exercise for its SLT members was in its own hands.

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[4] *Taylors Floorcoverings & Furnishings Limited v Brown* [2012] NZERA Christchurch 218 at [38].
[5] *Broadcasting Corporation of New Zealand v Nielsen* (1988) 2 NZELC 96,040 at 96,047 (HC).
[6] *Gallagher Group Limited v Walley* [1999] 1 ERNZ 490 at 495.

No consideration

[41] Even if the standard of requiring a written record was too high and an oral agreement to such a variation could be binding, Metro's claim regarding the validity of a nationwide restraint had to fail for want of consideration. A variation of an agreement requires consideration, just as much as the initial agreement does.[7] There was no evidence Metro provided any such consideration in exchange for Mr Meiring accepting a more restrictive obligation than that set in his written employment agreement.

[42] Ms Phillips' evidence established Metro understood the need for such consideration during the company-wide review of employment agreement terms conducted in 2014. The changes in restraint terms for other managers were linked to the pay review process so the legal obligation to provide consideration (something of value) for the variation would be clearly given.

[43] Mr Rigby confirmed Mr Meiring received no financial benefit in return for the variation said to have been agreed at the September 2014 SLT meeting. Financial benefit is one, but not the only, form in which consideration may be found. In answer to questions at the investigation meeting Mr Rigby suggested the privilege of being a member of the SLT in a NZX-listed company was the benefit that Mr Meiring received. Even if that could amount to consideration for a mutual promise made, it was a benefit Mr Meiring already had at the time of the supposed agreement to vary the scope of his restraint terms. There was no real suggestion his role in, and membership of, the SLT would otherwise have changed at the time but for his agreement to a restraint of a larger, and therefore more onerous, geographical scope. Metro bore no different detriment and Mr Meiring received nothing different of benefit to him as the result of a supposed change in restraint terms applicable to him from September 2014. Rather, while Metro would have benefited, Mr Meiring would have incurred only additional detriment through a greater restriction on his freedom to work post his employment with Metro. Accordingly no consideration can properly be said to have passed from Metro to Mr Meiring for the supposed mutual promise in such a variation. Without it, there was no valid and enforceable variation.

[7] *Fuel Espresso v Hsieh* [2007] NZCA 58 at [17] and [18].

[44] Mr Meiring did not seek to argue that a nationwide restraint would not have been reasonable, in September 2014, for a person in his position in order to protect Metro's proprietary interests in its confidential business information and its commercial relationships. Rather, his successful argument was that, not having followed the necessary process for recording agreement to any such variation and not having provided consideration for such a variation, Metro could not now claim the benefit of a bargain it never completed.

Insufficient grounds for estoppel

[45] In seeking a finding that Mr Meiring should be estopped from denying the enforceability of a national non-compete clause, Metro sought to have the Authority exercise its broad jurisdiction under s 162 of the Act to make orders the courts may make under any rule of law relating to contracts. One such rule, that of estoppel, may be applied to prevent a party going back on that party's word, express or implied, when to do so would be unconscionable. This includes situations where another party has reasonably acted on underlying assumptions made on the basis of what the resiling party has previously said or done.

[46] To establish the grounds for such an estoppel Metro had to show it reasonably relied on a belief or expectation created or encouraged by some action, representation or omission of Mr Meiring. It failed to establish a reasonable reliance due to its lack of vigilance at two points. Firstly, as already described, it failed to properly carry and complete documentation of a restraint variation, on the basis of what Metro said was agreed by the SLT members in September 2014. Secondly, Metro's apparent surprise that Mr Meiring did not consider himself bound by a national restraint would have been avoided if it had been more vigilant and diligent in establishing the true position regarding his actual contractual obligations between receiving his notice on 8 May 2015 and what, by Mr Rigby's consent, was Mr Meiring's last day of work on 31 August 2015.

[47] The evidence of Mr Rigby and Ms Phillips established neither had checked the actual terms of his written employment agreement until after the latter date, although two items of correspondence sent to him before then implied they had.

[48] On 9 July Mr Rigby sent Mr Meiring a proposed settlement agreement to confirm the terms on which he was leaving Metro. Mr Rigby's evidence was that

such an agreement was standard practice as a means of reminding departing managers of their ongoing obligations. His covering email said the agreement was "no different to your employment contract, just a clarification of what the company commits to and a reminder of your obligations".

[49] On 27 August Mr Rigby sent Mr Meiring a further email that referred again to the suggested settlement agreement and described its terms as "straight out of your employment contract and simply state the terms as a reminder of the company and your obligations". The terms listed in the email included the length of Mr Meiring's restraint of trade but made no reference to its geographic scope.

[50] In their oral evidence Ms Phillips and Mr Rigby confirmed neither of them had looked at Mr Meiring's actual written employment agreement until after his employment had ended.

[51] There were at least two instances within Mr Rigby's knowledge that should, reasonably, have alerted him to the need for an earlier and more careful check. If he had done so, he and Ms Phillips would have seen the restraint in Mr Meiring's employment agreement covered only the North Island. Mr Rigby would, thereby, have been more alert and sensitive to matters on which he could have made further inquiries while Mr Meiring was still Metro's employee.

[52] The first instance was when Mr Meiring rejected the settlement agreement in an email to Mr Rigby on 13 July. The document sent to Mr Meiring was clumsily drafted. It used wording more suited to a situation where an employee had raised a grievance. It referred to the employee having raised an employment relationship problem that the parties had now agreed to settle. Mr Meiring's email, not unreasonably, described the wording as "disappointing" but offered to discuss it with Mr Rigby. In his witness statement Mr Rigby described Mr Meiring's rejection of the agreement as "a bit of a red flag".

[53] In his oral evidence Mr Rigby revealed that, at the time he sent Mr Meiring his 27 August email, he already knew Mr Meiring was going to a competitor and "had a fair idea of who that competitor was". Mr Rigby sent the email while he was on holiday in Hawaii. He said the email was written and sent after he had received a call from a source that Mr Rigby said he "had no reason to disbelieve". The caller passed

on what the caller had heard about Mr Meiring's intentions. While what the caller told him was by its nature rumour rather than confirmed fact, Mr Rigby said he had "strong suspicions" about what Mr Meiring was doing. His 27 August email said he would call Mr Meiring the next day. There was no evidence Mr Rigby did call or tried to call him.

[54] Instead Mr Rigby simply left the matter on the basis set out in last paragraph of his 27 August email. Mr Meiring's employment was due to finish, by Mr Rigby's agreement, on 31 August. Mr Rigby wished him good luck and continued:

> … if you have opportunities that arise and you think there is a potential complication or conflict with you[r] employment contract terms, call me to see if we can figure out a solution assuming it doesn't impact Metro commercially.

[55] In the context of the information available to Mr Rigby and Ms Phillips at the time, Metro's supposed reliance on its assumption that Mr Meiring had accepted he was bound by a nationwide restraint was not reasonable. To have accepted Metro's estoppel argument would have been to belatedly impose on Mr Meiring a better bargain for Metro than it bothered to properly secure for itself during his employment.

[56] Neither, in that context, did Mr Meiring act unconscionably by carefully ordering his affairs in accordance with the North Island restraint term in his written employment agreement with Metro and accepting a role with Viridian in the South Island. However the question of whether, having done so, he then acted in good faith and faithfully served Metro during his notice period is a different matter, addressed later in this determination.

Alleged breaches of terms on confidential information and intellectual property

[57] By the nature of his position and role at Metro Mr Meiring had access to its confidential and proprietary information and was involved in developing its national sales and business strategies. Metro was entitled to protect that information from use to its disadvantage by way of restraint terms. It did so on the basis of the written terms in Mr Meiring's employment agreement. He did not challenge the geographic scope or temporal length of those terms as being unreasonable or unnecessary. No evidence established Mr Meiring had, in fact, breached those obligations or used Metro's confidential information to the advantage of his new employer since starting work for Viridian.

[58] Based on his agreed 31 August departure date, the restraint terms prevented Mr Meiring 'soliciting' Metro's employees, suppliers, clients and customers until 30 November 2015 and from working for a competitor before 29 February 2016 anywhere in the North Island. After Metro had begun litigation over this matter he also gave undertakings not to visit any Metro clients, including clients in common with Viridian, during the remainder of his three month non-solicitation period. That undertaking effectively extended the restraint obligation to the South Island for that period. Viridian provided its own undertaking that it would ensure Mr Meiring complied with his undertakings to Metro.

[59] However Metro alleged Mr Meiring had already breached his obligations to protect its confidential information and intellectual property before his employment ended. It sought the imposition of penalties for those alleged breaches along with an order requiring ongoing compliance with his enduring post-employment obligations in order to protect Metro's confidential business information and intellectual property.

[60] Metro pointed to two ways that Mr Meiring had failed, in its submission, to properly protect its information while he was still its employee. Firstly, Metro identified several instances where Mr Meiring had sent business information to himself at his personal email address (or that of his fiancé). Secondly, Metro identified two instances where Mr Meiring sent information from or about other entities in the glass industry to Mr Famularo, who at that time was the chair of Viridian's board.

[61] Mr Meiring's explanation for the information sent to personal email addresses was that he had sent it as a matter of convenience. He often worked at home during the evenings and weekends. He had experienced some problems connecting remotely to Metro's computer system using a laptop computer. Metro argued the connectivity or access issues that Mr Meiring referred to were either exaggerated or dated. Analysis of email traffic showed Mr Meiring frequently sent such information to his personal email address in 2013 but had done so much less often since then, expect for what appeared to be an unexplained and unnecessary increase shortly before and then during his notice period in 2015.

[62] To protect its confidentiality, the detailed evidence about the range and nature of the information Mr Meiring sent to his personal email address has not been set out in this determination. Although I have closely reviewed all the information and evidence about it, two examples were sufficient to explain the conclusion I have reached: Mr Meiring had cogent and acceptable reasons for having the information and Metro had not established, as more likely than not, that he was really only squirreling away information to use once he started work at Viridian.

[63] The first example was that Mr Meiring sent himself a spreadsheet of data about the operation of Metro's Bay of Plenty branch. He said he did so because he had to talk, during his notice period, to his successor as the Bay of Plenty branch manager about aspects of that operation. Mr Rigby had asked the successor manager to consider those aspects and Mr Meiring helped the successor manager to do so.

[64] The second example concerned used of a proprietary 'quoting tool', used by Metro under a licence from a supplier. It was a piece of software used to work out pricing for a particular service provided by Metro. Mr Meiring had sent a copy of that tool to himself at his home address. He said he did so because the person responsible for providing the quotes had a backlog of work and Mr Meiring had offered to help out. There was evidence that he had done so, including by using the quoting tool.

[65] The evidence also established Mr Meiring was not alone in sending Metro information from or to his personal email address, even though he accepted it was not sound business practice to do so because of the risk that it created. However he had not breached any express Metro policy. Its employee handbook emphasised the responsibility to protect business information and to only use it for authorised purposes. Those policies did not prohibit sending business information to home email addresses or using it on personal electronic devices.

[66] The evidence did reveal two instances where Mr Meiring, while still employed by Metro, forwarded information from his work email address that he then sent to Mr Famularo. In both instances however the information did not have the necessary character of confidentiality to constitute a breach by Mr Meiring of his contractual obligations to Metro.

[67] In one case he passed on a price list from a supplier. Metro did not establish the price list was not otherwise publicly available to Viridian or any other entity or person who rang and asked for it.

[68] In the other case Mr Meiring had forwarded an email that attached a public notice about the liquidation of a glass company. The notice was published in a newspaper and, by its very nature, was public. Mr Famularo's evidence was that he already knew of the liquidation before Mr Meiring sent him the notice. I was not persuaded by Metro's proposition that in forwarding the notice Mr Meiring "was alerting a direct competitor" that Metro was potentially interested in buying the liquidated business. There was nothing to indicate that notion was communicated by Mr Meiring to Mr Famularo or to confirm that such an inference would be taken from sending him a copy of the public notice.

[69] Accordingly Metro had not established Mr Meiring's possession and use of company business information during the period up to the end of his employment was out of the ordinary or for an improper purpose. It was *possible* to infer that he had the information for an ulterior purpose but I was not persuaded that it was more *probable* than not that he had sent the information to his home email address for that reason. In each instance he had a valid reason for doing so that related to the duties that he continued to carry out during his notice period.

[70] There was some limited evidence about Mr Meiring's contact since the expiry of his restraint period with some clients or suppliers of Metro. None of that evidence established any misuse by him of Metro's business information.

[71] Not having established there was a breach of his terms of employment, either before the end of his employment or (on present evidence) since, there were no sufficient grounds for making the compliance order against Mr Meiring or requiring him to pay penalties that Metro sought on those grounds. Absent such an order Mr Meiring nevertheless remained subject to those terms regarding confidentiality and protection of intellectual property that survived the end of his employment by Metro.

Breach of good faith

[72] Metro sought the imposition of a penalty against Mr Meiring for what it described as his deliberate and flagrant breach of good faith by not disclosing his

plans to join Viridian. It submitted he had, when directly asked about his future plans and whether he was planning to remain in the glass industry, "deliberately failed to mention that he was at least in conversations with Viridian".

[73] Metro also sought an order requiring Mr Meiring to repay the bonus paid to him during the notice period. It said Metro would not have paid the money if he had been open and honest about joining Viridian. The order was sought as an award of damages for a breach of good faith.

[74] Mr Meiring submitted there was no breach of good faith because he was not asked a direct question and to expect him to volunteer the information was placing his obligations at the level of someone with fiduciary duties rather than those appropriate to an ordinary employee, albeit in his case, one at a senior level. Alternatively he submitted that, if such a breach was found, it was not so outstandingly bad that it met the statutory threshold for imposition of a penalty – that is, it was not serious, deliberate or sustained.

[75] His obligations while working through the notice period were not those of someone in a fiduciary relationship. He was not bound to entirely subordinate his interests and act solely in Metro's interests.[8] However he was obliged to balance acting in his immediate and personal interests with his duties of good faith and faithful service to Metro for the remainder of his employment. I have found that he failed to do so, by deliberately withholding certain information and thereby depriving Metro of the opportunity to fully assess how it could best act in its own interests in two respects – firstly, on whether to agree to a request from Mr Meiring to let him go earlier than required under his contractual notice period and, secondly, to consider what customers and information he might have access to during that time.

[76] Mr Rigby's initial evidence was that he had directly asked Mr Meiring if he was going to work for a competitor. On questioning he accepted his actual query was wider and less precise. He had asked Mr Meiring what he was planned to do and whether he planned to "stay in glass". Although Mr Meiring maintained Mr Rigby made only more general inquiries about his "plans for the future", Mr Rigby's account was more likely to be correct. Mr Meiring, more probably than not, clearly

[8] *Nottingham University v Fishel* [2000] EWHC 221 (QB); [2000] ICR 1462 at page 1491C-D.

understood the import of Mr Rigby's inquiry as being about whether Mr Meiring might go on to work for a supplier, customer or competitor in the glass industry. His response was to tell Mr Rigby about a number of options that he was considering. These included working for an aluminium products company, getting involved in a solar business and returning to Britain with his fiancé.

[77] However Mr Meiring never mentioned the prospect of working for Viridian. He accepted in his oral evidence that it was a "strong option". He described it as his "safety net" in considering what he would do after his employment at Metro ended. His omission of that option in what he told Mr Rigby was, plainly, likely to mislead or deceive Mr Rigby. It was a deception Mr Meiring maintained throughout his notice period. From his point of his view he had good reasons (or an incentive) not to actively communicate his true position. He had sought an early release from his notice period – which would him enable to start work at Viridian, as he did, sooner than he otherwise would have been able to do so. Mr Meiring accepted in his oral evidence that if he had told Mr Rigby that work at Viridian was a real prospect, "he would definitely have made me serve out [the] six months [notice period]". He also admitted that he knew Mr Rigby would also probably have restricted the work that he could do and who he could be in contact with during that period.

[78] Assessed objectively, his actions in withholding that information from Mr Rigby were more likely than not deliberate. It was a serious omission that he sustained throughout at least the notice period of 16 weeks that he ended up working through – from when he gave notice on 8 May 2015 to his last day of employment on 31 August 2015.

[79] In reaching this conclusion it was not necessary to determine Mr Meiring had decided before his employment at Metro ended that he would definitely accept the Viridian post offered to him. His evidence was that he had resolved not to make a final decision till after he finished up at Metro. Given his positive response to Mr Bloch-Kristensen's 4 May email, there was reason to doubt that evidence.

[80] Internet message exchanges with his nephew in July and August added further doubt. In July his nephew had referred to, admittedly second hand, information passed on by a family member that Mr Meiring and his fiancé were "moving to the South Island ... and leaving the business". On 22 August, in a reply message, Mr

Meiring referred starting work with a new employer in the third week of September, which proved to be the time at which he subsequently started with Viridian.

[81] However a finding of a breach of good faith did not require him to have firmly committed to employment with Viridian anyway. Rather, what was relevant was the real prospect that he could immediately take up such a job with Metro's largest competitor and that he deliberately omitted to mention that real prospect when describing his options to Mr Rigby. Mentioning some but not all his options was likely to, and did in fact, mislead and deceive Mr Rigby.

[82] There was no general duty to disclose his post-employment plans. However, in choosing to answer Mr Rigby's question about his plans, Mr Meiring then told only part of the truth. Mr Meiring breached his good faith obligations by keeping mum on the strong option he had and that he must have known was most relevant to Metro's interests while he remained employed by it during the notice period,. Its relevance was not about what he would do after his employment with Metro ended, but was about what Metro might consider it needed to do to protect its commercial interests for the remainder of his employment with it.

[83] The relevant principle can be illustrated by reference to the Employment Court's decision in *Murray v Attorney-General*.[9] That case concerned, in part, a situation where the employees were found not to have properly disclosed relevant information *before* they were employed. The Court referred to the general contractual rule – applicable to a pre-employment situation – that there was no duty on negotiating parties to reveal material facts voluntarily but noted the situation changed if a question was asked:[10]

> However, if the other party asks and the first party chooses to answer, that answer must be honest and full. And if an answer is given that is correct but it becomes untrue by reason of supervening events but still during the negotiations, there is a duty to disabuse the questioner.

[84] Compared to someone not yet employed, an employee is subject to greater obligations in their dealings with the employer – that is both the statutory duty of good faith and the implied contractual duty of fidelity. An employee in that situation, if they choose to answer a question from their employer, cannot logically have a lesser

[9] [2002] 1 ERNZ 184.
[10] *Murray*, above n 9, at [44].

obligation to answer fully and honestly than someone not yet employed and not yet subject to those statutory and contractual obligations. Similarly the employee could not be expected to have a lesser duty to correct an answer that became untrue due to supervening events. And because good faith duties are mutual, an employer must have the same obligation in answering an employee's questions or in correcting earlier answers.[11]

[85] The reference to negotiation in the principles considered in the *Murray* case was also relevant to Mr Meiring's particular circumstances.

[86] His notice of resignation included a request to have his six month notice period reduced to three months. He wrote that such a reduction "would be in the best interests of both Metro and myself" and asked for "a favourable response to the above request". The conversations he had with Mr Rigby about his future plans were conducted in the context of his request for an earlier departure. Withholding the information about his Viridian option helped his negotiation of the early release agreed to by Mr Rigby.

[87] Further reference to the dicta in *Murray v Attorney-General* assisted on that point. The contractual rules referred to were drawn from the House of Lords decision in *Bell v Lever Bros Limited* [1932] AC 161. However the Employment Court made the following relevant observation about the application of those principles in the context of existing employment:[12]

> … [I]f the facts of *Bell v Lever Bros Ltd* were to come before the Court today, the result would have to be different. This is because the non-disclosing parties in that case were already employees who were negotiating what today we would call an exit package. They deliberately concealed from their employer details of their own wrong behaviour in the course of their employment which would certainly have resulted in their not being granted an exit package but only an exit. Their behaviour cut across the requirement of s 4 of the Employment Relations Act 2000 that the parties to an employment relationship must deal with each other in good faith and must not do anything to mislead or deceive each other. As I have said, s 4 does not apply until the employment relationship is established but, once it is, the rule in *Bell v Lever Bros Ltd* can no longer apply. There is no reason to allow it to continue to apply in a situation such as the present where it is vital to the interests of the defendant to employ only persons who have demonstrated an unblemished integrity.

[11] Employment Relations Act 2000, s 4(1A)(b).
[12] *Murray*, above at n 9, at [55]

[88] Mr Meiring had not behaved wrongly in resigning or securing the real prospect that he would soon start work for Viridian, however he was attempting to negotiate an early departure. If he had revealed that option, Metro could legitimately have exercised its discretion to decline the request to shorten his notice period. Mr Meiring failed to be active and communicative in providing that relevant information about himself and his prospects to his employer. By withholding that information he hindered Metro's opportunity to properly assess whether those prospects might be contrary to its interests and whether it should exercise its contractual rights while Mr Meiring was still its employee to prevent him having access to certain information and dealing with certain clients. For example, Metro did not get the opportunity to assess whether use of garden leave might have been appropriate. It was a measure Mr Rigby gave evidence of having used, in a different recent instance, during the notice period of an employee who had resigned and advised he was going to work for a competitor.

[89] Another consequence of Mr Meiring's early release from serving his full notice period was that the periods of restraint on non-solicitation and non-competition that did apply to Mr Meiring in respect of the North Island expired around ten weeks earlier than they otherwise would have done.

[90] If Mr Meiring had revealed the prospect of working for Viridian it was also likely that Metro would not have given him the bonus, paid on 29 May during his notice period. He had not, as I understood the evidence of all parties, asked for the bonus but Mr Rigby arranged on his own volition for it to be paid. Metro had a discretionary bonus scheme in place but the targets set in the scheme had not been met so it was not paid to other managers that year. The payment that Mr Rigby arranged, by seeking specific approval for it from his board, was also made despite one provision of the bonus scheme stating that any recipient must "not [be] working out a notice period on the day of payment". The reason Mr Rigby arranged for the payment was not clear. One factor may have been that Mr Meiring's resignation was motivated by his disappointment that he was not given an opportunity to apply for a general manager's position and the bonus may have been some acknowledgement of that situation. Another factor was that, throughout his two years in the acting regional manager role, Mr Meiring had received a significantly lower base salary than other SLT members. However, while Mr Rigby may have recognised those factors, he would likely have acted differently if he had been informed, in good faith, by Mr

Meiring of his prospects at Viridian. Mr Rigby might have chosen not to arrange for the payment or might have sought to use the prospect of making such a payment to negotiate some better terms of restraint in return for it. Mr Meiring's withholding of the information deprived Metro of those opportunities.

The penalty for the breach of good faith

[91] Mr Meiring's breach of good faith was not a single instance. Rather it was deliberate and sustained throughout the 115 days he worked on his shortened notice period. A penalty was appropriate to deter employees, particularly those in positions of seniority and trust, from committing such breaches. Mr Meiring created a serious risk of harm to his employer's interests – by denying it the opportunity to exercise contractual rights in respect of his work during that period, concerning the length of the notice period and the information and clients to which he had access. He showed no remorse for it because he did not accept he had any obligation to disclose the strong option he had to work for Viridian. His omission induced Metro to act differently towards him than it would likely have done if he had not misled it as to the true situation regarding his future prospects – by shortening his notice and paying him a handsome bonus not paid to other staff that year. In all the circumstances Mr Meiring's rather convenient silence throughout his notice period, while Metro agreed to his request to go early and then paid him the bonus, was outstandingly bad enough to warrant a penalty.

[92] Considering the particular facts in this case and the penalties imposed in comparable cases, a global penalty of $8000 was the appropriate award to mark disapproval of such breaches and to deter others from committing them. As Metro incurred the harm resulting from the breach of good faith, measurable in part by its decision to pay the bonus, it was appropriate for the penalty to be paid by Mr Meiring to Metro rather than the Crown.[13] Mr Meiring must pay Metro the $8000 awarded as a penalty for his breach of good faith.

No damages for breach of good faith – no order to repay the bonus

[93] Metro sought an order for repayment of the bonus as an award of damages caused to it by Mr Meiring's breach of good faith. Because a penalty is available for

[13] Employment Relations Act 2000, s 136(2).

the breach, an award of damages was not open to the Authority as a remedy.[14]

[94] Mr Meiring's actions (or omission) during his notice period were arguably also a breach of his implied contractual duty of fidelity, that is faithful service to his employer. An award of damages is open as a remedy for breaches of a contractual duty but Metro did not seek findings regarding the duty of fidelity or damages in the event that contractual term was found to have been breached.

Costs

[95] Costs are reserved and the parties are encouraged to resolve any issues of costs between themselves. If they are unable to agree and an Authority determination of that issue is needed, the parties may lodge and serve memoranda with the relevant invoices attached. As there may be debate on the 'event' or overall result I have not identified which party should lodge its memorandum first. Either or both should do so by no later than 28 days after the date of issue of this determination, with any reply made within 14 days of service of the other party's memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[96] Investigation meetings have been held over five days – 23 November 2015 regarding the interim application, 5 February 2016 regarding production of documents and records by Mr Meiring and Mr Bloch-Kristensen, and three days in April 2016 regarding the issues resolved in this determination.

[97] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[15]

Robin Arthur
Member of the Employment Relations Authority

[14] *Hally Labels Limited v Powell* [2015] NZEmpC 92 at [127] and [134]. See also *NZ Tramways and Public Transport Employees Union Inc v Mana Coach Services Limited* [2011] NZCA 571 at [75] per Justice Chambers suggesting the earlier authorities are divided on the issue.
[15] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].