

Attention is drawn to the
non-publication order
at paragraph [12]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 552
3001408

BETWEEN WRIGHT TANKS LIMITED
Applicant

AND JOSH IRWIN
Respondent

Member of Authority: Trish MacKinnon

Representatives: Glenn Mason, counsel for Applicant
Josh Irwin in person

Investigation Meeting: 16 August 2018 and 12 and 13 June 2019 at Palmerston North

Submissions Received: 20 May and 9 July 2021 from the Applicant and 2 July 2021
from the Respondent

Date of Determination: 27 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 30 April 2018 I determined Josh Irwin had breached the non-competition provisions of his employment agreement with Wright Tanks Limited (Wright Tanks) after he left his employment with that company.¹ The determination modified the non-competition provisions from a period of three years to one year. Those provisions were in force until they expired on 21 September 2017.

¹ Wright Tanks Limited v Josh Irwin [2018] NZERA Wellington 31.

[2] I further determined Mr Irwin had breached his obligation of good faith, his implied duty of fidelity, and the confidentiality provisions of his employment agreement by copying confidential information belonging to Wright Tanks to his personal iCloud account during his employment with that company, and retaining it after his employment ended.

[3] It had been agreed with the parties that the issue of liability would be determined in the first instance and, depending on the outcome, the quantum of any damages would then be determined. After issuing my first determination, I directed Wright Tanks and Mr Irwin to further mediation to try to resolve the issues, but they were unable to reach agreement.

[4] This determination deals with the quantum of damages and a penalty for obstruction of the Authority's investigation.

The Authority's investigation

[5] Following my 30 April 2018 determination and the parties' unsuccessful attempt to resolve the matter through further mediation, a case management conference was held on 25 July 2018. As a result, a notice of investigation meeting was issued for 16 August 2018. I directed Mr Irwin to attend that investigation meeting and to bring with him a number of specified documents which Wright Tanks had previously requested and Mr Irwin had not provided.

[6] In short, while Mr Irwin attended the investigation meeting with some documents, I was not satisfied with the reasons he provided for not providing all the required documentation. I put Mr Irwin on notice that failing to comply fully with my direction could result in the imposition of a penalty for obstructing my investigation. I will return to this matter later in the determination.

[7] I have not set out all the evidence and submissions I received from the parties, and am not required to do so.² I have, however, carefully considered all such material before making findings on facts and relevant issues of law, and reaching conclusions on the matters before me.

² In accordance with s 174E of the Act.

[8] The determination has been issued outside the timeframe at s 174C(3)(b) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided are exceptional, as he is permitted to do by s 174C(4).

Non-publication Order

[9] Wright Tanks has applied for a non-publication order to cover its financial information. It has done so on the grounds that it operates in a highly competitive industry where information such as turnover and profit margins is commercially sensitive and tightly guarded. Wright Tanks considers publication of this information in a publicly available determination would be detrimental to it.

[10] Mr Irwin opposes the application. In his view, all Wright Tanks' financial information should be publicly available. Mr Irwin's view appears to have been coloured by an article published by stuff.co.nz following the first determination I issued on liability in April 2018. Mr Irwin attributed the article to "false information" he believed the sole director of Wright Tanks had given to the publisher.

[11] I believe Mr Irwin was mistaken in that belief and that a Stuff reporter had simply used my determination as the basis for his reporting of the matter. Neither party had sought non-publication orders in relation to that determination which dealt with broader matters of liability and did not include detailed financial data.

[12] Having considered the views of both parties, and the commercially sensitive nature of the financial information that was made available in the course of the Authority's investigation into quantum, I have decided it is appropriate to prohibit the publication of any information relating to the Applicant's turnover, profit margins and other commercially sensitive data. I have redacted that information from this determination.

The claims for damages

[13] The Authority's jurisdiction in respect of claims for damages derives from s 162 of the Act, the pertinent part of which provides that:

...the Authority may, in any matter related to an employment agreement, make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts...

Damages arising from breaches of restraint of trade

[14] Wright Tanks claims it lost work and revenue directly as a result of Mr Irwin's breaches. It has grouped its claims under six categories, and I will refer to those categories when considering the claims. Before doing so, I will consider the methodology Wright Tanks used to arrive at the amounts it is claiming in damages as that methodology was disputed by Mr Irwin.

[15] Wright Tanks has taken the gross amount Mr Irwin invoiced for each job and added a percentage to that amount which it says represents what it would have charged for the work if it had undertaken it. Wright Tanks has then applied its gross profit margin to that sum.

[16] Daniel Willson, who has been Wright Tanks' accountant since the company was established, calculated both the percentage increase and the gross profit margin. Mr Willson, who gave evidence at the Authority's investigation meeting, said he made the additional percentage calculation on the basis of invoices WPSL had sent to five clients. Wright Tanks had provided him with those invoices and its director, Mr Andrew Wright had made handwritten notes on them of what Wright Tanks would have charged for the itemised components and the overall jobs.

[17] On the basis of those invoices, and acceptance of Mr Wright's notes of what Wright Tanks would have charged for the same work, Mr Willson concluded that Wright Tanks' charges were a certain percent higher than WPSL's. Accordingly, Wright Tanks added that percentage increase to each of the jobs Mr Irwin had undertaken in breach of his non-competition restraint when calculating the losses the company had incurred. None of the invoices contained information that identified the client or the location of the job.

[18] I am not persuaded that the methodology used to calculate the percentage increase is reasonable and I have declined to apply that component when considering what damages are appropriate. I have done so because it is not clear how the five clients were chosen, and how representative their invoices were.

[19] I have also taken into account that in some instances Wright Tanks could have used the quotes it had provided for jobs and compared them directly with the invoices Mr Irwin had submitted for undertaking the work. A further consideration was that Mr Irwin had applied discounts to some components of two of the invoices and it is not clear how those discounts were treated in Mr Willson's calculation.

Category 1- responsibility acknowledged

[20] This category comprises those jobs for which Wright Tanks' quotes had been accepted and for which it had provided reports to Council to obtain building consents during Mr Irwin's employment with it, but where Mr Irwin had undertaken the work. Wright Tanks' Quote and Payment Terms and Conditions provide that:

A quote is not a binding contract until the client signs, dates and returns a copy, or accepts the quote in writing, by phone or any other means of communication. However acceptance of plans and reports from Wright Tanks Limited is deemed to be acceptance by the client for all work proposed to be undertaken.

[21] Wright Tanks identified six such instances, but in submissions acknowledged it was unable to provide evidence that Mr Irwin had undertaken the work on one of them. Accordingly, it seeks damages in relation to five of those six jobs.

[22] All five of the properties on which the work took place were within the geographical area covered by the non-competition provision and within the one year period of the modified restraint provision of Mr Irwin's employment agreement. In each of those jobs, Wright Tanks had quoted for the work to be carried out; its quotes had been accepted; and its expectation was that it would be carrying out the work.

[23] Mr Irwin accepts he undertook the work in those five instances. He acknowledged some liability for damages although he disputes the amounts sought by his former employer. Mr Irwin undertook the work through the company he established, Waste Product Services Limited (WPSL) which was registered with the Companies Office on 26 October 2016. The company stopped operating, according to Mr Irwin, in or around September 2017.

[24] Four of the instances where Mr Irwin accepted some liability involved a company that builds "Latitude Homes." The licence for building Latitude Homes in the area changed hands during the period Mr Irwin's non-competition restraint applied, which I will return to shortly.

I note here that, while invoices submitted by Mr Irwin were paid by the licensee, some of his bank statements identified the payer as Latitude Homes.

[25] In my earlier determination, I preserved the privacy of the home owners by referring to the street and/or town in which the homes were situated and I will follow that process again in this determination.

[26] The first of the homes was located in Bulls on a property for which Wright Tanks had quoted, and had already undertaken some of the work. It had been paid for that work. It had also quoted for the drains work. Mr Irwin undertook the drains work after his employment with Wright Tanks ended, receiving two separate payments from Latitude Homes for the work.³

[27] The second property was located in Ashhurst on Pohangina Road. Wright Tanks had provided quotes for rib raft flooring and stormwater in March and April 2016 respectively. It prepared plans for Council in April 2016 and completed the rib raft flooring for the property in June 2016, for which it tendered an invoice and received payment.

[28] On 5 July 2016, Wright Tanks quoted for wastewater treatment and concrete water tanks. The following day Latitude Homes confirmed by email the upcoming jobs to be undertaken by Wright Tanks, including the stormwater and concrete tanks work on the Pohangina Road property. The email was addressed to Mr Irwin, who was at that time still an employee of Wright Tanks.

[29] Mr Irwin's bank and invoicing records show that he undertook both the stormwater work and the wastewater/concrete tank job through WPSL after he left Wright Tanks. He submitted three invoices for his work, all of which are recorded as being paid.⁴

[30] In the same email to Wright Tanks of 6 July 2016 confirming the Pohangina Road, Ashhurst work, Latitude Homes confirmed that Wright Tanks had the work for a Tokomaru property for wastewater and drains. Mr Irwin completed that work on his own behalf after he departed from Wright Tanks. He submitted three invoices to Latitude Homes for which he received payment in full according to his bank records.⁵

³ WPSL invoices 001 dated 20 October 2016 and 0012 dated 01 November 2016.

⁴ WPSL invoices 0002 of 20 October 2016; 0010 of 25 November 2016; and 0024 of 10 February 2017.

⁵ WPSL invoices 0004 of 20 October 2016; 0034 of 09 March 2017; and 0071 of 13 July 2017.

[31] The work including the installation of a wastewater treatment plant and water tank on the fourth of the properties for which Mr Irwin acknowledged some liability, took place in Levin. Wright Tanks had quoted for the work and its quotes had been accepted, but it was Mr Irwin who undertook the work after he had left Wright Tanks. In this instance he issued two invoices to Latitude Homes, and received full payment for each.⁶

[32] The last of this tranche of work that Mr Irwin acknowledged undertaking, and for which he acknowledged responsibility, related to a “Landmark Homes” property in Palmerston North. Mr Irwin issued one invoice, and was paid the amount in full.⁷

[33] As noted above, I have declined to include the percentage increase Wright Tanks had applied to Mr Irwin’s charges for these five jobs. I have taken the total amount Mr Irwin received in payment for the work and applied Wright Tanks’ gross margin to it. This results in a figure of \$38,854.28, I consider this amount appropriate to award to Wright Tanks as damages to compensate it for the loss of that work.

[34] Mr Willson who, as I have noted, has been the accountant for Wright Tanks since the company’s inception, calculated the gross margin, or profit margin, by taking an average over a five year period from 2014 to 2018 inclusive, using the financial statements prepared by the firm of Chartered Accountants of which he is a Director. Mr Willson explained that gross margin percentage was “based on sales less material purchased, subcontractors, wages (excluding owners) and freight as filed with Inland Revenue.”

[35] During the Authority’s hearing into quantum Mr Irwin questioned Wright Tanks’ use of a gross margin originating from an averaging exercise to calculate damages for the loss of work in the above five instances. In Mr Irwin’s view, Wright Tanks should do a specific costing for each of those jobs and calculate the gross margin for each one rather than use an average. Mr Irwin claimed to have made only \$3,251.90 profit on all five jobs combined, although I note that is less than the sum of the profit he claimed to have made for each job.

[36] I am sceptical of Mr Irwin’s account of the profits he made from each job particularly in light of the numerous invoices he supplied in redacted form to Wright Tanks. This made it difficult to ascertain whether he had supplied accurate information about all the invoices he

⁶ WPSL invoices 0003 of 20 October 2016; and 0018 of 21 December 2016.

⁷ WPSL invoice 0011 of 23 November 2016.

had submitted to clients, and payments he had received from clients, in respect of the five instances where he acknowledged some responsibility for Wright Tanks' loss of work.

[37] I do not accept Mr Irwin's views of the averaging method Mr Willson used for calculating Wright Tanks' gross margin. I accept that methodology as being adequate to establish the gross margin it could have expected to achieve in these five instances of work, if it had not been for Mr Irwin undertaking that work instead.

[38] Mr Irwin also submits Wright Tanks had exaggerated figures to show greater losses than it suffered. In support of his submission, he cited from a report provided to him by a Chartered Accountant he had engaged to advise him on confidential financial information that Wright Tanks had released to the Chartered Accountant for that purpose.

[39] In *Rooney Earthmoving Ltd v McTague and others*, counsel for one of the defendants submitted there had been no loss to Rooney Earthmoving Ltd (REL) because that company was, and remained, highly profitable overall despite the various breaches of duties by three former employees that resulted in one branch of REL experiencing a reduction in revenue.⁸ Judge Travis rejected those submissions and said:

(REL's) case has been put on the basis that it has lost revenue that it would otherwise have obtained, but for the actions of the defendants. Provided (REL) can prove that the loss of revenue it would have otherwise have earned was attributable to the unlawful acts of the defendants, it is entitled to be compensated for that loss.⁹

[40] In this situation, I find Wright Tanks has proven it lost revenue from Mr Irwin's actions of undertaking work in the above five instances in category 1, in breach of the provisions of his employment agreement. That is sufficient to merit an award of damages to compensate it for the losses.

[41] I find Mr Irwin liable for payment of damages of \$38,854.28 to Wright Tanks in respect of the above five instances.

Categories 2, 3 and 4: no responsibility acknowledged - Latitude Homes, Landmark Homes, and Baillie Construction Limited

⁸ *Rooney Earthmoving Ltd v Kelvin Douglas McTague* [2012] NZEmpC 63.

⁹ N9 at [75].

[42] Wright Tanks claims that it undertook all the waste water installations for Latitude Homes, Landmark Homes and Baillie Construction Limited, until Mr Irwin's departure from its employment. After he left, Wright Tanks says he undertook all that work. Wright Tanks also asserts Mr Irwin did not bring any clients with him when he commenced his employment: those clients came on board while he was its employee.

[43] In Wright Tanks' view, if it had not been for Mr Irwin undertaking the work in breach of his employment agreement, it would have continued to undertake work for those companies. Wright Tanks claims damages in respect of the work undertaken by Mr Irwin for those companies in the year in which his employment agreement restraints were in operation after his employment ended. It asks the Authority to consider the springboard effect of Mr Irwin's taking that work when calculating damages.

[44] Mr Andrew Wright is the sole director of Wright Tanks. His evidence was that the company had the capacity to undertake the work and there had been no issues with previous work it had done. In Wright Tanks' submission it would, on the balance of probabilities and because of the relationships it had established with those companies, have continued to receive their work. It submits there is a loss of chance component that needs considering in relation to Mr Irwin's breaches of the restraint provisions of his employment agreement as those breaches deprived Wright Tanks of the chance to obtain the work he undertook in that 12 month period.

[45] I note at this point that Mr Irwin maintained in oral evidence to the Authority in relation to many of the claims Wright Tanks made, that in undertaking waste water, drainage and sewerage work, he was not in competition with his former employer. Mr Irwin claimed that, because he had not been trained in these matters by Wright Tanks, and did not undertake those tasks while working for Wright Tanks, they were not covered by the non-competition provisions of his employment agreement.

[46] I find Mr Irwin to be mistaken. It was irrelevant whether he had been trained in, or had carried out, those tasks when he was employed by Wright Tanks. The non-competition provisions of his employment agreement restricted him from carrying on business in competition with Wright Tanks. The provisions did not limit the non-competition restraint to the customer liaison work for which Mr Irwin had been employed by that company.

Category 2: Latitude Homes

[47] Mr Irwin said he was responsible for introducing the Latitude Homes business to Wright Tanks. It came about through the strong relationship he had forged with Ricky Crutchley during his several years of employment with a motorcycle company before he joined Wright Tanks. When Mr Irwin started working for Wright Tanks, Mr Crutchley had the licence to build Latitude Homes in the area.

[48] Wright Tanks did not deny Mr Irwin had introduced that client to it. It said it was part of Mr Irwin's role as Customer Liaison to bring in new customers and forge relationships to benefit Wright Tanks. Mr Irwin appears to have been effective in turning the existing personal relationships he had with some business owners into client relationships for his employer. That, of course, did not give him the right to breach the non-competition restraints of his employment agreement by accepting work from them after his employment ended.

[49] Mr Irwin's evidence was that he had not tried to retain Latitude Homes, or any other Wright Tanks client, after he left that company. He said he sent out a text on the last day of his employment to all the housing companies and customers who had used Wright Tanks. In the email Mr Irwin provided his new telephone number and advised the clients that Wright Tanks would still "take care of everything you will need going forward...". At that time Mr Irwin believed he would be taking over a portaloo hire business he and Mr Wright had established separately during his employment and he also referred to that business in his email to Wright Tanks' clients.

[50] Mr Crutchley's evidence at the Authority's hearing into liability supported that of Mr Irwin. Mr Crutchley said he had known Mr Irwin for approximately ten years through the motorcycle industry and he had no relationship with Wright Tanks until Mr Irwin started working there. Before that, he had used two different contracting companies for the septic and drainage work for the homes he built.

[51] Mr Irwin's own home had been built through Latitude Homes and Mr Crutchley said he returned the favour by supporting Mr Irwin while he was working for Wright Tanks and giving that company his business, starting in 2015. Mr Crutchley confirmed that Mr Irwin had texted him when he left his employment with Wright Tanks to advise him to contact Wright Tanks for all his septic and drainage requirements. Mr Crutchley said he had some problems contacting Wright Tanks about work which is why he asked Mr Irwin to do it.

[52] Mr Crutchley said he sold Latitude Homes to Graham Wellington who took over on 31 May 2016 as licence holder for the brand. Mr Wellington and his wife own and operate the building business G & K Construction Limited (G & K). Mr Crutchley contacted Wright Tanks, amongst other businesses, on 31 May 2016 to advise he would be introducing Mr Wellington to them shortly. He also advised he would be completing a number of homes that were identified in an attachment to his email. Mr Crutchley anticipated his involvement would continue until February 2017. The attachment listed the four Latitude Homes in category 1, for which Mr Irwin accepted he had some liability for Wright Tanks' loss of that work. The list also contained other Latitude Homes jobs that I will return to shortly.

[53] Mr Wellington gave evidence to the Authority that he had not known Mr Irwin until Mr Crutchley introduced, and recommended, him. Mr Wellington said he liked Mr Irwin and engaged him to undertake work for Latitude Homes. At the time Mr Wellington took over Latitude Homes Mr Irwin was employed by Wright Tanks and I gather he meant that he decided to engage Mr Irwin after he had left Wright Tanks and set up his WPSL business in October 2016. Mr Wellington said he has used Wright Tanks from time to time and had no problem doing so but he did not believe Wright Tanks had any ownership over the septic and drainage work for Latitude Homes.

[54] I agree with Mr Wellington and find Wright Tanks has no claim against Mr Irwin for damages for loss of work in relation to any new clients Latitude Homes signed up after Mr Wellington took over the licence for building homes under that brand. The exception to that is any instance where Mr Wellington, after asking Wright Tanks to provide a quote for work on a property, accepted the quote, but Mr Irwin carried out the work in his own right after his employment ended. In such instances, it would be reasonable to find Mr Irwin liable for damages in relation to Wright Tank's loss of the work.

[55] I apply the same reasoning to any situations in which Mr Wellington took over existing work from Mr Crutchley where Wright Tanks' quotes had been accepted and it had prepared the documentation for obtaining Council consents for a Latitude Homes property, but where the work was undertaken by Mr Irwin through WPSL. Again, it is fair that Mr Irwin be held liable for damages in relation to losses caused to Wright Tanks by his breaches of the restraint provisions of his employment agreement.

[56] Otherwise, I do not accept that Mr Irwin is liable for any loss claimed by Wright Tanks in respect of new work on Latitude Homes properties after Mr Wellington took over the licence on 31 May 2016. I find there was no basis for Wright Tanks to consider it would continue to receive new work from a new licensee who had no previous dealings with it. In the absence of any contractual undertaking binding the Latitude Homes' licensee to engage Wright Tanks for all septic, wastewater, tank installation and related work, Mr Wellington was at liberty to engage whichever company or individual he chose to undertake that work. Wright Tanks did not base its claims on the existence of such a contractual obligation.

[57] Following the reasoning applied above, I find Mr Irwin is liable for damages for loss of work sustained by Wright Tanks in relation to the work in progress that Mr Crutchley continued to oversee in the months after the Latitude Homes' licence had transferred to Mr Wellington. Again, I find this applies only where Wright Tanks' quotes had been accepted and it had prepared the requisite documentation for Council consents. It is reasonable to assume this was the situation with the work that was identified in the attachment to Mr Crutchley's email of 31 May 2016 to businesses including Wright Tanks.

[58] From the incomplete and redacted invoices and the bank statements provided by Mr Irwin, Wright Tanks identified three jobs he had undertaken for Latitude Homes that were clearly within the time and geographical restraints in his employment agreement.¹⁰

[59] Mr Irwin's bank records show that payment for all three jobs came from G & K. Wright Tanks had submitted a quote for one of those jobs but there is no indication of the quote being accepted or of Wright Tanks having applied for Council consents. Those three jobs fit into the category of work for which I have found Mr Irwin not liable for damages and I decline to award damages in relation to them.

[60] Wright Tanks identified a further 12 jobs undertaken by Latitude Homes within the 12 month restraint period. Due to client information having been redacted from WPSL invoices, the location of the work is not known in most of those cases. Mr Irwin said under cross examination one of the jobs was undertaken in New Plymouth, which puts it outside the 50 kilometre geographical restraint.¹¹ I accept his evidence in this instance and note that Mr

¹⁰ WPSL invoices 009 of 18 November 2016; 0037 of 10 March 2017; and 0038 of 22 February 2017.

¹¹ WPSL invoice 0022 of 16 January 2017.

Crutchley's list of the work he would continue to be involved with included three properties in New Plymouth.

[61] I am not satisfied that the work carried out in one other instance took place within the one year restraint period. Mr Irwin invoiced that job on 13 December 2017 and was adamant he had undertaken the work after 21 September 2017 when the restraint expired.¹² I find that is likely to be true and will not further consider damages in relation to that work.

[62] Of the remaining 10 jobs, Mr Irwin's banks records reveal nine were undertaken for G & K and there was no evidence in eight of those instances that Wright Tanks had obtained Council consents for the work or that it had any form of undertaking from G & K that the work was theirs.¹³ I have therefore ruled those eight jobs out of consideration for damages.

[63] Mr Irwin acknowledged orally that the remaining G & K job "may have been" for a named client of Latitude Homes whose property was in County Heights Drive in Palmerston North.¹⁴ Having observed Mr Irwin over three investigation meetings, I have no doubt the work in question was in respect of that property.

[64] Wright Tanks had provided a quote in October 2015 for the wastewater plant, water tank, stormwater and sewerage drains work for that property and its quote had been accepted. Wright Tanks had provided reports and plans for Latitude Homes to include in its application to Council for building consents in February 2016. This was during the time Mr Crutchley was building Latitude Homes.

[65] Mr Irwin, after leaving Wright Tanks' employment, provided a revised report on WPSL letterhead to the new licensee, Mr Wellington, for submitting to the Council. This is a situation where the work was in progress at the time Mr Wellington took over the licence for Latitude Homes. Mr Irwin knew that Wright Tanks had successfully quoted for the work and had prepared the necessary documentation for obtaining Council consents.

[66] Mr Irwin acknowledged his role in preparing a revised report in June 2017 but said he had not undertaken the work. The invoice that he conceded "may have been" in respect of that Latitude Homes' client was, he said, for some planning design work. Mr Irwin produced

¹² WPSL invoice 0080 of 13 December 2017.

¹³ WPSL invoices 0023 of 11 January 2017; 0042 of 30 March 2017; 0043 of 30 March 2017; 0046 of 24 March 2017; 0059 of unknown date; 0068 of 26 June 2017; 0074 of 17 August 201; and 0078 of 18 October 2017.

¹⁴ WPSL invoice 0042 of 30 March 2017 for \$782.

documentation that showed another local contracting firm as having undertaken the physical work in November 2018, more than a year after Mr Irwin had ceased operating his business.

[67] As noted earlier, Wright Tanks could find no evidence Mr Irwin had undertaken the physical work on this property. While that may not necessarily extinguish Mr Irwin's liability, that was not an argument that Wright Tanks pursued and no damages will be awarded in respect of that property.

[68] The final piece of work, for which Mr Irwin's bank records show he received payment from Latitude Homes on 18 January 2017, related, according to Mr Irwin, in oral evidence, to ground preparation for house foundations.¹⁵ The description of the work on the WPSL invoice supports that. When questioned about the invoice, which contained no details of the location or the property owner, Mr Irwin said he believed it related to foundations work he undertook in Feilding for Mr Crutchley.

[69] The work on preparation for foundations is work Wright Tanks has the equipment and facility to do and it is work it undertakes for clients when required. The work was undertaken within the geographical area of the restraint and within the 12 months the restraint was operative. As such, I find the work Mr Irwin performed on that site was in breach of his non-competition restraints. If the work was undertaken for Mr Crutchley, as Mr Irwin intimated, it is reasonable to assume the work was for one of the clients who had signed up for a Latitude Home before Mr Wellington took over the licence. There were Feilding properties on Mr Crutchley's list of 31 May 2016 although, because of the redactions on the WPSL invoice, it was not possible to know if this was one of those cases.

[70] I find it more likely than not that this was work that would have gone to Wright Tanks and Mr Irwin is liable for damages to compensate for its loss of the work. I find Mr Irwin to be liable for damages of \$4,496.79 in respect of that loss.

Category 3: Landmark Homes

[71] Landmark Homes did not provide evidence to the Authority but it was Mr Irwin's evidence, not contradicted by Wright Tanks, that it had not used Wright Tanks before Mr Irwin began to work for it. He said it was through his longstanding personal relationships with a director of Landmark Homes and with that company's head salesperson, with whom he had

¹⁵ WPSL invoice 0025 of 18 January 2017.

been friends from school days, that Wright Tanks had been engaged to undertake their work.¹⁶ Email communications provided to the Authority support Mr Irwin's assertions of a close connection with one of the directors.

[72] As I have noted above, it was part of Mr Irwin's role during his employment with Wright Tanks to bring new clients into the business. The fact that Wright Tanks benefitted from that business did not give Mr Irwin the right to breach the non-competition provisions of his employment agreement by accepting work from those clients after he had left Wright Tanks.

[73] Wright Tanks has identified two instances where Mr Irwin undertook work for Landmark Homes in the 12 month period his non-competition restraint was operative. They were identified from the invoices Mr Irwin had supplied, although he had redacted them to conceal any details that could identify the location of the property on which the work had been carried out.

[74] Under cross-examination Mr Irwin acknowledged the location of one of the properties on which he had undertaken drainage work was Ashhurst.¹⁷ In relation to the second piece of work, Mr Irwin said it was not waste water work that he had carried out on the property and there was no breach of his non-competition restraint.

[75] I do not accept that, as the invoice for the second piece of work referred to sewer drains and stormwater drains being laid which is clearly work that Wright Tanks undertakes.¹⁸ Although he did not identify the location that work took place, Mr Irwin did not claim it was outside the 50 kilometre area of the restraint. I conclude it was inside the time and geographical restraints and that the work Mr Irwin undertook in both this and in the Ashhurst instance was in breach of the non-competition provisions of his employment agreement.

[76] However, I am not satisfied the evidence Wright Tanks provided to the Authority establishes that Landmark used Wright Tanks to undertake all its septic, wastewater, tank installation and related work. Nor am I satisfied that it would have continued to use Wright Tanks after Mr Irwin left his employment there. I cannot therefore find on the balance of probabilities that it would have been given the work in the two instances cited and for that

¹⁶ Mr Irwin was referring to a director and employee of the building company based in Palmerston North that has the local franchise for Landmark Homes.

¹⁷ WPSL invoice 0017 of 19 December 2016 for \$5,423.72.

¹⁸ WPSL invoice 1167 of 2 May 2017 for \$6,936.80.

reason I decline to consider further awarding damages for loss of the two pieces of work Wright Tanks has cited.

Category 4: Baillie Construction Limited (BCL)

[77] In submissions for Wright Tanks, Mr Mason identified three invoices rendered to BCL in respect of work Mr Irwin had undertaken within the 50 kilometre restraint area¹⁹ and five other invoices where the location of the work was unknown.²⁰ Mr Irwin had redacted information from the invoices that would identify the client or the location of the property at which the work was undertaken. Some information was able to be gleaned by checking WPSL invoices against the respondent's bank records and some information was obtained through cross-examination, although this mainly related to the nature of the work rather than its location.

[78] I am satisfied from the WPSL invoices that all eight jobs fell within the range of work carried out by Wright Tanks and all but one constituted breaches of Mr Irwin's non-competition restraints. The one that may not have been in breach was invoiced on 26 November 2017 and may have been for work undertaken after the 12 month period of the restraints had expired.

[79] Mr Irwin denied any responsibility for losses Wright Tanks incurred by his undertaking the work. Under cross examination, Mr Irwin did not claim any of the locations where he undertook the work were outside the geographical boundaries of the restraint. His disclaimers of responsibility for Wright Tanks' loss of the work related more to the type of work rather than its location.

[80] Mr Irwin also indicated that Wright Tanks was not the only business operating in its line of work and could not reasonably assume it would retain clients who had the choice to go elsewhere. I accept this was not a situation where BCL would have had no choice other than to use Wright Tanks if Mr Irwin had not breached his employment agreement by setting up as a competitor to it. A number of other local contractors could have been engaged to undertake the work.

¹⁹ WPSL invoices 0032 of 13 February 2017 for \$4,072.67; 0033 of 15 February 2017 for \$2,814.86; and 0058 of 1 May 2017 for \$3,378.70.

²⁰ WPSL invoices 0008 of 26 November 2016 for \$4,495.36; 0030 of 7 March 2017 for \$2,673.75; 0039 of 30 March 2017 for \$4,182.55; 0041 of 30 March 2017 for \$920.00; and 0062 of 22 May 2017 for \$17,976.80.

[81] Mr Mason submitted that, on the balance of probabilities, the work would all have gone to Wright Tanks if it had not been for Mr Irwin undertaking it in breach of his employment agreement's non-competition provisions. He says the relationship Wright Tanks had established with BCL supports that view.

[82] I am not persuaded the evidence supports that assertion. It was clear from the evidence of Simon Amos, Project Manager for BCL, that the reason for giving its work to Wright Tanks was Mr Irwin's employment there. It is not clear that BCL had an exclusive relationship with Wright Tanks or that it would have continued to give work to that company if Mr Irwin had resigned from his employment but not set up a business that competed with Wright Tanks in breach of the applicable restraint provisions of his employment agreement. The personal relationship with Mr Irwin appeared to be the key factor in BCL's decision making, not the relationship with Wright Tanks.

[83] While BCL may have continued to give work to Wright Tanks, I find there is insufficient evidence to suggest that, on the balance of probabilities, it would have done so with all its work. BCL may have chosen another contractor or contractors after Mr Irwin's departure from Wright Tanks.

[84] Mr Irwin breached the non-competition provisions of his employment agreement in undertaking work for BCL while the restraint provisions of his employment agreement were operative but, for the reasons above, I do not find him liable for the loss of work from BCL that is claimed by Wright Tanks.

Category 5: no responsibility acknowledged – "Various Customers"

[85] In this category, Mr Mason has identified one group of five customers within a 50 kilometre radius of Wright Tanks for whom Mr Irwin undertook work in the period his restraint was operative. He also identified a second group of 22 customers for whom Mr Irwin undertook work during that period, but whose location was unknown.

[86] Wright Tanks submits the onus is on Mr Irwin to show that this work would not have come to it, had it not been for his breaches of the non-competition provisions of his employment agreement. In its submission, Wright Tanks lost the chance to obtain the work in this, and other categories apart from category 1, because of those breaches by Mr Irwin.

[87] I am not persuaded by that submission. As I have noted above, this is not a situation where Wright Tanks was the only company in the region that was capable of carrying out wastewater, septic and related work. The work could have gone to any one of a number of companies if it had not been undertaken by Mr Irwin.

[88] In relation to the first group of named customers, Wright Tanks provided no evidence it had undertaken work for those customers in the past such that it had an expectation of receiving future work from them. One of the named customers was Lee Building Maintenance 2011 Limited. Simon Barry, who is the owner and director of that company gave evidence to the Authority that he and his wife had been friends of Mr Irwin and his wife for many years. While he knew Mr Wright socially, they did not have the same relationship as he had with Mr Irwin. Mr Amos said he had engaged Mr Irwin to prepare a report in relation to the home he was building for himself. He did not believe Wright Tanks undertook that particular type of reporting in any event.

[89] Mr Irwin was in breach of his employment agreement to accept work from those customers, but I do not have evidence on which to conclude it was more probable than not that the customers would have given their business to Wright Tanks had it not been for Mr Irwin's breaches.

[90] For similar reasons I decline to consider further an award of damages in relation to the second group of 22 unnamed customers, the identities of some of whom were able to be ascertained by matching the invoices to WPSL bank statements. I accept that Mr Irwin created more difficulty for Wright Tanks to establish its claims due to his redaction of identifying information on the invoices but am not willing to find that Wright Tanks can claim damages for loss of the work when it is not clear that it would have had the opportunity to undertake the work. I will return to this issue when considering a penalty against Mr Irwin for obstruction of the Authority's investigation.

[91] For the reasons above I decline all the claims in Category 5.

Category 6: no invoices provided

[92] Wright Tanks has included a further 10 claims in respect of invoices it claims would have been rendered by Mr Irwin but have not been provided by him. Mr Mason has ascribed

a figure of \$7,885.78 for each of the missing invoices, which he submits is the average of the amount Mr Irwin invoiced during the 12 month restraint period.

[93] I decline to award damages in respect of instances where it is unknown whether Wright Tanks had ever carried out work for any of the clients and where it may have had no reasonable expectation of being asked to carry out work in these instances.

[94] I make no award of damages in relation to the claims in category 6.

Summary of damages claims

[95] I have awarded Wright Tanks damages of \$38,854.28 in respect of work lost due to Mr Irwin's breaches of his employment agreement restraint provisions under category 1, and \$4,496.79 in damages in respect of work lost for similar breaches under category 2.

[96] No other damages claims have been upheld.

Penalty for obstruction

[97] The Authority may, either of its own motion or on the application of any party to the investigation, impose a penalty on a person who, without sufficient cause, obstructs or delays an Authority investigation.²¹

[98] On 25 July 2018, following a telephone conference with the parties, I issued a Notice of Investigation Meeting to take place in Palmerston North on 16 August 2018 and I directed Mr Irwin to attend the investigation meeting and bring with him documents specified in a Memorandum of 12 June 2018 by counsel for Wright Tanks.

[99] Mr Irwin attended the 16 August 2018 investigation meeting with some of the specified documents but failed to provide others. I found his explanations for not providing all the required documents to be inadequate.

[100] He claimed not to have access to some documents because of proceedings in another jurisdiction, of which he provided no evidence. He said he did not think other documents were relevant to the matter before the Authority. I put Mr Irwin on notice that failing to comply with an Authority direction could result in the imposition of a penalty for obstructing my

²¹ Section 134A of the Act.

investigation. I gave a further direction that he provide the missing documents by 31 August 2018, which I later extended to 4 September 2018.

[101] Some further documents were provided by Mr Irwin and continued to be provided on a drip-feed basis up to the June 2019 investigation meeting and beyond. Not all the documentation sought from him was supplied. Some documents Mr Irwin provided, notably the invoices WPSL had issued, had identifying details redacted. As I have already noted, this made it difficult at best and impossible at worst to determine what work the invoice related to and whether the work had taken place within the geographical area of the non-competition provisions of Mr Irwin's employment agreement.

[102] Mr Irwin's explanations for the delays in supplying documents included that they were non-existent; that he lacked access to them; and that he had already provided them, when he had not.

[103] I consider Mr Irwin's delays in providing information and his refusal to provide unredacted invoices to be serious and deliberate and to have obstructed the Authority's investigation. It has added considerably and unnecessarily to the work of both the Authority and the Applicant. I do not find Mr Irwin's excuses for failing to provide documents and/or delaying the provision of documents to be plausible and find his conduct in deleting identifying text from invoices obstructed my investigation into his breaches of the non-competition provisions of his employment agreement.

[104] The maximum penalty that can be imposed on an individual is \$10,000 and I find an appropriate penalty to impose on Mr Irwin is \$7,500 under s 134A of the Act. In the circumstances I consider \$5,000 of that amount should be paid to Wright Tanks and I order that to occur, under s 136 of the Act.

Summary and orders

[105] Mr Irwin is ordered to pay:

- (a) Damages to Wright Tanks for the loss of work it sustained as a result of his breaches of the non-competition restraint provisions of his employment agreement in the total sum of \$43,351.07.

- (b) A penalty of \$7,500 for obstructing the Authority's investigation, of which \$5,000 is to be paid to Wright Tanks and \$2,500 is to be paid to the Employment Relations Authority for paying into the Crown account.

Costs

[106] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is needed, Wright Tanks may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Irwin would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[107] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²²

Trish MacKinnon
Member of the Employment Relations Authority

²² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1