IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 535
3125798

	BETWEEN	NEW ERA IT LIMITED Applicant
	AND	ANDREW HOOD Respondent
Member of Authority:	David G Beck	
Representatives:	Amy Keir and Penny Shaw, counsel for the Applicant Glen Jones, counsel for the Respondent	
Investigation Meeting:	3rd, 4th and 5th August and 7 October 2021 in Christchurch	
Submissions Received:	7 October 2021 from the Applicant 7 October and further information 15 October 2021 from the Respondent	
Date of Determination:	30 November 2021	

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] New Era IT Limited (New Era) is part of a multi-national company that provides IT and allied services to the New Zealand education sector. New Era has entered in agreements for comprehensive IT service provision to around 300 schools in the compulsory education sector and it supports those agreements with 160 New Zealand based employees. The interface with schools is managed by regionally based operations and client managers, engineering support and team leaders, managing onsite technicians.

[2] From June 2012 until 24 April 2020 Andrew Hood worked for New Era, latterly in the role of South Island Regional Manager based in Christchurch. The parties entered into a record of settlement agreement (ROS) following a restructure that disestablished Mr Hood's role. The ROS was entered into pursuant to s 149 Employment Relations Act 2000 (the Act) and signed by both parties on 23 April 2020 and a Ministry of Business, Innovation and Employment Mediator on 29 April 2020.

[3] New Era alleges that Mr Hood breached specific terms of the ROS's confidentiality and non-disparagement provisions, ongoing restraint obligations and that Mr Hood allegedly committed the identified breaches by acting in concert with three other departing New Era employees. New Era seek remedies for identified breaches and the imposition of penalties.

[4] Mr Hood denies the identified breaches and asserts that the Authority cannot determine the claim he acted in concert with others on the basis that this claim amounts to common law tort excluded from the ambit of the Authority by s 161(1)(r) of the Act.

The Authority's investigation

[5] The investigation took three full days and one half day for submissions. I heard evidence 'in person' and in this order, from: New Era summoned witnesses, Karla Smith, Assistant Principal, Cashmere High School; Donna Scarlett, Executive Officer, Villa Maria College (Christchurch); Kim van Vuuren, Assistant Principal, Kaiapoi High School; and John Baigent, sole director of Contrast New Zealand Limited and Overseer Software Limited. For New Era: Sharon Ketter, Principal of Carew/Peel Forest Primary School; Andrew Grace, Chartered Accountant; Nicholas Coakley, ex-Technical Services Manager of New Era; Timothy Foley, ex-regional manager, Te Tai Tokerau; Kate Finlayson, HR Manager; Gregory Strachan, CEO; and the respondent, Andrew Hood.

[6] I received helpful submissions and additional documentation from both parties following the investigation meeting. I have carefully considered the information provided and submissions. As permitted by s 174E of the Act I have not set out a full record of every event or matter in dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of the applicant's claims.

Issues

[7] The issues I have to resolve are:

(a) Do the obligations Mr Hood owes to New Era arise from the s 149 record of settlement or as distinct ongoing employment agreement terms?

(b) Are the restraints reasonable?

(c) Has Mr Hood breached any ongoing obligations arising from the ROS?

(d) Can the Authority determine the claim that Mr Hood has 'acted in concert' with other ex-employees of New Era to effect the alleged breaches?

(e) What, if any, remedies should be awarded to New Era if breaches are established?

(f) If it is appropriate to impose penalties for any established breaches how should such penalties be apportioned between the Crown and New Era?

(g) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[8] Mr Hood commenced working for New Era in June 2012. Prior to this, Mr Hood owned a computer servicing business and later worked in a business development manager/sales/marketing role for a technology services company.

[9] Initially, Mr Hood worked as a client manager for New Era responsible for servicing schools in the South Island and canvassing new business. Mr Hood says pertinent to these proceedings, he was responsible for bringing on board and being the primary contact for Cashmere High School, Villa Maria College and Kaiapoi High School. In September 2014 Mr Hood was promoted to New Era's South Island regional manager role. Mr Hood remained responsible for the aforementioned schools up to 2018, when he handed over responsibility to a, then new, South Island client manager but Mr Hood says he retained an ongoing relationship

role with Kaiapoi High School and continued to take part in occasional meetings with Villa Maria and Cashmere High alongside the client manager.

[10] In late March 2020, New Era commenced a restructuring, citing Covid-19 created uncertainty and the need to contain costs. As a result, it was proposed that Mr Hood's role be disestablished. This led to the parties entering into the ROS now in dispute. Both parties were legally represented at the time they entered the ROS. The ROS referenced restraint obligations of six months' duration relating to non-solicitation of clients and New Era employees and ongoing confidentiality obligations contained in Mr Hood's individual employment agreement. However, a provision preventing him from working for a competing business was waived.

Aftermath of the settlement

[11] On the morning of 24 April Mr Hood called Kim van Vuuren, deputy principal Kaiapoi High school to advise he had been made redundant. Ms van Vuuren recalled that Mr Hood referred to an 'agreement' with New Era but did not disclose details of such and that he did not speak ill of New Era. Ms van Vuuren said Mr Hood had also contacted the school principal.

[12] In the evening of 24 April Greg Strachan, CEO of New Era, emailed the Kaiapoi principal and Ms van Vuuren saying he understood Mr Hood had been in contact. Mr Strachan's email advised "unfortunately we have had to make the position of South Island Regional Manger redundant". Mr Strachan then acknowledged Mr Hood's contribution to New Era and said they wished him well in his "next career step". He ended the email with an invite to discuss the matter further with him.

[13] On 28 April 2020 the principal of Kaiapoi High school emailed Mr Strachan outlining his significant unease about Mr Hood's departure who he lauded as professional in all dealings with the school and concerns the school had over the provision of on-site technicians and on-going support. He also indicated he was "less than impressed" by New Era's "clear cost–cutting and centralisation of your management in Auckland". The email concluded with a warning that the contractual relationship was close to ending. Text messages between Mr Hood and Phil Gourley (then still employed by New Era) of 28 April discussed the content of the email.

[14] On 29 April Mr Strachan emailed the principal of Villa Maria College advising that Mr Hood's position had been disestablished after they had assessed staffing levels. Mr Hood was described as "no longer employed at New Era" and his "significant contribution" was acknowledged wishing him well for with his future endeavours. Mr Strachan invited the principal to call him on his cell phone if she wished to discuss the matter further.

[15] Following ending employment with New Era, Mr Hood approached John Baigent and met with him on 30 April. This led to Mr Hood being engaged by Mr Baigent's company Overseer Software Limited as a contractor to sell and market an asset management software product to schools (Oversight). New Era acknowledged that they did not offer a similar product.

[16] Mr Baigent disclosed that Mr Hood had apprised him of the restraint provisions of his employment agreement on 7 May by emailing him a copy of an extract from the s 149 settlement agreement and the relevant employment agreement restraint provisions. Mr Hood, on being questioned, affirmed he discussed the ROS provisions with Mr Baigent and clearly was aware of the non-solicit component of his restraint

[17] Mr Hood says he entered into a contractor agreement with Overseer Software Limited on 11 May 2020 and his remuneration was commission on sales only. It emerged in evidence that Mr Baigent also paid Mr Hood additional compensation in the form of a regular fixed retainer not recorded in the contracting agreement.

[18] Mr Baigent suggested to Mr Hood on 20 May that he approach Kaiapoi High School. Mr Hood says he had a lunch meeting with the principal of Kaiapoi School on 27 May on the principal's invite. At this meeting, that Mr Hood claimed he saw as an opportunity to pitch Oversight, the subject of Kaiapoi High's dissatisfaction with New Era as an IT provider arose. Mr Hood said the principal told him he was looking for alternative IT providers. Mr Hood says he told the principal he was restrained for six months and could not discuss this issue. The school principal did not give evidence.

[19] Mr Baigent said that Mr Hood reported the above conversations to him indicating there might be an opportunity to provide IT services to Kaiapoi High School. This led to Mr Baigent meeting Mr Hood on 29 May to discuss a "new business venture". Mr Baigent recalled Mr Hood also discussed other potential schools interested in switching IT provider but did not

remember which ones. Mr Baigent became aware from Mr Hood, without recalling his exact words, that some schools were specifically dissatisfied with New Era's services.

[20] Ms van Vuuren says that she also met Mr Hood at Kaiapoi High School on 3 June 2020 at his request and she indicated an interest in meeting Mr Baigent after Mr Hood had briefed her on what IT services Mr Baigent intended to be engaged in providing. Ms van Vuuren recalled Mr Hood being clear that he would be involved in Mr Baigent's business once his restraint expired.

[21] Mr Baigent then decided he would expand his business by providing services similar to New Era. To this end, he incorporated Contrast New Zealand Limited on 10 June 2020. As context, Mr Baigent indicated he was an experienced business person having worked in senior management roles in various fields, working as a management consultant and latterly as a business owner, director and investor. Mr Baigent acknowledged he had no IT industry background and knew nothing about IT infrastructure matters or schools' needs. What he described as his strength was business acumen.

[22] Shortly after setting up Contrast NZ Mr Baigent says Mr Hood invited him to a "social function' at a Christchurch public house on 12 June so he could be introduced to Phil Gourley, who was then still employed by New Era in a senior engineer and South Island Technical Manager role, and another New Era technician then working at Kaiapoi High School. Both formerly reported to Mr Hood and evidence suggested Mr Gourley had a long standing personal friendship with Mr Hood.

[23] Mr Baigent says he approached Mr Gourley thereafter on Mr Hood's recommendation, to sound out his interest in a potential role. Mr Gourley subsequently accepted a role of Engineering Manager with Overseer Software Limited on 27 July 2020. Mr Baigent conceded that Overseer was only a convenient vehicle as Mr Gourley worked solely for Contrast NZ and he had not got round to changing the contractual arrangements to reflect this.

Villa Maria College

[24] Ms Scarlett (executive officer at Villa Maria College) confirmed Mr Hood visited the college on 28 May 2020 to discuss Oversight software and that she had previously assisted John Baigent in developing this product that was provided to the school gratis.

[25] On 24 June 2020, Mr Baigent met with the Villa Maria College principal and Ms Scarlett at the college to present a proposal to replace New Era as the IT services provider. Mr Hood attended the meeting and Ms Scarlett recalled he said very little and at the time she knew Mr Hood was the subject of a restraint of trade restriction but she could not recall how she became aware of this. Mr Hood conceded it was likely he apprised Ms Scarlett of his restraint of trade obligations.

[26] Ms Scarlett said she wrongly assumed at the time, that Mr Baigent had an IT team working for him. Mr Baigent, when questioned, disclosed that Mr Hood was present at the meeting to answer any "technical questions".

[27] After the meeting on 25 June, Mr Baigent emailed Ms Scarlett with a proposed Contrast IT Support agreement using his Oversight email letterhead – Mr Hood was copied into this email. On that evening the Villa Maria College board, after being pressed by their principal, endorsed that they should "look into the procurement of the new company Contrast IT". One of the reasons advanced by the principal and recorded in the board minutes was: "New Era has become larger and has been bought off shore". The savings envisaged in shifting the IT contract were described as "small" ($6,000) but the principal envisaged "some real opportunities to get some good levels of service and increased development from their team".

[28] Shortly thereafter on 3 July, Villa Maria College terminated their agreement with New Era citing the departure of Andrew Hood as one of the reasons precipitating the decision. Villa Maria College had by this point already entered into an agreement with Contrast NZ as a replacement IT provider for New Era on 1 July 2020 to take effect from 1 October 2020.

Kaiapoi High School

[29] On 29 June 2020 Mr Baigent and Mr Hood met with the principal of Kaiapoi High School and his deputy Ms van Vuuren. At this meeting Mr Baigent presented a proposal to

take on the IT services contract that New Era was at the time the provider of. Ms van Vuuren provided evidence to establish that the school had also been engaging with a potential third party provider and had decided to end the New Era IT agreement.

[30] Ms van Vuuren, after providing an affidavit that omitted to mention Mr Hood's attendance at the 29 June meeting, said Mr Hood was a passive participant in the meeting but she recalled asking him a question and Mr Baigent referring to Mr Hood working with Kaiapoi once his restraint of trade with New Era expired.

[31] Ms van Vuuren said from that point the next meeting was with Mr Hood as they developed the emerging contractual relationship with Contrast NZ. Kaiapoi High School then served notice on New Era of ending their IT service contract. Ms van Vuuren exchanged texts with Mr Hood up to 13 July in which Mr Hood agreed to meet to discuss the draft Contrast NZ IT contract with her and the Kaiapoi principal. Mr Hood avoided mentioning this fact in his written brief and when put to him he made no comment.

[32] The exchanges over the prospective IT contract culminated in an email from Ms van Vuuren to Mr Hood of 20 July detailing some final contractual requirements including a specific provision that: "This Support Agreement is dependent on the security of the services of Phil Gourley as the Senior Engineer by 31 August 2020". No evidence was advanced to establish that Contrast NZ had any difficulty with this suggested provision.

[33] Unfortunately for Mr Hood, the above email came to the attention of New Era as it was emailed to Mr Hood's old New Era email address. Mr Hood said that Ms van Vuuren alerted him to this mistake and he told her to re-direct it to Mr Baigent and that she should now be dealing with Mr Baigent.

New Era communicates notice of potential breaches

[34] By an emailed letter of 28 July 2020 to Mr Hood headed "BREACH OF RESTRAINT", New Era's lawyer reminded Mr Hood of his obligations arising out of the ROS and after reciting clause 13.5 of Mr Hood's individual employment agreement they highlighted two specific provisions that ran until 24 October 2020 - those being: non solicitation of New Era's clients and employees. The letter alluded to Mr Hood's approach to Kaiapoi High School, then an

existing New Era client (who had given notice ending the relationship), and "the inescapable inference" that Mr Hood was attempting to entice Mr Gourley away from New Era. The consequences of the alleged breaches were detailed including that indemnity costs would be sought. New Era gave Mr Hood until noon on 31 July to provide them with a "proposal to remedy the situation" and sought an undertaking Mr Hood would desist from taking any further steps on the alleged breaches.

Mr Hood's initial response

[35] Mr Hood sought legal advice and through his then lawyer, responded by letter of 4 August 2020. The letter denied Mr Hood's involvement in the identified breaches suggesting he was employed legitimately by Overseer Software on a part-time basis to market a product New Era did not provide.

[36] Mr Hood said he did not work for Contrast IT and that his involvement with Kaiapoi High School was solely to provide an Overseer software product that they had engaged him to provide which had arisen from prior contact between the school and Mr Baigent. It was pointed out on Mr Hood's behalf that Kaiapoi High had initiated the IT provider change due to dissatisfaction with New Era. The letter then specifically denied the suggestion that Andrew Hood was "involved in the contract between Contrast IT and Kaiapoi High School" and the extent of his contact with the school was "its contract with Overseer".

[37] Mr Hood denied inducing or attempting to induce Mr Gourley to leave New Era. The letter ended with an assurance that Mr Hood was willing to:

> … give an undertaking repeating his commitment to the restrictive covenants as set out in your letter if you wish to provide one for him to review. He assures New Era that he is aware of the restrictive covenants and will fully comply.

Observations

[38] It emerged in evidence that Mr Hood had specifically misled New Era in the above response as to his involvement with Kaiapoi High School – Ms van Vuuren confirmed they had not purchased the Overseer software asset management product and were not interested in it. In addition, whilst Kaiapoi High School clearly was dissatisfied with New Era, Mr Hood was instrumental in introducing them to Mr Baigent and Contrast NZ, he had attended a key meeting

and he facilitated contact between Mr Baigent and Mr Gourley and another technician whilst he was under restraint provisions. Thereafter, and not revealed to New Era at the time, was the fact that Mr Hood had exchanged text messages (late June early July 2020) with Ms van Vuuren on the IT contract Contrast NZ was proposing and he had had a meeting with the principal and Ms van Vuuren (without Mr Baigent's involvement) on 22 July 2020.

[39] I also note Mr Hood maintained ongoing contact over the Contrast IT contract details with Ms van Vuuren and the meeting was after the 20 July email that Mr Hood claimed had been sent to New Era in error. This led to Contrast NZ securing a signed contract with Kaiapoi High on 30 July 2020 and securing Mr Gourley's commitment to work for Contrast NZ (using Overseer Software Limited as 'cover' vehicle).

New Era's follow up response

[40] In a further letter from their lawyer of 14 August 2020, New Era indicated they were not satisfied with Mr Hood's responses. New Era sought a statutory declaration affirming Mr Hood was not involved in discussions with Kaiapoi High School to provide IT services and that he had no involvement in facilitating Mr Gourley leaving New Era together with undertakings previously sought including confirmation that Mr Hood was not involved in approaching other New Era clients. The letter concluded requesting a copy of Contrast's IT contract with Kaiapoi High School.

Mr Hood's response

[41] In a response of 25 August through his lawyer, Mr Hood signalled he would not make a statutory declaration or engage in further correspondence whilst making the following points clarifying his earlier "explanations" – these were that:

(a) His legitimate dealings with Kaiapoi High School were in relation to Overseer's asset management software.

(b) The 20 July 2020 email was assumed to be related to Mr Hood's Overseer role and "Mr Hood is not involved in Contrast IT nor does he provide IT support".

(c) Mr Hood had not been involved in Mr Gourley's recruitment away from New Era.

[42] The letter, further suggested Mr Hood had not accessed the Contrast IT contract with Kaiapoi High School and he had no authority to disclose it. The letter concluded: "We trust this is the end of the matter".

Further potential ROS breaches involving Mr Hood

Cashmere High School

[43] In tandem with the timing of the above correspondence, on 12 August 2020 Contrast NZ placed a job advertisement and by 20 August they had recruited two other former New Era employees who had links to Kaiapoi High School and Villa Maria College. Mr Baigent confirmed he discussed the appointees and their capabilities with Mr Hood and he did not seek any other referee comments. The two additional employees were engaged by Overseer Software but both were placed in technical IT roles at schools - outside the scope of Overseer Software's purview.

[44] Contrast NZ also secured an IT services contract with Cashmere High School, another former New Era client. Mr Baigent claimed the 'lead' to pursue this contract had been through a prior introduction from the Kaiapoi High School principal and Mr Baigent having approached the school in October 2019 to supply Overseer asset management software. This led to Mr Baigent meeting with Carla Smith, Cashmere's Associate Principal in early October 2020 and a further meeting on 27 October 2020 involving Mr Hood. This led to a contract being signed for IT Services supplied by Contrast NZ. Contrast NZ also recruited two ex-New Era technicians situated at Cashmere High School.

IT contract content

[45] It also emerged in questioning Mr Baigent that Mr Hood, from mid-June 2020, had assisted Mr Baigent in putting together the wording of IT contracts including some identical wording between New Era contracts and Contrast NZ contracts (the Cashmere High School contract cited as an example) – a fact that neither Mr Baigent or Mr Hood, when questioned during the investigation meeting, could explain.

[46] When pushed on how Mr Baigent had formulated the pricing in the IT contracts with the identified schools he could not recall if Mr Hood had had any input. Mr Hood initially denied assisting in the contract pricing but conceded he may have had some discussion on the wording of said documents with Mr Baigent including reviewing the contracts.

Other potential breaches of the ROS - confidentiality and non-disparaging provisions

Tim Foley

[47] Tim Foley, who up until September 2020 was a New Era Te Tai Tokerau regional manager, gave evidence that on 17 September 2020 he had a pre-arranged evening meal and drinks with Mr Hood at a motel in Christchurch. Mr Foley had just left New Era and responded positively to Mr Hood's invite to catch up with an ex-colleague and managerial counterpart.

[48] Mr Foley recalled the meal lasting around 2-3 hours and both parties were drinking alcohol. Mr Foley says Mr Hood disclosed he had reached a settlement agreement with New Era when he left and that Mr Hood disclosed the amount he had negotiated as compensation for the manner by which he had been made redundant. Mr Foley said Mr Hood then disclosed his plans to "get back" at New Era by poaching their clients in a new business venture he had formed that his partner was initially fronting but would go "full noise" once his restraint of trade expired.

[49] Mr Foley says Mr Hood also disclosed that he had arranged for three ex-New Era employees to come and work for him and was working on one other. Mr Foley recalled that Mr Hood also alluded to having already been approached by a New Era client school but having to get his business partner to front the response to protect himself.

[50] In reply, Mr Hood suggested this was a private conversation that he thought was 'in confidence'. Mr Hood said he did disclose the existence of a settlement agreement but he told Mr Foley the terms were confidential. He denied indicating he had said he arranged for the New Era employees to 'jump ship' and denied that he had disclosed his new business plans or disparaged New Era.

Nicholas Coakley

[51] Nicholas Coakley, an ex-New Era Technical Service Manager up to 2018 and former report of Mr Hood, and who has a brother currently working at new Era, gave oral and documentary evidence of contact he had with Mr Hood on Facebook Messenger in 14 September 2020 initiated by Mr Coakley. The messages show Mr Hood responded to the initial contact with "did Greg tell you he fired me?" (in reference to Greg Strachan). A response, after Mr Coakley said he had not spoken to Greg "in years", was corrected by Mr Hood to "he made me redundant" and the comment "watch this space'.

[52] Mr Coakley then pressed about Mr Hood's non-compete restraint and when Mr Gourley was leaving New Era - Mr Hood responded: "Can't talk about it but I can say I have never been so humiliated in all my life" and "revenge will be served".

[53] Mr Coakley says he assumed from the close working and personal relationship Mr Hood had with Mr Gourley that the latter would leave to join Mr Hood in a new business venture.

[54] Mr Hood then initiated a discussion about departing employees and New Era's "values", indicating: "all Greg cares about is money"; "it was a good company but is going down"; and "it's just going to end up Greg and the migrant community". Mr Coakley then commenced to make negative observations about New Era to which Mr Hood replied it would: "Just become a shitty overpriced helpdesk". There then followed a discussion about how New Era fared during the Covid lockdown and their wage subsidy eligibility with Mr Hood observing: "Yeah I'm sure they cooked the books".

[55] After a discussion about Mr Hood running a candle business "until my restraint ends" the exchange terminates with Mr Hood saying: "My future is about people not profits, The New Era greed has taught me a lot" and "I'll fill you in one day".

[56] Mr Hood accepted the Facebook exchanges with Mr Coakley and stated "I do not consider anything I said to be a breach of any of my obligations to NEIT".

Sharon Ketter

[57] Sharon Ketter, the principal of a small rural school, recalled being contacted by Mr Hood after he had left New Era and that he discussed the existence of a redundancy agreement and New Era being a big overseas company that took profits off shore and that his new business would operate differently. However, when pressed in questioning, Ms Ketter had little recall of the conversation with Mr Hood beyond her recalling him saying he had been made redundant. The conversation timing was established as early November 2020, outside Mr Hood's restraint period, and did not develop into an ongoing relationship for Contrast NZ.

Text exchanges with New Era employee

[58] I was provided with text exchanges of 29 April 2020 between a New Era technician and Mr Hood that referenced New Era and the employee he was communicating with in negative and pejorative language such as "look at the way the company have treated good people", "all you do is work your ass off for some American dude that is getting rich, and the targets grow and grow, maybe that's all an Indian deserves!".

New Era' claimed breaches

[59] New Era filed a statement of problem with the Authority, initially for compliance with the ROS terms and for the recovery of penalties, on 20 November 2020. The dispute was concisely framed as (using numbering in application):

> 1.5 It has subsequently come to the Applicant's attention that at some time shortly after the Respondent's employment with the Applicant ceased, the Respondent, in breach of the Settlement Agreement, was in contact with, at least, one school, Kaiapoi High School, which at the time was a client of the Applicant's.
>
> 1.6. The Respondent may have been in contact with a number of other of the Applicant's current clients.
>
> 1.7. The Applicant has requested the Respondent to provide an explanation of his activities. The Respondent's explanation has not satisfied the Applicant.

1.8. The Applicant seeks an order that the Respondent comply with the relevant provisions of the Settlement Agreement, and penalties for having breached the Settlement Agreement.

[60] New Era then amended their statement of problem on 26 February 2021 reframing the matters they wished the Authority to resolve as:

> (a) Whether the Respondent acted in breach of contractual restraint of trade obligations at clause 13.5 of his Employment Agreement with the Applicant dated 29 May 2012 by:
>
> (i) approaching, inducing, soliciting, or persuading a client or clients of the Applicant to cease doing business with the Applicant; or
>
> (ii) soliciting the Applicant's employees;
>
> (b) Whether the Respondent acted in concert with other employees or former employees of the Applicant in committing the breaches referred to in clause 1(a) above;
>
> (c) Whether the Respondent has breached his obligations pursuant to a Record of Settlement with the Applicant dated 23 April 2020 by:
>
> (i) breaching his contractual restraints set out in clause 1(a) above;
>
> (ii) making disparaging comments about the Applicant;
>
> (iii) disclosing the terms of his Record of Settlement to third parties;
>
> (d) What remedies should flow from the Respondent's breaches, and how these should be calculated, including whether any penalties should be imposed.

[61] In tandem, New Era initiated separate proceedings against three ex-employees of New Era and Contrast NZ Limited and sought to consolidate the proceedings with those filed against Mr Hood and to remove the matter to the Employment Court. In a preliminary determination of 1 April 2021, the Authority declined both the consolidation and order to remove the matter

to the Employment Court. [1] The proceedings against the three ex-employees and Contrast NZ Limited have not yet been determined.

Issue one: do the obligations Mr Hood owes to New Era arise from the ROS or from his employment agreement?

[62] The first part of this assessment is to look at what were the relevant obligations the parties agreed. The terms of the ROS were certified by an MBIE mediator and in a format and layout commonly adopted as confidential but the following elements need to be disclosed for the purposes of this determination:

a) Mr Hood's employment ceased on 24 April 2020 "by reason of his position becoming redundant" (a fact it was agreed would be internally communicated to New Era employees in a communication that also acknowledged Mr Hood's contribution and wished him well).

b) The parties mutually agreed to desist from "disparaging, negative or otherwise adverse remarks" about each other.

c) The existence of the terms of settlement and content were to remain strictly confidential "and shall not be directly or indirectly disclosed, discussed, copied or transmitted to any other person".

d) The agreement is at clause 11, described as being a:

> … full and final settlement of all and any claims, rights or actions either Party has, or may have, against the other arising out of, or in connection with, Mr Hood's employment with New Era and including (but not limited to) any claim, including the Claim, Mr Hood may have arising out of, or in connection with, the cessation of his employment.

e) Following the cessation of employment at clause 13, Mr Hood was directed to have regard to and be bound by "all expressed and implied obligations in his employment agreement (including without limitation obligations of confidentiality)". It then states that "any restriction on Mr Hood undertaking

[1] *New Era IT Limited v Andrew Hood, Philip Gourley, Laura Kaye, Stephen McGirr and Contrast NZ Limited* [2021] NZERA 128.

employment with, or providing services to, a direct competitor of New Era is waived and of no effect".

f) The parties agree "that this Agreement replaces all previous written or oral agreements and understandings between the parties and constitutes a complete record of the Parties' agreement".

g) The parties "understood that" any breach on "an agreed term" is liable to a penalty imposed by the Authority pursuant to s 149(4) of the Act.

Assessment of the ROS terms

[63] The case asserted by New Era's counsel was that any obligations existing in Mr Hood's employment agreement at clause 13.5 were "preserved" apart from a restriction of Mr Hood undertaking employment or providing services to a direct competitor of New Era and in submissions that:

> The actions based on restraint of trade in this case are not actions to require compliance with the Record of Settlement, rather they are actions for breach of the employment agreement as allowed by the Record of Settlement.

[64] On this analysis, New Era claim a right to recover damages for alleged breaches of the agreement and penalties.

[65] By contrast, Mr Hood's counsel asserts the only statutory remedy available apart from enforcement (via a compliance order) are penalties to be assessed by the Authority pursuant to s 149(4) of the Act. As authority for this view, Mr Hood's counsel alluded to the full bench Employment Court decision *South Tranz Ltd v Strait Freight Ltd* [2] which dealt with the extent of the Authority's jurisdiction to grant remedies for a breach of a mediated settlement agreement. At issue was whether the Authority had been correct in stipulating a remedy that ordered a party to account for lost profit arising from a breach by one of a group of companies, of a restraint provision contained in a mediated settlement agreement. The court rejected the Authority's approach, holding:

---

[2] *South Tranz Ltd v Strait Freight* [2007] 1 ERNZ 704.

> We find the scheme of the Employment Relations Act 2000 as it applies to this case to be clear. Where parties have concluded an agreement which is enforceable under s 149(3), the only means of enforcement available are those provided for in s 151. Where, as in this case, the term of the agreement which is found to have been broken does not require the payment of money, the only remedy available to the Authority is to order compliance with the term in question. No other remedies are permitted under s 151 and the effect of s 149(3)(b) is that the agreement may not be the subject of any form of proceedings other than enforcement proceedings. A compliance order is an order made under s 137 and is limited to an order of the type specifically provided for in s 137(2). It cannot be made to include an order for damages or any order related to an order for damage such as an account of profits. [3]

[66] Mr Hood's counsel also drew to my attention the Court of Appeal decision *JP Morgan Chase Bank NA v Lewis*, [4] as an authority that prevented a party pursuing damages for breach of an employment agreement referenced in a settlement agreement. In this case, the parties had reached a settlement agreement on the employee's termination outside the scope of s 149 of the Act which meant the Authority did not have jurisdiction under s 161 of the Act to enforce the settlement agreement by means of a compliance order or penalty. However, the employee sought to instead enforce the settlement agreement as a variation of the employment agreement. The employee sought to obtain damages for the breach, claiming it was a breach of the employment agreement. The Court of Appeal rejected this claim reasoning that the employment agreement had been replaced by the settlement agreement.

[67] The problem that immediately presents is clause 14 of the ROS between New Era and Andrew Hood, is explicit in its provision that:

> The Parties record that they have had the opportunity to take independent advice about the meaning and the terms of this Agreement. They also agree that this Agreement replaces all previous written or oral agreements and understandings between the parties and constitutes a complete record of the Parties' agreement.

---

[3] Above, at [38].
[4] *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618.

[68] A similar provision existed in the settlement agreement the parties had struck in *JP Morgan* where the Court of Appeal found it superseded any previous agreements and expanded upon this by finding:

> (a) The provisions in the employment agreement that were referenced in the settlement agreement could be categorised as incorporated by reference [into the settlement agreement]; their contractual force rested on the settlement agreement, not on the employment agreement (at [68]).
>
> (b) An attempt to rely on implied terms in the employment agreement "would face the insuperable difficulty that … the settlement agreement provided that it constituted the entire agreement between the parties and that it superseded all and any prior agreements" (at [71]).
>
> (c) "[O]nce the settlement agreement was executed, it could not be said that it was possible for both agreements to be performed. … it would be entirely artificial to describe the situation as one involving the ongoing performance of both contracts" (at [72]).
>
> (d) "[T]he settlement agreement should be regarded as replacing the employment agreement and as governing, on its own, the relationship between the parties after the cessation of Mr Lewis' employment" (at [74]).
>
> (e) "[T]he settlement agreement is to be regarded as a stand-alone agreement and not properly categorised whether in whole or in part as an employment agreement" (at [81]).

[69] The conclusion in *JP Morgan* was that the settlement agreement was a new agreement which was intended to replace the employment agreement, not merely vary it and that neither the Authority nor the Employment Court had jurisdiction to award damages in relation to a breach of the settlement agreement. [5]

[70] What is distinct in a s 149 settlement agreement signed by a mediator, is the statutory ability of the parties to either seek compliance under s 137(1)(a)(iii) of the Act or a penalty for a breach pursuant to s 149(4) of the Act.

---

[5] Above, at [65] and [109]

[71] New Era's counsel tried to distinguish the facts in *South Tranz Limited* by suggesting that entirely new obligations were created at the time that settlement agreement was struck whereas in the current situation, New Era only sought to preserve ongoing, established agreement provisions. Whilst this distinction may be so, I struggle to find the relevance of this point to persuade me from departing on the statutory remedies that are confined by the act to compliance and penalties. The Authority is a creature of statute and in dealing with disputes arising from s 149 agreements the scope is limited by s 149(4).

[72] If New Era had intended to retain the ability to seek damages then they should have made explicit provision for such in the settlement agreement as the law on the matter is settled.

[73] Whilst *JP Morgan* is not a case involving a s 149 agreement it still has applicable observations on relevant contractual principles that I have outlined above. I am drawn to the Court of Appeal's emphatic and concise formulation in *JP Morgan* that:

> …. we are in no doubt that the settlement agreement should be regarded as replacing the employment agreement and as governing, on its own, the relationship between the parties after the cessation of Mr Lewis' employment. [6]

Finding on issue one

[74] I find that the only available remedies, given that compliance is not sought are discretionary penalties under s 149(4) and not damages to account for any alleged loss of profit.

Issue two: are the restraints reasonable?

[75] On public policy grounds, provisions restricting an employee's post-employment activity are regarded as unenforceable unless they can be justified as reasonably necessary to protect an employer's legitimate proprietary interests. The provision must be confined to protect such interests. An interest must be some identified advantage or asset held or developed by or for the employer that it would be unjust to allow an employee to appropriate for their own purposes, even though the employee may have contributed to the creation of that advantage or asset.

---

[6] Op-cit at [74].

[76] A recognised category of such interests are business or trade connections, often referred to as "client relationships", developed or sustained by an employee during employment. An employee may reasonably be restrained post-employment, from soliciting clients or customers they had particular knowledge of or contact with during employment. This includes situations where customers have relied on the skill and judgement of the employee or dealt exclusively with the employee so that personal contact may sway them into moving their business from the employer to the employee's new activity. [7]

[77] No issue over the non-competition arises as New Era has waived a right to enforce such and an ongoing duty of confidence is uncontroversial. What remains is a non-solicitation clause protecting New Era's interests in clients Mr Hood has had a part in developing or maintaining whilst in his former employ, and a non-solicitation clause preventing Mr Hood from approaching New Era employees with a view to enticing them to leave their employ with New Era. Both latter provisions were for six months and no issue has been raised by Mr Hood's counsel as to their reasonableness. I also have to have regard to the fact that they are enforceable pursuant to a s 149 ROS and, as counsel for New Era asserted in submissions, were clearly part of the "value exchange" leading up to a negotiated settlement where both parties were legally represented.

Finding

[78] I find the restraint provisions surviving are aimed at protecting legitimate proprietary interests and the six months duration is not unduly long given the seniority of Mr Hood's position and the time needed for New Era to work on maintaining client relationships after he left. However I note that in the circumstances Mr Hood's actual position was disestablished but the latter provision preventing him from soliciting employees was proportionate to the time needed to protect New Era's interests as the employees concerned occupied specialist positions.

---

[7] *Airgas Compressor Specialists Limited v Bryant* [1988] 2 ERNZ 42 at [53].

Issue three: has Mr Hood breached any ongoing obligations contained in the ROS?

[79] This exercise involves interpreting the meaning of the provisions of the settlement agreement and a good starting anchor is provided by Judge Smith quoting the Supreme Court's approach in *Crossen v Yangs House Ltd* [8] that:

> It was common ground that interpreting the settlement agreement is an objective exercise to ascertain the meaning it would convey to a reasonable person having all of the background knowledge reasonably available to the parties in the situation they were in at the time of the agreement. In this exercise context is significant and taking it into account does not depend on establishing any ambiguity in the agreement being interpreted. [9]

[80] The first issue is to look objectively at what was agreed and in what context. Relevantly in full, clause 13 of the ROS states:

> After the Cessation Date, Mr Hood will continue to be bound by, and fully abide with, all express and implied obligations in his employment agreement (including without limitation obligations of confidentiality), and all New Era policies and procedures, that are intended to apply after the termination of an employee's employment. New Era agrees, however, that any restriction on Mr Hood undertaking employment with, or providing services to, a direct competitor of New Era is waived and of no effect.

[81] The first issue is the above clause does not specifically reference any clauses in Mr Hood's employment agreement nor use the term 'restraint' or 'non-solicit'. The only specific ongoing obligation referenced is one of 'confidentiality'. A perusal of Mr Hood's employment agreement discloses the only explicitly headed clause of confidentiality is at clause 10. The restraint and non-solicitation of New Era's clients and employees is contained as a sub-clause of the termination provisions at 13.5 and states:

> The employee agrees that he will not, whilst employed, and for a period of 6 months following the termination of the Employee's employment (for whatever reason), within New Zealand, without the prior written consent of the Company, do any of the following:

---

[8] *Crossen v Yangs House Ltd* [2021] NZEmpC 102 at [12].
[9] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [62]-[63].

> **Induce or attempt to induce** any director, manager or employee of the Company, or any company in the Group, to terminate his or her employment with his or her employer, whether or not that person would commit a breach of that person's contract of employment; and
>
> **Approach, induce, solicit or persuade** any person or entity who or which was or is a client or customer of the Company within the last 12 months of the Employee's employment with the Company, or any related company, to cease doing business with the Company or reduce the amount of business which the person or entity would normally do with the Company, **or accept any contract of service with or contract for the provision of services to such person or entity where the nature of the service provided or to be provided by the Employee are substantially similar to the services provided by the Company to that person or entity.**
>
> **(My emphasis)**

[82] The problem for New Era is by waiving the requirement that Mr Hood could not work for a direct competitor and 'splitting' the above clause, a potential lack of clarity in what Mr Hood had agreed to be restrained in doing post-employment and what was the extent of activities he was allowed to undertake, is at issue. For example - if Mr Hood was allowed to provide 'services' to a competitor where those services "are substantially similar" to ones provided by his former employer: would he still reasonably believe he was bound by the first part of his restraint that prevents him soliciting clients and was he specifically aware of this from the terms of the ROS?

[83] Objectively, I find the settlement agreement is in itself, not specific or clear enough about the ongoing obligations Mr Hood was agreeing to as this was complicated by the waiving of a key component of the restraint that allowed Mr Hood to immediately work for or provide services to a direct competitor. The question of whether Mr Hood could involve himself in starting up a new business to compete with New Era also arises as the clause in his employment agreement is not a 'non-compete' provision.

[84] I have to objectively consider what the settlement terms would convey to a reasonable person in these circumstances with the contextual knowledge reasonably available to them. In this context, Mr Hood was an experienced senior manager who objectively would have a more than basic understanding of what a restraint of trade entailed. This is reinforced by Mr Hood being, whilst engaged by New Era, responsible for signing the employment agreements of his direct reports that contained similar restraint provisions (although Mr Hood made the point he was not responsible for drafting such agreements).

[85] In the event, Mr Hood did not engage contractually with an employer in direct competition with New Era but he did advise an emerging direct competitor of New Era during a period covered by the above restraint on solicitation and he actively engaged with New Era's clients during the restraint period.

[86] I then have to assess, more subjectively in the face of the identified ambiguities, whether Mr Hood's actions conveyed an understanding of what obligations he had allegedly agreed to abide by. The problem for Mr Hood in this respect is that he clearly had a knowledge of being restrained by some 'obligations' as he communicated this to his new employer and mentioned such in conversations with the schools he engaged with including him being aware of the duration of those obligations.

[87] Further, once New Era became aware of the 20 July 2020 email from Kaiapoi High School, Mr Hood took steps to distance himself from being actively involved in persuading Kaiapoi High School to move their IT business to Contrast NZ. I find that whilst it could legitimately be said that this school had already chosen to dispense with New Era's services, Mr Hood's actions objectively showed he had a good understanding of the restraint in his employment agreement that he must not be involved in approaching New Era clients.

[88] The exchange of correspondence between the parties of 28 July 2020 when New Era specifically alerted Mr Hood to the provisions of cl 13.5 of his employment agreement elicited the response through his specialist and experienced employment practitioner that he was "willing to give an undertaking repeating his commitments to the restrictive covenants as set out in your letter".

[89] Further, during the investigation meeting Mr Hood, in responding to a question on his understanding of the settlement agreement, indicated he knew he could work for competitors but could not solicit clients or employees of New Era.

[90] Mr Hood's employment agreement also contained detailed provisions preventing disclosure and/or use of confidential information both during and post-employment and a

provision protecting intellectual property. The employment agreement provision New Era seek reliance upon is the definition of confidential information at cl 10.4, being:

> … any information in respect of the business and affairs of the Company and the clients or suppliers of the Company that is not in the public domain (whether known by the Employee before or after the date of execution of this contract). For the avoidance of doubt, this information includes (but is not limited to) information concerning:
>
> (a) financial budgets;
>
> (b) market research data (including both qualitative and quantitative reports);
>
> (c) finances of the Company or any of the Company's clients, suppliers or other business partners;
>
> (d) development plans and strategies;
>
> (e) strategic business recommendations;
>
> (f) the pricing, formats, margins client or supplier contacts, marketing plans and business plans of the Company;
>
> (g) any technical data, technical procedures, software or software licencing, in any format including but not limited to electronic format and hard copy.

[91] Mr Hood took no issue with this obligation and objectively it is specifically referenced in the ROS and it can be reasonably concluded that a person with Mr Hood's knowledge and experience would be well aware that confidential information included the wording of IT agreements with clients of his former employer and pricing information.

Finding

[92] I find overall that, although how it is expressed leaves a lot to be desired, Mr Hood objectively understood what the terms of the ROS generally entailed for him and what ongoing obligations he had agreed to. Mr Hood contended his knowledge of what 'soliciting' involved was limited (he 'googled' the term) and he argued that he had not directly been engaged in such. I will have to assess this in the context of the evidence to ascertain if any breaches were committed.

Mr Hood's submissions on alleged breaches

[93] Mr Hood's counsel generally contended that the act of 'soliciting' involves direct or positive actions that Mr Hood did not engage in. It was suggested all Mr Hood did was engage in follow up actions after Mr Baigent had solicited the client and New Era employees.

[94] In relation to specific allegations Mr Hood's counsel contended in summary that:

- In regard to Cashmere High School, Mr Hood conducted no soliciting of this client during the restraint period.
- In regard to Villa Maria College his presence at the 24 June 2020 meeting did not involve him soliciting this client to leave New Era.
- In regard to Kaiapoi High School no soliciting away from New Era was apparent as the school had already made a decision to seek alternative providers for reasons unrelated to any persuasive influence of Mr Hood and were in the process of assessing two alternatives (including Contrast NZ) thus Mr Hood was not involved in an approach to an existing new Era client.
- The employment agreement provision pertaining to approaching New Era's employees was confined to 'inducing' them to leave and no evidence suggested this occurred.
- Mr Hood denied disclosing the details of the ROS to third parties but did concede he disclosed the fact that he had reached a settlement with his former employer.

[95] Mr Hood's counsel in submissions contended that if any penalties were levied on Mr Hood they should be modest and made the observation that Mr Hood

> … was always very conscious of his restraint obligations under the ROS and that he even looked up the meaning of "solicit'. He had an understanding of where the boundaries lay and he says that he was always careful not to cross the boundary.

Assessment of the alleged breaches

[96] I deal with the alleged solicitation of clients sequentially and make an observation that the assessment of what breaches Mr Hood committed is complicated by his previous positive

involvement with the identified schools, and a balancing of whether their decisions to use Contrast NZ in preference to New Era was based on independently reached dissatisfaction or whether they been the subject of Mr Hood's influence, including him allegedly disparaging New Era's business model.

Kaiapoi High School

[97] My finding in relation to Kaiapoi High School was that extraneous and multiple compelling factors of dissatisfaction existed prior to Mr Hood's involvement. At the time of Mr Hood's approach they could not be seen to be a firmly established ongoing New Era client as they were already seeking alternative providers. There was implied evidence to suggest Mr Hood could have been negative to the principal when the principal suggested in an email to New Era's CEO that one reason for leaving New Era was the school's concern about New Era's costs cutting and centralisation of management but that could equally have been a conclusion independently drawn from the announcement communicated by New Era disestablishing Mr Hood's South Island management position.

[98] That said, it was clear Mr Hood approached the school in the guise of selling an unrelated product and after becoming aware of the decision to change providers, he introduced them to Mr Baigent and then was heavily involved in contract negotiations. However, given the context I do not find that Mr Hood's actions breached his restraint preventing him soliciting a New Era client. Conceptually at the time, Mr Hood was advised of the school's decision, no IT servicing company had been set up by Mr Baigent and all Mr Hood did was apprise Mr Baigent of an opportunity that Mr Hood later became involved in.

Villa Maria College

[99] The discussion around Contrast NZ pitching for the Villa Maria contract is more problematic for Mr Hood as he was at a 24 June 2020 meeting and directly involved in presenting a proposal with Mr Baigent. The College's decision and rationale for then moving from New Era directly to Contrast NZ impliedly was driven by factors that Mr Hood more likely than not disclosed, including that he would be involved with Contrast NZ and the negative suggestion to the board that New Era was an offshore owned company.

[100] I find in this context, Mr Hood did breach the non-solicitation of clients provision.

Cashmere High School

[101] I accept that there was no evidence of an approach by Mr Hood to Cashmere High School within the restraint period and any assurances by Mr Baigent of Mr Hood's future involvement were not direct breaches attributable to Mr Hood.

Finding

[102] Overall, I find that in one instance (Villa Maria College), Mr Hood breached an obligation to desist from soliciting New Era clients.

Solicitation of New Era employees

[103] Here I consider that there is sufficient initial circumstantial evidence to establish that Mr Hood was actively involved in seeking the services of New Era employees. Without the specialist employees concerned, Contrast NZ had no ability to service any client agreements. Mr Hood was essentially a salesperson aware of schools' IT infrastructure needs and Mr Baigent a financial backer for the Contrast NZ project. It was not plausible that Contrast NZ would seek to enter agreements with the three identified schools without a fair assumption that they could service such with specialised staff. There is ample inferential evidence including the social connections and introductions to Mr Baigent that Mr Hood effected and the lack of competing candidates interviewed, that show Mr Hood was the conduit for the recruitment of key employees with connections to the schools that signed up Contrast NZ IT agreements.

[104] New Era's counsel pointed to authorities where the courts have found that solicit is a wider concept than direct targeting or open persuasion. Counsel also pointed to the wide scope of the non-solicitation clause in Mr Hood's employment ("induce or attempt to induce").

Finding

[105] I am persuaded that Mr Hood, by his recruitment assistance to Mr Baigent, was significantly involved in recruiting New Era employees to engage solely in work for the benefit

of Contrast NZ. This included introducing Mr Gourley and recommending his appointment whilst being involved in negotiating a contract with a school where Mr Gourley was integral to the securing of such. In doing so, Mr Hood breached restraint obligations within the specified restraint period and he was aware of the obligations he had breached. New Era is entitled to a consideration of the imposition of penalties.

Breach of ongoing duty not to use confidential information

[106] Mr Hood adamantly denied providing Mr Baigent with a copy of an example New Era IT contract claiming without specifying which school, that it was possible one had supplied such to Mr Baigent. Mr Hood however, conceded he had some involvement in putting the Contrast IT contract bid together and email exchanges with Kaiapoi demonstrated this whilst he was ostensibly confined to doing tasks for Overseer Software Limited. Mr Hood claimed he noticed that the IT contract Mr Baigent drafted looked similar to a New Era one but he did not raise any concerns with Mr Baigent.

[107] Mr Baigent, in explaining how Mr Gourley's employment agreement appeared to mirror the one he had with New Era, accepted this was so and stated that he had been provided the New Era agreement by Mr Gourley that he subsequently re-drafted to form an employment agreement between Overseer Software Limited and Mr Gourley.

[108] In assessing that evidence in this area is largely inferential, I have to consider the possibility that Mr Baigent secured a copy of a New Era contract from someone other than Mr Hood. To a school, there is a distinct advantage price wise to share contractual information but that could easily be confined to just the overall contract price. I also have to assess that Mr Baigent knew nothing about school IT needs and was heavily reliant on Mr Hood's knowledge of this and the New Era price point for such contracts.

[109] Broad factors I have to examine are (as set out in a High Court decision *Fresh Prepared Ltd v de Jong and DJ's Fruits Ltd*):

- the nature of the employment;
- the nature of the information at issue;

- whether confidentiality of the information was an issue during the employment relationship; and
- whether the relevant information is separable from other information able to be used or disclosed. [10]

[110] Useful guidance cited in the above case is the following extract from the High Court judgment *SSC & B: Lintas New Zealand Ltd v Murphy that*:

> Specialised information in relation to current transactions between employer and customer must give its possessor a head-start over other competitors and enable him to compete on unfair terms with his previous employer … a former employee's undoubted right to canvass among his former employer's customers must be subordinated to a duty not to use, to his own advantage and to his employer's detriment, information about his employer's business transactions acquired in the course of his employment.

[111] The position Mr Hood occupied at New Era was senior and gave him access to client IT contract information including pricing content and strategies. Whilst he was employed Mr Hood was bound by confidentiality and fidelity provisions in his employment agreement and company policies. The information was not separable.

Finding

[112] I find the evidence too inconclusive to determine that Mr Hood disclosed a New Era IT contract or employment agreement to Mr Baigent. I find however, that Mr Hood more likely than not, assisted Mr Baigent in putting together the IT contract details being cognisant of the content and pricing points New Era used and thus he breached an ongoing obligation of confidentiality he owed to New Era.

Non-disparagement

[113] Mr Hood essentially accepted the comments he made about New Era in conversations with ex-colleagues. His only defence was he thought they were 'in-confidence'. The comments were generally disparaging but also opinion of Mr Hood already well known to the

[10] *Fresh Prepared Ltd v de Jong and DJ's Fruits Ltd* [2006] High Court, Auckland CIV 2004-404-1264, 9 June 2006, Judge Harrison

recipients of the information. Mr Hood's counsel cited the case of *Byrne v NZ Transport Agency* for the proposition that established disparaging remarks has to be considered in context, looking at the scope of the settlement clause in dispute and comparison with other cases is not necessarily helpful. [11]

[114] I adopt a similar approach taken by Judge Corkill in *Byrne* that I must have regard to the parties submissions in the context of defining the issues as:

> a) What is the correct interpretation of the relevant provisions of the record of settlement?
>
> b) Was there a breach of cl 9 of the record of settlement?
>
> c) Subject to the above, should any remedies be awarded? [12]

The wording of the settlement agreement

[115] The wording of clause 9 of the settlement agreement is:

> Mr Hood will not, at any stage whether before or after the Cessation Date, make any disparaging, negative or otherwise adverse remarks about New Era, including any New Era director, employee or officer. No employees of New Era who are aware of the terms of this Agreement will make any disparaging remarks about Mr Hood.

[116] Adopting an objective approach, I find the language used is plain, explicit and easily understood and suggestive of a mutual agreement expressed in absolute terms that neither party will colloquially 'speak ill of each other'. No context is defined but the reach of the agreement's term is focused beyond the employment relationship and is enduring. Counsel for New Era suggested the wording went beyond mere 'disparagement' in using the additional "negative or otherwise adverse". I find the latter adds little to the definition of disparaging as Judge Corkill noted citing Black's Law dictionary in *Byrne* that:

> … any statement having a negative meaning, could be disparaging in a general sense. That is, a disparaging statement can be expressly stated, or implied.

---

[11] *Byrne v NZ Transport Agency* (2019) 17 NZELR 262 at [85] and [102].
[12] At [73].

[117] The Court and Authority have approached the meaning of 'disparage' by referencing the Shorter Oxford Dictionary to:

> Bring discredit or reproach upon; dishonour; lower in esteem; degrade; lower in position or dignity; cast down in spirit; and speak of or treat slightingly or critically; vilify; undervalue; depreciate. [13]

[118] In the context of the discussions that led to the settlement agreement and its totality of resolving a bitter employment by a series of compromises, the term was of critical importance to both parties. Reputational wise, it is assumed New Era wished to protect itself from negative comments to clients and the general education sector given they had also agreed to waive Mr Hood's specific restraint on working for direct competitors.

Finding

[119] I find that in the context they were made and as described above (in paras [43]-[58]) and the timing of such that the numerous negative remarks Mr Hood made were in breach of his obligation to not disparage his former employer. Of an aggravating nature were the comments made of New Era to schools. Although apparently innocuous and potentially just factual (overseas ownership), these were unnecessary and pointedly made in the context of securing business for his emerging new employer by fostering a negative impression of his former employer. In making this finding I consider New Era is entitled to consideration of penalty actions against Mr Hood.

Breach of confidentiality of existence and/or terms of ROS

[120] Clause 9 of the ROS is plainly written and objectively in its predominant message, easily understood:

> Mr Hood and New Era agree that the existence and terms of this Agreement including the payment of any sums hereunder, shall remain at all times, fully and strictly confidential to the parties and shall not be directly or indirectly disclosed, discussed, copied or transmitted to any other person in any circumstances

[13] Lesley Brown, New Shorter Oxford English Dictionary (6th ed Oxford University Press, New York, 20070 at 709.

whatsoever, except with the prior consent of the other party, as required by law or as required to give effect to the terms of this Agreement.

[121] Whilst the disclosure of the terms of the settlement compensation was at issue I found the evidence on this matter to be inconclusive as the conversation with Mr Foley was 'over a few drinks' and I give Mr Hood the benefit of the doubt over whether he did or did not disclose a settlement figure. I do find though that it was more than likely that he discussed the existence of a settlement agreement to the point of creating the clear impression that he was paid off. Mr Foley's evidence was credible and Mr Hood's response that he thought the discussion was 'in confidence' is not exculpatory. Mr Hood also referred to an 'agreement' being struck to Ms van Vuuren that he could not divulge the details of.

Finding

[122] I find that Mr Hood breached the provision in the ROS that he was not allowed to disclose the existence of a settlement agreement and that in doing so, he 'fuelled' an impression to at least one New Era client that all was not amicable about his departure. New Era could reasonably conclude that an impression that they had 'got rid of' Mr Hood was likely to spread.

Acting in concert

[123] Two apparent, and I consider insurmountable, problems arise from New Era's claim that after he left employment Mr Hood "acted in concert" with then existing employees of New Era, to plan the transfer of clients to a new entity (Contrast NZ). The first is jurisdictional as I agree with Mr Hood's counsel view of the recent Supreme Court case *FMV v TZB* that to proceed the claim would have to be framed as one of the examples listed in s 161(1) of the Act and none apply, and that as noted in this determination the Supreme Court in *FMV* did not deal with a fact situation pertaining to a s 149 settlement agreement and thus did not make any material findings that would disturb the authority of *JP Morgan* that the employment agreement was not preserved.

[124] The second problem for New Era is one of available remedies as the essence of the claim is that Mr Hood acting 'in concert' should be liable for losses caused by his actions. For reasons cited in this determination I have found that no such remedy (damages for breach of

the employment agreement) is available and the Authority's jurisdiction for breach of s 149 agreement is confined to either compliance of consideration of penalties. On the latter, apart from a general breach of fidelity that does not survive the ending of the employment relationship nothing is apparent that can be framed as a breach of the s 149 settlement agreement.

Number of breaches for consideration of penalties

[125] I have found that there are five breaches of the ROS and possibly more that were not conclusively established.

Penalties: what level is appropriate in the circumstances of the identified breaches?

[126] Section 149(4) of the Act specifies that a person in breach of a provision of an agreement entered into under s 149 of the Act is liable to a penalty at the discretion of the Authority. The maximum penalty an individual can sustain for a single breach is not to exceed $10,000 as per s 135(2)(a) of the Act. The primary purpose of a penalty is to punish the wrongdoing and act as a deterrent to further breaches.

[127] The approach I adopt is consistent with the factors set out in s 133A of the Act and I am guided in the application of such by the full Employment Court decision *Borsboom v Preet PVT Limited* [14] that identified a four-step framework to fixing penalties where multiple breaches of minimum standards are evident:

> Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
>
> Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.
>
> Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
>
> Step 4: Apply the proportionality or totality test to ensure that the amount of each

[14] *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

final penalty is just in all the circumstances. [15]

[128] To assist my approach further in *Allan Nicholson v Matthew Ford* Chief Judge Inglis set out guidance on applying s 133A of the Act and *Preet* indicating that:

> Drawing the threads together from the statute and *Preet*, the mandatory considerations which must be considered in assessing penalties are the following (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case):
>
> 1. The object stated in s 3 of the Act (mandatory statutory consideration 1);
>
> 2. the nature and extent of the breach or involvement in the breach (mandatory statutory consideration 2);
>
> 3. whether the breach was intentional, inadvertent or negligent (mandatory statutory consideration 3);
>
> 4. the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (mandatory statutory consideration 4);
>
> 5. whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (mandatory statutory consideration 5);
>
> 6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (mandatory statutory consideration 6);
>
> 7. previous conduct (mandatory statutory consideration 7);
>
> 8. deterrence, both particular and general (*Preet* additional mandatory consideration 1);
>
> 9. culpability (*Preet* additional mandatory consideration 2);
>
> 10. consistency of penalty awards in similar cases (*Preet* additional mandatory consideration 3);
>
> 11. ability to pay (*Preet* additional mandatory consideration 4); and
>
> 12. proportionality of outcome to breach (*Preet* additional mandatory consideration 5). [16]

---

[15] At [151].
[16] *Allan Nicholson v Matthew Ford* [2018] NZEmpC 132 at [18].

The objects of the Act

[129] Section 3(a) of the Act sets out relevant 'aspirational' matters I must consider these include broadly the need to "build productive employment relationships through the promotion of good faith in all aspects of the employment environment" and by "promoting mediation as the primary problem-solving mechanism" to avoid the need for judicial intervention. I view these broadly as applicable and linked to the premise that upholding agreements made in mediation is a serious issue. A ROS is a legal agreement with significant obligations and mutual benefits for both parties once they have decided to compromise other rights and here New Era was entitled to expect compliance from a departing senior employee.

The nature and extent of the breaches

[130] The breaches I have identified are significant and involve restraints fundamental to what New Era was entitled to expect as consideration for allowing Mr Hood to be compensated as well as move on and work for a competing business. I am convinced that the breaches undermined New Era's reputation and market position in a competitive services industry.

[131] The manner in which Mr Hood effected the breaches show he had a disregard for the opportunity New Era gave him to move on and preserve his dignity. The discourse with a former employee and an existing employee demonstrated Mr Hood's ongoing bitterness that he displayed in an unfortunate manner.

[132] Viewing the nature and extent of the breaches, I find them to be serious and accompanied by aggravating features of Mr Hood's conduct in flouting what were standard non solicitation provisions.

Were the breaches intentional, inadvertent or negligent?

[133] Given the circumstances and efforts to conceal his actions and the content of exchanges disclosed, I find Mr Hood intentionally breached the ROS in a planned and deliberate manner.

The nature of New Era's loss or damage suffered

[134] In their pursuit of claims for contractual damages that I have found not available as statutory remedies, New Era detailed significant actual lost business opportunities and costs of having to recruit specialist employees and rebuild and maintain trust with clients. Whilst some of the extent of the losses and timeframe such was calculated over was rightly contested, I nevertheless place significant weight on this factor in assessing penalties.

Whether Mr Hood has paid compensation, reparation or restitution or any other step in mitigation?

[135] Mr Hood has not taken any steps to rectify his behaviour or apologise and I found that he initially misled his former employer when the breaches were brought to his attention and he continued to deny or minimise the breaches throughout the investigation meeting. This was not a mitigating factor in favour of Mr Hood.

The circumstances of the breach and any contextual factors such as vulnerability of the parties

[136] Mr Hood claimed he had been suffering from stress whilst employed by New Era and his work not being acknowledged and that he had been pressured into leaving. This contention was contested by New Era who pointed to constructive efforts to resolve tension.

[137] I have to consider however, that the breaches committed were almost immediate and various and in an objective sense 'cavalier' in their scope. These are aggravating contextual features.

Previous conduct of a similar nature

[138] Counsel for New Era pointed out that Mr Hood has been previously been before the Authority in a matter that involved allegations of breaching a restrictive covenant. Whilst the Authority found a breach to be 'de-minimis' and the Authority concluded it was more than likely other breaches occurred, the Member reasoned that Mr Hood had incurred other sanctions

sufficient to conclude a penalty was not warranted. [17] I stress that the assessment on factual matters was not conclusive enough for me to consider that previous similar conduct was established to a degree where I could consider it an aggravating factor.

***Preet:* additional consideration # 1 deterrence**

[139] Generally, there is an imperative that parties understand the legal significance and ramifications of entering into a ROS – typically each party compromise their positions in return for a legally binding agreement that is enforceable and the terms of which have significant merit to either party. I consider that 'deterrence' is at issue here to reinforce to Mr Hood that the obligations he undertook were a part of 'legal bargain' that allowed him to move on and for his former employer to have protection in a transition period.

***Preet:* additional consideration # 2 Degree of culpability**

[140] Taking all of the background factors into account I consider that Mr Hood's degree of culpability for the breaches is high.

***Preet:* additional consideration # 3: the general desirability of consistency in decisions on penalties**

[141] In reviewing Authority cases dealing with confidentiality and other breaches of s 149 ROS's I was also assisted by an annexure attached to a leading Employment Court decision *Lumsden v Sky City Management Ltd.* [18] The decisions indicate with some exceptions that penalties range from $2,000 to $6,000 for breaches of confidentiality and up to $10,000 for a flagrant and deliberate restraint of trade breach. [19]

***Preet:* additional consideration # 4 : ability to pay**

[142] Mr Hood provided information on his financial situation that indicated his income was modest up to October 2021. A statement of ongoing outgoings suggested Mr Hood was in a reasonably difficult financial position with moderate debt liabilities.

---

[17] *Hood v Connector Systems Holdings Ltd* [2013] NZERA Christchurch 89.
[18] [2017] ERNZ 96.
[19] *Tibbitts v EWP Sales Ltd* [2015] NZERA Auckland 196.

[143] New Era contested the veracity of Mr Hood's financial information that was not given on oath including a suggestion obtained by viewing Council valuation information that he had underestimated the value of his family home. Mr Hood's counsel responded indicating his client had assured him this was an accurate picture of his financial situation. I remain satisfied that I have been provided with enough information to establish that Mr Hood has only moderate means, a moderate ongoing income and some average long term debt commitments. Overall, I will take these factors into account in assessing Mr Hood's ability to pay penalties.

Globalisation

[144] The approach to quantification in *Preet* allows me to consider whether any of the breaches can be 'globalised' for the purpose of quantifying a penalty so that one breach may reflect two or more. [20]

[145] This approach was affirmed by the Court in *A Labour Inspector v Parihar* where Judge Perkins allowed that a failure to keep wage and time records and holiday and leave records although required under two separate statutes, relates to the general breach of failure to keep adequate records and should be treated as one breach per impacted employee. [21] Judge Corkill pragmatically refined the latter approach in *A Labour Inspector v Matangi Berry Farm Limited.* [22]

[146] Whilst the cited cases involve multiple and sometimes sustained breaches of minimum standards the general approach to globalising is apt in these circumstances to avoid the artificiality of levelling a multiplicity of penalties and then having to step through the process of reducing such so that a proportionate and realistic outcome can be achieved.

[147] The global approach I have taken, having regard to the above cases, reduces the various breaches to five 'representative' breaches and provides a sensible starting point to define potential maximum penalties before I apply further analysis of other factors using guidance from *Preet.*

---

[20] At [100].
[21] *A Labour Inspector v Parihar* [2019] NZEmpC 43.
[22] *A Labour Inspector v Matangi Berry Farm Limited* [2019] NZEmpC 43

[148] So at this stage, the potential maximum penalties I can impose using a globalised approach, are $10,000 per breach [23] which for the five accumulated breaches identified amounts to $50,000.

Assessment of level of penalties

[149] Considering the above and the aggravating feature that the various breaches involved Mr Hood embarking on a deliberate course of conduct to flout his obligations I believe deterrence is a key consideration. Taking the later considerations into account I conclude that the breaches are reasonably significant and I deem 90% of the maximum accumulated penalties of $50,000 to be a 'starting point' ($40,000).

[150] I found no mitigating factors that could be applied to Mr Hood's situation and do not discount further on this basis

[151] I however, do take into account that Mr Hood is in a relatively modest income bracket and has ongoing reasonably significant debt obligations. In this respect I will reduce the amount by a further 20% to come to an indicative figure of a maximum of $32,000 for the five breaches.

Proportionality

[152] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the context of such. This leads to the following findings;

a) For the breach involving the solicitation of clients - $5,000.

b) For the breach of soliciting New Era employees - $4,000.

c) For the breach of use of confidential information - $4,000.

d) For engaging in making disparaging remarks - $1,500

[23] Section 135(2)(a) Employment Relations Act 2000.

e) For the breach of disclosing the existence of the ROS to a third party - $500.

Finding

[153] Taking into account the totality of factors I have explored and that applying proportionality to my analysis should lead to further reductions I find it just in the circumstances that Mr Hood should pay an accumulated penalty of $15,000 for the five identified breaches. Normally a significant amount or all of a penalty is paid to the Crown but in these circumstances the breaches relate to Mr Hood's obligations with New Era rather than breaches of statutory obligations. New Era has suffered significant harm as a result of Mr Hood's actions and the accumulated penalty levied does not address the harm in full or costs incurred. I find that New Era should be paid the full amount of the penalty.

Orders

[154] Andrew Hood has breached the Record of Settlement.

[155] Andrew Hood must pay an accumulated penalty of $15,000.

[156] I direct that the $15,000 accumulated penalty be paid to New Era IT Limited.

Costs

[157] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and a determination on costs is required, New Era IT Limited may lodge and serve a memorandum on costs within 14 days of the date of this determination. Mr Hood will then have 14 days from the date of service of that memorandum to lodge and serve a reply memorandum.

David G Beck
Member of the Employment Relations Authority