

within 28 days of the date of this determination, the sum of \$2,540.64 nett being an unlawful deduction from wages.

- F. Orica New Zealand Limited is ordered to pay to Ms Mattson the sum of \$1,317.24 gross for unpaid holiday pay within 28 days of the date of this determination.**
- F. Orica New Zealand Limited is ordered to pay Ms Mattson the sum of \$123.60 in reimbursement of expenses within 28 days of the date of this determination.**
- G. Ms Mattson's claim for breaches of good faith is declined.**
- H. Costs are reserved.**

Employment relationship problem

[1] Orica New Zealand Limited (Orica) claims Ms Mattson has breached the express and implied terms of her employment agreement by breaching the following duties:

- a) Confidentiality; and/or
- b) Fidelity.

[2] Orica also claims Ms Mattson has breached her statutory duty of good faith including engaging in misleading and deceptive conduct.

[3] Ms Mattson denies the claims and has raised a counter-claim against Orica that it has breached its statutory duty of good faith owed to her and claims arrears of wages including holiday pay and seeks reimbursement of expenses. Orica denies Ms Mattson's claims.

[4] As permitted by section 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Orica and Ms Mattson but has stated findings of fact and law, expressed

conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[5] Orica carries out the business of manufacturing, importing and supplying chemical products and related specialist services to customers operating in industrial, food and beverage, agricultural, manufacturing and mining markets in New Zealand.

[6] Ms Mattson worked for Orica for about five years until 2011 when she left to take up employment with a division of Dow Chemicals. Later that same year Ms Mattson was approached and asked if she would like to return to Orica. After an interview Ms Mattson was offered and accepted employment and returned to work for Orica in October 2011. On 2 November 2011 Ms Mattson signed an individual employment agreement (the employment agreement) with Orica confirming her appointment to the position of Technical Account Manager – Process Cleaning Technologies (PCT).

[7] In March 2013 Ms Mattson suffered from a medical diagnosis that required extensive surgery and recovery time. Ms Mattson returned to her role in July 2013.

[8] During 2013 a number of employees, including senior managers, resigned from Orica to work for Jasol New Zealand (Jasol) a direct competitor to Orica. In early November 2013 Ms Mattson became aware that Jasol was looking to replace a Food and Beverage Account Manager.

[9] On 30 November 2013 Ms Mattson updated her CV and made a formal application for the vacant role at Jasol.

[10] On 3 & 4 December 2013 Ms Mattson attended a company conference held at Mount Maunganui. Ms Mattson offered the use of her company laptop computer so that participants could connect to a data projector for the purpose of assisting them in presentations made at the conference.

[11] During this conference, and without any prompting, Ms Mattson addressed the conference on recent rumours about her possible move to Jasol. Ms Mattson announced to all those present that she wished to quash the rumours that she was going to leave Orica making it clear that her intention was to stay.

[12] Ms Mattson says that during November 2013 she heard rumours that her manager Mr Malcom Black, Sales Lead in the Food and Beverage division, was asking staff if Ms Mattson was leaving to go to Jasol. Ms Mattson says that on 30 November 2013 she approached Ms Leah Davey, Business Manager – PCT and complained about what she had heard. Ms Davey's evidence is that Ms Mattson approached her on 10 December 2013 and not 30 November 2013. I have preferred the evidence of Ms Davey on this point.

[13] On 9 December 2013 Ms Mattson attended an interview with Jasol and was advised on 18 December 2013 that her application was successful. A formal offer of employment was made that day and accepted by Ms Mattson on 19 December 2013. Ms Mattson gave notice in writing to Orica that same day advising Mr Malcolm Black, that she would be leaving to work for Jasol.

[14] Mr Black was concerned about the fact that Ms Mattson was leaving to take up employment for a competitor and advised her that she would not be required to work out her notice period.

[15] Mr Black requested Ms Mattson to hand back her phone, iPad and laptop computer. Ms Mattson handed back the phone, iPad and her access card but explained that her laptop was at home and she would need to retrieve it. Mr Black followed Ms Mattson to her home and waited while she deleted her personal information from the laptop.

[16] While Mr Black was waiting for Ms Mattson to delete her personal information he received a call from Ms Davey. The mobile phone was passed to Ms Mattson who was told by Ms Davey that she was not to take any Orica information with her.

[17] There was a dispute between Mr Black and Ms Mattson as to whether she was entitled to use the company vehicle during her notice period. That dispute was never resolved satisfactorily and on Friday, 20 December 2013 a tow truck, organised by Orica attended Ms Mattson's house and towed the vehicle away after Ms Mattson had removed her personal belongings from it.

[18] Ms Mattson's laptop was then sent off for forensic examination which found a number of documents had been copied by Ms Mattson in the days leading up to her resignation. Ms Mattson was formally requested to return all property belonging to Orica including any documents contained on USB or other devices.

[19] Ms Mattson eventually returned all property belonging to Orica with the exception of a LEXAR USB device which Ms Mattson could not locate. As events transpired the LEXAR USB device was located at an Orica client's premises in December 2014. The LEXAR USB device had been left there by Ms Mattson on a visit to the client premises in the weeks leading up to her resignation.

Issues

[20] The issues for this determination are:

- a) Did Ms Mattson breach the implied and/or the express terms of her employment agreement with Orica and if so what, if any, damages should flow from the breaches;
- b) Did Ms Mattson breach her statutory duty of good faith owed to Orica and if so, what if any penalty should be awarded;
- c) Is Ms Mattson owed wages in arrears or expenses incurred on behalf of Orica; and
- d) Did Orica breach its statutory obligations of good faith towards Ms Mattson; and

Breach of the implied and express terms of the employment agreement

[21] Orica claims Ms Mattson has breached the express terms of the employment agreement relating to confidentiality, the restrictive covenants in the employment agreement, and the obligation to return all property belonging to Orica on termination.

Breach of confidentiality

[22] The signed employment agreement provides for confidentiality of Orica's information at clause 14 in the following terms:

Confidentiality – In this agreement “confidential information” means all information which is not in the public domain and which is reasonably regarded by the Company as confidential to it which you become aware of in the course of carrying out this agreement including, but not limited to:

- a the Company’s financial affairs
- b trade secrets
- c confidential business and technical information
- d business methods and management systems
- e detailed information and records relating to customers, suppliers and staff and parties with whom the company deals commercially
- f strategic information relating to marketing, advertising or any other aspect of business
- g computer software and data
- h know how not generally known to the public

You agree that you will hold all Confidential Information in confidence and will not without the written consent of the Company directly or indirectly at any time during this Agreement or following its termination (for so long as the information continues to be Confidential Information):

- a use any Confidential Information
- b disclose any Confidential Information to any person, firm, company or entity
- c copy any material containing Confidential Information for personal use or for use by any other authorised person, firm, company or entity

other than to the extent necessary to carry out your duties under this agreement or as required by law.

The employee acknowledges that the company will treat a breach of this clause as serious misconduct and may result in summary termination of your employment.

...

You recognise that you will, during the course of employment with the Company have access to confidential information as described in the Agreement and deal with the Company’s key clients, and supplier contacts (**‘proprietary interests’**). In recognition of the importance of these proprietary interests and confidential information, the business relationships, and in consideration of this offer of employment, the remuneration payable under and the beneficial terms of this agreement, you agree to be bound by the restrictive covenants under this clause in the event that your employment with the Company is terminated for any reason.

[23] Orica claims Ms Mattson acted in breach of this clause of the employment agreement when Ms Mattson copied confidential and sensitive information for the purposes of taking that information with her to Jasol.

[24] Orica says that on 2 December 2013 and between the dates of 13 and 16 December 2013 Ms Mattson downloaded and/or copied and/or removed Orica’s sensitive and confidential information from its computer network.

[25] The sensitive and confidential information included:

- a) Individual sales plans;
- b) Key contact lists;

- c) Product roll out plans;
- d) Product information sheets; and
- e) Client transition plans.

[26] Ms Mattson does not dispute that she had copies of documents but says the majority of the documents were legitimately copied in the ordinary course of her work and to the extent necessary to carry out her duties for Orica.

[27] To be a breach of this clause, Orica must show that the documents contained information which was not in the public domain and was reasonably regarded by Orica as confidential to it.

Individual sales plans

[28] Orica says Ms Mattson had two individual sales plan documents on a USB device which she subsequently returned to Orica following the termination of her employment. The two documents belonged to two sales employees both of whom gave evidence at the investigation meeting. Ms Sara Strawson could not recall providing Ms Mattson with a copy of her sales plan, however, she did provide Ms Mattson with a copy of a tankerwash document which was used as part of a presentation Ms Strawson made at the December conference.

[29] Mr Robert Scott gave evidence that he did make a presentation of his sales plan to the conference and that he provided the sales plan on a USB device which he himself connected to Ms Mattson's laptop.

[30] How these plans ended up on Ms Mattson's laptop has not been satisfactorily explained by either Ms Mattson or Orica. I accept the plans contained confidential information belonging to Orica but there is no evidence that Ms Mattson used the information, disclosed it to any person firm, company or entity, or copied it for personal use or for use by any other person, firm, company or entity.

Key contact lists

[31] It was common ground that Ms Mattson took business cards which she had collected during her employment at Orica when she left Orica on 18 December 2013. Before returning the business cards to Orica Ms Mattson photocopied them. It was

not until a search of Ms Mattson's Jasol office in April 2014 that the photocopies were discovered and returned to Orica.

[32] Ms Mattson says she retained the photocopied business card information because when Mr Black attended her residence on 19 December 2013 he saw the document and asked her about it. He did not raise any concerns about her having it and neither did he request that she hand it up to him at that time.

[33] The employment agreement defines confidential information as including detailed information and records relating to customers, suppliers and staff and parties with whom the company deals commercially. This is precisely the information contained on the business cards. At the investigation meeting I spent some time taking Ms Mattson through the business cards she had photocopied. During this time Ms Mattson conceded that the business cards were directly connected with her role at Orica.

[34] The business cards were photocopied after Ms Mattson had applied for the role at Jasol and she intended to use the information in her new role. I am satisfied Ms Mattson copied for her personal use the detailed information relating to customers and suppliers contained on the business cards. This was a breach of the confidentiality clause in the employment agreement.

Product roll out plans

[35] A copy of a PowerPoint presentation which contained information relating to the roll out of a new product was found on a USB device. Ms Mattson's explanation is that she downloaded the document onto a USB device so that it could be used at the conference in early December 2013. Ms Mattson told the Authority that if the document had been used during the presentation and downloaded directly from the Mount Maunganui server it would take a long time for each slide to download. It was easier and more efficient to have the document on a USB device. Ms Mattson's evidence is that the presentation did not contain any confidential information and that the information contained in the presentation was already publically known.

[36] Ms Davey's evidence, which I accept, is that the presentation contained confidential information relating to the intended use of the product, the client sites at which the product would be rolled out and when the product would be rolled out.

[37] The metadata report on the USB device shows that the document was copied onto the USB device on 16 December 2013. This is after Ms Mattson's interview with Jasol and is also after the conference which was held on 2-3 December 2013.

[38] Ms Mattson has provided no satisfactory explanation as to why the PowerPoint presentation was copied onto her USB device on 16 December 2013. Ms Mattson's explanation that she downloaded it for use during the conference which occurred on 2-3 December 2013 is not accepted.

[39] The USB device was handed in to Orica on 27 February 2014 and the evidence indicates the document was not accessed after it was copied on 16 December 2013.

[40] I accept the PowerPoint document contained confidential information belonging to Orica. However, there is no evidence that Ms Mattson used the information, disclosed it to any person firm, company or entity, or copied it for personal use or for use by any other person, firm, company or entity after it was copied to the USB device on 16 December 2013.

Product information sheets

[41] This information related to a specific client of Orica. Ms Mattson attended a meeting with this client on 18 December 2013. Ms Mattson says that in preparation for her meeting with the client she transferred the client's documents onto a LEXAR USB drive to leave with the client. Ms Mattson usually provided the client with an annual Product Information Pack in hard copy as well as providing the client with the same information on a USB drive because the documents were frequently audited as part of the clients risk management plans.

[42] The LEXAR USB device is the one device that was missing when Ms Mattson delivered all other USB devices to Orica on 27 February 2014. The client gave evidence to the Authority confirming the LEXAR USB device was given to her as a client of Orica in December 2013 and it had remained in her office until she had a discussion with Ms Mattson in December 2014 at which time it was returned to Orica.

[43] I accept the LEXAR USB device contained confidential information belonging to Orica. However, there is no evidence that Ms Mattson used the information, disclosed it to any person firm, company or entity, or copied it for personal use or for use by any other person, firm, company or entity except to the extent necessary to carry out her role.

Client transition documents

[44] Ms Mattson does not deny she took copies of documents relating to the transition of customers including checklists with her to Jasol. Ms Mattson had used the documents many times to transition clients to Orica. Ms Mattson's evidence is that the documents did not contain confidential information and she believed she was entitled to take the documents as she had designed the forms.

[45] Apart from the fact that Ms Mattson's employment agreement addresses intellectual property rights in Orica's favour, Ms Mattson's evidence that she designed the forms is not supported by the metadata provided by the forensic examination of the documents which shows that the documents were created by other Orica employees.

[46] In mid-2014 Orica lost a contract with a major client. The contract was awarded to Jasol. Orica says that Ms Mattson's use of confidential information assisted in the loss of this contract. Ms Mattson denies she had any role in the negotiations over the contract awarded to Jasol.

[47] Ms Mattson was supported in her denials by Mr Grant Sims the Business Manager (Dairy Industry Australia/New Zealand) for Jasol based in Melbourne, Australia. Mr Sims was previously the Australian Marketing Manager for Orica. Mr Sims left Orica in December 2013. He became involved, on behalf of Jasol, in the negotiations over the contested contract in March 2014. Mr Sims evidence is that Ms Mattson was not involved in any way with the negotiations over the contract.

[48] Ms Mattson altered a document entitled "Chemical Supply Transition" to read as if it were a Jasol document and then emailed the altered document to Mr Sims, Mr Anthony White and Mr Ray Vagana on 11 February 2014. All three men work for Jasol.

[49] At the investigation meeting Ms Mattson told the Authority she emailed the amended document as there had been discussion about what would need to happen if the contested contract was awarded and the client was to be transitioned to Jasol. Mr Sims could not recall seeing the document emailed to him on 11 February 2014

[50] I am satisfied Ms Mattson copied confidential information being a document which sets out the process for transitioning clients from another supplier to Orica. Not only did she copy it, she altered the document for use by Jasol and passed this document to three Jasol employees, at least one of whom were acting for Jasol in the negotiations to secure the contested contract from Orica. This was a breach of the confidentiality clause in the employment agreement.

Breach of obligation to return all property on termination

[51] Orica claims Ms Mattson breached the express requirement to return all Orica property on the termination of employment. The employment agreement provided for the return of property in the following terms:

Upon termination of employment, for whatever reason, you will immediately deliver to the company all documents, letters, papers, keys and other material of every description (including all copies of or extracts from the same) within your possession or control, relating to the affairs of business of or belonging to the Company. All company property must be returned or accounted for to the satisfaction of your manager/team leader.

[52] Ms Mattson was told by both Mr Black and Ms Davey on 19 December 2013 that she was required to return all property belonging to Orica. This instruction was consistent with the obligations set out in Ms Mattson's employment agreement.

[53] Orica's lawyers wrote to Ms Mattson on 25 February 2014 demanding the return of all property and requested undertakings from Ms Mattson that she would comply with her obligations of confidentiality as set out in the employment agreement.

[54] This letter was followed by a telephone conversation on 27 February 2014 where Ms Mattson was urged to take the matter seriously and return all property belonging to Orica urgently. When Ms Mattson attended the lawyer's offices on 27 February 2014 she confirmed all Orica property except for one missing LEXAR USB device had been returned.

[55] Orica later discovered that Ms Mattson had sent the Orica client transition plan documents to Jasol employees, had copied documents onto her home computer and had taken other documents to her Jasol office.

[56] After a forensic examination of the USB devices returned by Ms Mattson, Orica wrote again to Ms Mattson enclosing a copy of the forensic reports and seeking explanations about the use of documents and repeated its demands for the return of all outstanding Orica property. These documents were returned to Orica in April 2014 and an undertaking was made by Jasol that emails containing the client transition plan document and the document itself had been deleted from all computers.

[57] The missing LEXAR USB device was finally located in December 2014 and returned to Orica. As set out earlier in this determination the device had been left with a client by Ms Mattson in December 2013.

[58] Ms Mattson breached the express terms of her employment agreement when she failed to return all property belonging to Orica immediately upon termination of her employment.

Breach of duty of fidelity

[59] It is an implied term that employees will serve their employer with fidelity. Employee's must not misuse the employer's property for the employee's benefit.¹ The duty does not extend beyond the ending of the employment relationship.

[60] Orica claims that during the last weeks of her employment Ms Mattson altered Orica client transition plan documents with a view to using them once she commenced working for Jasol. There is no dispute that Ms Mattson amended the documents and sent them to Jasol employees who were or would become involved in negotiations to secure a contract which was being contested by both Jasol and Orica.

[61] Ms Mattson's conduct in using the transition plans in the way she did was a breach of her duty of fidelity.

[62] During the investigation meeting Orica gave evidence that during her employment Ms Mattson purposefully ran the contestable client out of product and

¹ *Walden v Barrance* [1996] 2 ERNZ 598.

referred the client to Jasol, thereby opening the door for Jasol to secure the contract, which it did in April 2014.

[63] There is no evidence as to when this incident occurred. Ms Mattson disputed Orica's evidence that she had run the client out of product on purpose. Ms Mattson's evidence is that the client had run out of product as a result of a valve failure. Ms Mattson says that when the client contacted her she spent the next two hours speaking with Mr Tim Cooper, a manager with Orica, trying to find a solution as the bulk tank fleet could not get a tank to the client. When the client enquired if there was any other supplier she gave them two other options, Jasol being one and JohnsonDiversey being the other.

[64] I have no reason not to accept Ms Mattson's evidence on this point. Mr Black confirmed he found out about the situation from Mr Cooper.

[65] I find that Ms Mattson breached her duty of fidelity when she deliberately copied documents belonging to Orica with the purpose of using them in her new employment.

Damages

[66] Orica seeks awards for special and general damages amounting to \$83,000 plus interest for the breaches of the express and implied terms of the employment agreement.

Special Damages

[67] Orica claims Ms Mattson's conduct may have contributed either directly or indirectly to the loss of its client in April 2014 to Jasol. It seeks to recover \$80,000 as special damages as follows:

- a) \$20,000 to compensate Orica for the loss suffered to its business including loss of profits, goodwill and reputation; and
- b) \$60,000 for the expenses in legal fees and forensic investigations incurred in conducting its investigation into Ms Mattson's actions.

[68] The purpose of damages is to compensate a party for the loss it has sustained. Special damages is an award of compensation to place Orica back in the position it would have been if Ms Mattson had behaved as she was supposed to have behaved.² The losses must be as a direct result of Ms Mattson's conduct. The consequences must be sufficiently proximate and must not be too remote. It is for Orica to prove, not for Ms Mattson to disprove, that loss has been sustained.³

[69] I have found Ms Mattson breached the express and implied terms of her employment agreement with Orica when she photocopied the business cards and retained them for her own use in her role at Jasol, copied the Client Transition document altered it and then emailed it to three Jasol management team members, failed to return all property belonging to Orica immediately upon termination of her employment and breached her duty of fidelity.

[70] Orica has failed to demonstrate any actual loss suffered to its business for loss of profits, goodwill and reputation caused by Ms Mattson. I am satisfied on the balance of probabilities that Ms Mattson did not play any part in the contested contract negotiations and have accepted her evidence that the negotiations had been in train for at least 18 months at the time she joined the Jasol team.

[71] A number of current Jasol senior managers have previously been employed in similar senior positions for Orica. This includes Mr Sims. Some of those senior management employees were involved in the contested contract tender process on behalf of Orica in 2006/2007. Those employees worked closely with the client over the years and formed strong professional relationships with the senior members of the client's management team. I would have thought that the relationship between Orica and its client was more at risk with employees such as Mr Sims being involved than Ms Mattson.

[72] There is no dispute that Ms Mattson amended the Client Transition document so that it looked as if it were a Jasol document. The evidence of Ms Mattson and Mr Sims is that the document was never used by Jasol. Ms Mattson's evidence is that it was only ever intended to be a template document setting out the various steps necessary to transition any new client to Jasol.

² *Medic Corporation Ltd v Barrett (No 2)* [1992] 3 ERNZ 977 at page 983.

³ *Ibid* at page 984.

[73] There is no evidence that the document was used to assist Jasol in its contract negotiations. The negotiations had been underway for 18 months when Ms Mattson made the amendments to the document. Given the information contained in the document, on balance, it is unlikely it would have assisted in the negotiations to the extent that the client would be encouraged to move from Orica to Jasol.

[74] Orica has failed to substantiate its claim for damages for loss suffered to its business for loss of profits, goodwill and reputation that has been caused by Ms Mattson.

[75] With respect to the claim for expenses incurred in the forensic investigations, the evidence of the parties was that it was standard practice for Orica to undertake such forensic examinations when an employee left to work for a competitor. In this case, the costs incurred relating to the forensic examinations were a normal business expense and no order for reimbursement will be made.

[76] Orica's claim includes a claim for its legal costs associated with the legal advice sought following the receipt of the results of the forensic examinations. Having discovered the extent of copying undertaken by Ms Mattson, it was reasonably foreseeable that Orica would seek to enforce the terms of its employment agreement with Ms Mattson. Ms Mattson had made it clear to Orica that all property belonging to Orica was available for Orica to uplift from her home. Orica took no steps to do so. By 27 February 2014 Ms Mattson believed she had returned all property belonging to Orica. The additional documents located in her office at Jasol included her personal notebooks and training manuals from training courses she had undertaken while working for Orica. I accept that when Ms Mattson took that property she was acting under a genuine belief that she was entitled to take the notebooks and training manuals with her believing they were her property.

[77] There was also one further step that Orica could have taken before instructing legal counsel in this matter. The employment agreement included a restraint of trade provision which, if enforced, would have prevented Ms Mattson from taking up her employment with Jasol for a period of six months following the termination of her employment. Orica took no steps to invoke that clause of the employment agreement

and could provide no explanation as to why it had not taken that step when questioned during investigation meeting.

[78] The claim for special damages is declined.

General damages

[79] Orica claims general damages for the inconvenience caused to its business as a result of Ms Mattson's breaches of her employment agreement. In closing submissions Orica seeks the sum of \$10,000. This is more than the claim investigated by the Authority which was \$3,000. There is no explanation as to why the claim has increased.

[80] Such a claim amounts to a claim for pecuniary loss where no specific loss can be proved. The claim is based on the loss of executive time, general inconvenience and interruption to Orica's business caused by Ms Mattson's breaches. The claim relies in particular on the time and effort Ms Davey was obliged to devote to the investigation.

[81] The Employment Court and Authority have previously allowed a claim for inconvenience.⁴ In both cases there was evidence to support the claims. In *Medic Corporation Ltd v Barrett* there was evidence to show executive time had been spent on particular attempts to restore supplier relationships and staff training.⁵ Likewise in *Auckland Regional Council v Tilialo* the evidence supported the claim that team members were obliged to devote significant amounts of time to an investigation, including preparing for and attending meetings and deliberating on and reporting the outcome.⁶

[82] In support of Orica's claim Ms Davey's evidence was that she spent time instructing legal counsel. Ms Davey has not specified how much time she has spent instructing Counsel or reading reports and has not provided any evidence of adverse effects on her ability to undertake her normal duties.

[83] I am not satisfied that the evidence establishes the claim for general damages.

⁴ *Medic Corporation Ltd v Barrett* (No 2) [1992] 3 ERNZ 977; *Auckland Regional Council v Tilialo*, Auckland Employment Relations Authority, Member Monaghan, AA 368/09.

⁵ *Ibid* at p 987-988.

⁶ *Supra* n 4 at [61] – [63].

Breach of duty of good faith

[84] Orica claims Ms Mattson breached her statutory duty of good faith by misleading or deceiving Orica during the weeks leading up to her resignation. Orica points to the evidence from Ms Mattson about her application and ultimate acceptance of the role with Jasol to support this claim.

[85] It was common ground that during November 2013 Ms Mattson had discussions with at least one ex-Orica employee about the prospect of working for Jasol and then formally applied for a position on 30 November 2013.

[86] Ms Mattson's conduct in complaining to Mr Black during November about rumours that she was leaving to work for Jasol, is inconsistent with her making an application on 30 November 2013 to work for Jasol and the discussions she admits she had during November 2013 about working for Jasol. Further Ms Mattson's public announcement during the conference on 2-3 December 2013 that she was not leaving to work for Jasol was at best, disingenuous.

[87] While technically Ms Mattson had not made the decision to leave Orica, she had clearly taken steps which included the discussions during November and the formal application which then invited Jasol to have formal discussions with her about a possible move.

[88] Further, it was Ms Mattson's own evidence that she attended the conference on 2-3 December 2013 with the purpose of deciding whether she would continue to work for Orica or move to Jasol. Ms Mattson did not normally attend these conferences but specifically requested permission to attend with the intention of deciding whether to stay with Orica or leave to work for Jasol.

[89] I find that Ms Mattson's behaviour when she announced in early December 2013 to those present at the company conference that she was not leaving Orica was misleading and deceitful conduct. It was misleading and deceitful because there was, at that time a possibility that she was leaving Orica and had invited Jasol to enter into discussions with her about a possible role at Jasol on 30 November 2013 when she submitted her application.

[90] Further, Ms Mattson attended an interview for the role with Jasol on 9 December 2013. I have preferred Ms Davey's evidence that it was on 10 December 2013 that Ms Mattson approached her asking her to take disciplinary action against Mr Black for spreading rumours about her leaving Orica and moving to Jasol. During that discussion Ms Mattson assured Ms Davey that she was not leaving Orica.

[91] This is again, misleading and deceitful conduct on the part of Ms Mattson. Ms Mattson was in no position to give assurances, particularly in light of the interview she had attended on the previous day.

[92] I find the conduct of Ms Mattson at the Conference in early December 2013 and her assurances to Ms Davey on 10 December 2013 breached Ms Mattson's statutory obligations of good faith.

Penalties

[93] Orica seeks the imposition of two penalties of \$10,000 each for Ms Mattson's breaches of her employment agreement and the breach of her statutory obligations of good faith.

[94] I have found that Ms Mattson has breached the express and implied terms of her employment agreement as well as her duties of good faith. I view Ms Mattson's breaches seriously. It is important that employers are able to protect confidential business information from, in Ms Mattson's words, "fierce" competition.

[95] The Employment Relations Act 2000 expressly provides for employees who are found to be in breach of their employment agreements and good faith to be subject to penalties.⁷

[96] Penalties are designed to punish and deter others from engaging in similar conduct.⁸ Ms Mattson breached her employment agreement when she took confidential information with her to Jasol and was misleading and deceitful in her assurances during November and December 2013 about her intentions not to move from Orica to Jasol.

⁷ Employment Relations Act 2000, section 133(1)(a), 4A(a).

⁸ *Tan v Yang & Zhang* [2014] NZEmpC 65.

[97] Before awarding a penalty I must be satisfied that Ms Mattson conduct was deliberate, serious and sustained.⁹ Ms Mattson's statements to the conference participants and her assurances to Ms Davey were deliberate. As was the taking of the confidential information found in Ms Davey's Jasol office.

[98] The seriousness of the breaches of the employment agreement must be assessed in context which includes the fact that Ms Mattson was aware of the "fierce" competition between Jasol and Orica when she took the confidential information and shared it with the Jasol employees who were engaged in the negotiations over the contestable contract. Further, at the time Ms Mattson made assurances that she was not going to Jasol, she knew she had applied for a role with Jasol and at the time she spoke to Ms Davey had attended an interview.

[99] The misleading and deceitful statements made by Ms Mattson were sustained. She repeated them on more than one occasion. The confidential information Ms Mattson took with her to Jasol was taken with the intention of using it in her new role and was available in her office from the time she commenced her employment in January 2014 until discovered in April 2014.

[100] For all these reasons I conclude Ms Mattson's conduct when she breached the express and implied terms of the employment agreement and conducted herself by making misleading and deceitful statements was sufficiently serious to warrant the imposition of a penalty.

[101] The maximum penalty for any breach of an employment agreement or statutory obligation of good faith for an individual person is \$10,000.¹⁰ I have taken a global approach to the question of penalties and consider a total penalty of \$5,000 to be justifiable. The Authority has the discretion to award the whole or any part of the penalty to Orica.¹¹ I have determined that in this case it is appropriate for 100% of the penalty to be paid to Orica.

[102] Ms Mattson is ordered to pay a penalty of \$5,000 to Orica within 28 days of the date of this determination.

⁹ Employment Relations Act 2000, section 4A(e).

¹⁰ Employment Relations Act 2000, section 135(2)(a).

¹¹ Employment Relations Act 2000, section 136(2).

Counter-claims

[103] Ms Mattson counter-claims against Orica for arrears of wages and claims Orica has breached its obligations of good faith toward her.

Arrears of wages

[104] Ms Mattson received her final pay on 14 January 2014. Ms Mattson claims Orica made unlawful deductions from her final pay for annual holidays which she had not taken and for repairs to the company vehicle used by Ms Mattson during her employment.

Deductions for annual leave not taken

[105] Ms Mattson says that the amount of \$1,975.86 was deducted from her final pay for annual holidays taken over the Christmas/New Year period. Ms Mattson says she had only applied for and been granted approval to take two days annual leave over that period. Therefore Ms Mattson's annual leave entitlement at termination should have been reduced by those two days only and not six days.

[106] There was no dispute that Ms Mattson had applied for and been granted only two days over the Christmas/New Year period. In that case, with the exception of those two days, Ms Mattson was entitled to be treated as if she was working during the period.

[107] I find Ms Mattson's entitlement to paid annual leave was incorrectly reduced by four days which she was then not paid for in her final pay. Ms Mattson is entitled to a reimbursement of those four days totalling \$1,317.24.

[108] Orica New Zealand Limited is ordered to pay to Ms Mattson the sum of \$1,317.24 gross for unpaid holiday pay.

Deductions for repairs to company vehicle

[109] Ms Mattson had the use of a company vehicle as a tool of trade to assist her in carrying out her duties. On 8 November 2011 Ms Mattson signed a letter of agreement acknowledging that she had received a copy of Orica's Vehicle Policy and that she agreed to the terms and conditions set out in the policy. In signing the letter of agreement Ms Mattson provided written authorisation for Orica to deduct any costs

associated with loss or damage to the vehicle not deemed to be fair wear and tear, from her final pay.

[110] The vehicle policy does not clarify an employee's liability when a vehicle which may be covered by insurance is damaged. The policy touches on insurance but is limited to requiring employees to recognise that insurance premiums are affected by the number of accidents and reparation costs incurred. The policy does provide a general clause which reserves Orica's right to recover the cost of repairs from the employee. Likewise clause 10 of the employment agreement provides for a general deductions clause at termination.

[111] The policy does set out employee obligations for "multiple at fault accidents or incidents". This section denotes the disciplinary action available to Orica in the event that Ms Mattson is liable for minor accidents but does not address the issue of who pays for any repairs.

[112] There is no dispute that while at the conference in early December 2013 Ms Mattson damaged the company vehicle and the vehicle required repairs to be undertaken.

[113] Following receipt of her final pay Ms Mattson emailed Mr Black and asked for an explanation regarding the deduction for the repairs to the vehicle. Up to that point, there had been no discussion with Ms Mattson about the estimated costs of repairs or what her liability would be in contributing to the cost of the repairs. Ms Mattson believed the repairs would be covered by insurance.

[114] Mr Black advised Ms Mattson that the vehicle was in the process of repair and they had deducted the total amount given as an estimate, to ensure the full cost of repairs was covered.

[115] The total deducted from Ms Mattson's final pay was \$2,540.64. The total of the vehicle repairs was actually \$2,386.44.

[116] The Wages Protection Act 1983 requires employers to pay the entire amount of wages payable to a worker without deduction unless the worker otherwise consents.

When dealing with a general deductions clause such as that contained in Ms Mattson's employment agreement the Employment Court has stated that:

[C]onsistently with its good faith obligations under the [Employment Relations] Act, an employer must, at a minimum, consult with the worker before making any deduction. Without such a safeguard, the protection intended to be afforded by the Wages Protection Act 1983 would be illusory.¹²

[117] In this case, Orica did not consult with Ms Mattson before making the deduction. This lack of consultation meant that Ms Mattson had no opportunity to enter into different arrangements with Orica over the payment of the repairs and/or to discuss whether Orica would be seeking insurance cover for any aspect of the repairs.

[118] I find the deduction of \$2,540.64 from Ms Mattson's final pay was unlawful and must be reimbursed to her. Orica New Zealand Limited is ordered to pay Ms Mattson the sum of \$2,540.64 without deduction within 28 days of the date of this determination.

[119] Ms Mattson should understand that the matter of payment for the repairs will not finish here and should expect to have to enter into a discussion with Orica about her liability for the repairs.

Reimbursement of expenses

[120] Ms Mattson seeks the reimbursement of expenses she says she incurred during her employment with Orica.

[121] Ms Mattson wrote to Mr Black on 10 January 2014 seeking reimbursement of the business expenses and enclosing the relevant supporting documentation. I find the expenses are owed to Ms Mattson and Orica is accordingly ordered to pay the amount of \$123.60 without deduction to Ms Mattson within 28 days of the date of this determination.

Breach of good faith by Orica

[122] Ms Mattson says Orica's treatment of her in not allowing her the use of her company vehicle during her notice period and its conduct following the ending of the

¹² *Jonas v Menefy Trucking Ltd* [2013] NZEmpC 200.

employment relationship breached its statutory obligations of good faith and has caused her to suffer psychological and physical distress.

[123] The difficulty with Ms Mattson's claim under this heading is that once an employment relationship ends, the statutory duties of good faith come to an end also.

[124] Orica refused to allow Ms Mattson the use of her company vehicle during her notice period which commenced on 19 December 2013 and ended on 18 January 2014.

[125] The employment agreement provided for a company vehicle in the following terms:

A tool of trade vehicle is necessary for you to carry out the requirements of this position. It is supplied in accordance with the Orica NZ Vehicle Policy. This vehicle does not form part of your salary package and will only be provided whilst the job demands. The vehicle may be used for reasonable personal business with the knowledge of your manager.

[126] The Vehicle Policy requires all vehicles to be returned to Orica on the employee's last working day to a place designated by Orica. Ms Mattson's last working day was 19 December 2013. It was on that date that she was required to return her vehicle to Orica. When Ms Mattson failed to return her vehicle in accordance with the terms of the employment agreement Orica arranged for the vehicle to be uplifted from her residential property.

[127] The Vehicle Policy requires all vehicles to be returned to Orica on the employee's last working day to a place designated by Orica. Ms Mattson's last working day was 19 December 2013. It was on that date that she was required to return her vehicle to Orica. When Ms Mattson failed to return her vehicle in accordance with the terms of the employment agreement Orica arranged for the vehicle to be uplifted from her residential property.

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[129] The uplifting of the vehicle in light of Ms Mattson's failure to return it was not a breach of good faith.

[130] Ms Mattson's application for a penalty for breach of good faith is declined.

Costs

[131] Costs are reserved. The parties are invited to resolve the matter by agreement. If they are unable to do so Orica shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Mattson shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority