

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 362  
3004471

BETWEEN	JCR (2006) LIMITED T/A 1 <sup>ST</sup> CALL RECRUITMENT Applicant
AND	HAMISH MCARTHUR First Respondent
AND	MAC RECRUITMENT LIMITED Second Respondent

Member of Authority: Robin Arthur

Representatives: Richard Upton, Counsel for the Applicant  
Melanie O'Neill, Counsel for the Respondent

Investigation Meeting: 28 and 29 August 2017 in Hamilton

Determination: 22 November 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. A term restraining Hamish McArthur from soliciting clients of JCR (2006) Limited until six months after the end of his employment was reasonable and enforceable.**
- B. In respect of breaches by Mr McArthur of that term of his employment:**
- (i) JCR (2006) Limited's claim for damages is declined; and**
  - (ii) Mr McArthur must pay the sum of \$9000 as a penalty under s 134(1) of the Employment Relations Act 2000 (the Act). He must pay the full amount of that penalty directly to JCR (2006) Limited. He must, either, pay it in full by no later than 1 February 2018 or, if he elects to do so, pay \$1500 a month in six instalments starting from that date.**

**C. JCR (2006) Limited’s claim for a penalty against Mac Recruitment Limited is dismissed.**

**D. Costs are reserved with a timetable set for memoranda if an Authority determination of that issue is needed.**

### **Employment Relationship Problem**

[1] JCR (2006) Limited said its former employee Hamish McArthur breached restraint of trade terms in his employment agreement. Mr McArthur had worked from June 2014 to 16 September 2016 as a team leader and consultant in the Hamilton office of the company’s recruitment services business. The business trades under the name of 1<sup>st</sup> Call Recruitment.

[2] The basis on which the parties decided their employment relationship had ended were formalised in a settlement agreement certified by a mediator on 3 October 2016.<sup>1</sup> While the terms of that agreement were confidential, it was necessary for the purposes of this determination to disclose one term. Clause 8 stated Mr McArthur agreed to “comply with the obligations in his employment agreement that survive the termination of his employment”.

[3] However, according to the application 1st Call lodged in the Authority on 21 March 2017, Mr McArthur breached some of those obligations by setting up his own recruitment services business and by approaching its clients within six months of ending his employment at 1<sup>st</sup> Call. He operated his business through Mac Recruitment Limited (MRL), a company he registered on 14 November 2016. Mr McArthur was MRL’s sole director and held 90 per cent of its shares, his wife holding the balance.

[4] Mr McArthur’s statement in reply said the settlement agreement term referring to ongoing obligations had not expressly mentioned the restraint of trade provisions in his employment agreement with 1<sup>st</sup> Call. He said he had not recalled any restraint provisions were in that agreement but he had still waited four months before starting a new business and approaching clients. He said he waited that long because he recalled that was the restraint period that applied at the end of his employment with

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<sup>1</sup> Employment Relations Act 2000, s 149.

the recruitment services business he worked for before he joined 1<sup>st</sup> Call in 2014. He also questioned whether the restraint terms were enforceable because no separate consideration was paid for them.

[5] During the Authority's investigation meeting 1<sup>st</sup> Call discontinued some of its claim against Mr McArthur. At the outset of the meeting 1<sup>st</sup> Call confirmed it no longer sought an account of profits. During the second day of the investigation meeting 1<sup>st</sup> Call abandoned a claim for enforcement of the non-competition clause in Mr McArthur's employment agreement. What remained were claims that a non-solicitation clause should be declared reasonable and that orders should be made requiring Mr McArthur to pay remedies of damages and penalties for breaches that clause. 1<sup>st</sup> Call also sought orders requiring MRL to pay a penalty for aiding and abetting Mr McArthur's breaches and for all penalties awarded to be paid to 1<sup>st</sup> Call.

### **The issues**

[6] By the end of the Authority's investigation meeting, the following issues remained for determination:

- (i) Was the non-solicitation clause in Mr McArthur's reasonable and enforceable?
- (ii) If the clause was reasonable, was it also enforceable?
- (iii) If so, had Mr McArthur's activities breached the non-solicitation obligation?
- (iv) If so, should he be ordered to pay damages and/or penalties?
- (v) And, if Mr McArthur had breached the non-solicitation clause, should MRL also be ordered to pay a penalty for aiding and abetting those breaches?
- (vi) If penalties were ordered, should some or all of that amount be paid to JCR (2006) Limited?
- (vii) If Mr McArthur were ordered to pay any amount, either in damages or penalties, should payment by instalments be allowed?
- (viii) Should either party contribute to the costs of representation of the other party.

## **The Authority's investigation**

[7] Written and oral evidence for the Authority's investigation was provided, under affirmation, by 1<sup>st</sup> Call's general manager Angela Singleton, 1<sup>st</sup> Call's managing director Phillip van Syp and Mr McArthur. They each answered questions from me and the parties' representatives. The representatives provided closing submissions on the issues for determination.

[8] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[9] The prospect of prohibiting publication of some financial information and the names of 19 or so client businesses was discussed but no order was made. While the Authority investigation received no direct evidence from anyone from those businesses about their interactions with any parties in this matter, what the witnesses who did give evidence said included some potentially sensitive commercial information that might have needed to have been included in the determination. It has however proved possible to explain the conclusions reached in this determination without using the names of client businesses incidentally involved in the issues between 1<sup>st</sup> Call and Mr McArthur. And, because the details of Mr McArthur's contact with those client businesses was canvassed at length in the investigation meeting and are now well known to the parties, it was not necessary to set out much of that detail in this determination.

## **Was the restraint reasonable?**

[10] The relevant clauses in Mr McArthur's employment agreement were:

### 11.6 Non-solicitation of clients

The Employee agrees that for a period of six months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of the Employer for which the Employee had completed any work for whilst employed by the Employer. The Employee has agreed that the salary has covered compensation for the period. ...

### 11.8 Non-competition

Given the information disclosed in this role Hamish McArthur acknowledges that there is a high level of access to critical and confidential information relating to the business, its operational systems and clientele. Hamish McArthur agrees to the terms of this restraint and its reasonableness having regard to the position.

Hamish McArthur agrees that for a period of six months following the termination of their (sic) employment for whatever reason, they (sic) shall not, either personally or as an employee, consultant, manager, agent, director, shareholder or financier of any other person in any business similar to the business for any other entity or employer, carry on business in competition with the employer within a radius of 20 kilometres from the employer's premises.

[11] As a matter of legal policy such clauses restricting an employee's post-employment activity are regarded as unenforceable unless they can be justified as reasonably necessary to protect an employer's legitimate proprietary interests. The provision must be no wider than necessary to protect such interests. Those interests must be some identified advantage or asset held or developed by or for the employer that it would be unjust to allow an employee to appropriate for his or her own purposes, even though the employee may have contributed to the creation of that advantage or asset.<sup>2</sup> One recognised category of such interests are business or trade connections, often referred to as "client relationships", developed or sustained by an employee during their employment. An employee may reasonably be restrained from soliciting clients or customers she or he had particular knowledge of or contact with during the employment. This includes situations where customers have relied on the skill and judgement of the employee or dealt exclusively with the employee so that personal acquaintance may sway them into moving their business from the employer to the employee's new activity.<sup>3</sup>

[12] The non-competition clause in Mr McArthur's employment agreement could not clear the hurdle of being reasonable. It was contrary to the public interest in allowing for competition in markets and for the freedom of former employees to use their personal skills and experience in their next job or business activity. 1st Call could legitimately forbid McArthur from using confidential client and business information he gained in its employment. This particular clause, however, went too far. It simply sought to prevent him from working at all in the recruitment industry

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<sup>2</sup> *Stenhouse (Australia) Limited v Phillips* [1974] AC391, 402 (PC).

<sup>3</sup> *Airgas Compressor Specialists Limited v Bryant* [1988] 2 ERNZ 42 at 53.

for six months. It was an unreasonable fetter on competition. As a matter of public policy, Mr McArthur should have been entitled to use his skill and experience in recruitment during that six month period, provided he did not rely on confidential information gained only in his employment with 1<sup>st</sup> Call to do so.

[13] By contrast the non-solicitation clause was reasonably limited to the extent necessary to protect 1st Call's proprietary interests in client relationships Mr McArthur had developed or maintained on 1st Call's behalf while he was working for it. The clause's scope was limited to those 1st Call clients for which he had completed any work. It did not purport to prohibit him canvassing clients of 1st Call with whom he had no contact. It did not prohibit him from using his skills and experience to work with or for people and businesses which were not 1<sup>st</sup> Call clients.

[14] The restraint's length was not unreasonable. One measure of reasonableness is how long might be needed for the employer to recruit a replacement and enough time for the replacement to establish her or himself as the point of contact for the employer's clients. The business from some of 1st Call's clients' was seasonal so such contact might not happen for several months, even though there was a notional monthly call cycle.

[15] In *Pottinger v Kelly Services (New Zealand) Limited* the Employment Court found, as seriously arguable on an interim basis, that a six month non-solicitation restraint on a branch manager in a recruitment business was reasonable.<sup>4</sup> Given Mr McArthur's role as office team leader in a similar recruitment business, the limitation to non-solicitation only, and the characteristics of clients dealt with, the same conclusion could reasonably be reached in his case also.

### **Was the restraint enforceable?**

[16] Mr McArthur submitted there were two reasons that, even if the non-solicitation restraint was found to be reasonable, it was not enforceable. Neither submission was compelling.

[17] Firstly, he submitted no separate consideration was given for the restraint. The restraint clause was in his employment agreement from the outset. Consideration

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<sup>4</sup> [2012] NZEmpC 101 at [55].

was included in the original bargain made for his salary. This was not a situation where a variation to his agreement was made during the course of the employment, so no separate consideration for the additional burden of a restraint was required.<sup>5</sup>

[18] Secondly, Mr McArthur said he was not aware of the restraint term and could not recall after his employment had ended whether his agreement had included one. Mr McArthur was given an employment agreement, and the opportunity to review it, before his employment with 1st Call started. He read, signed and returned the agreement. What he said was his later failure to recall its terms did not excuse him from being bound by the obligations in it. Mr McArthur's personal and business experience meant he well understood he was bound by terms in such a signed agreement. He had worked as a general manager of a family business and had a law degree from Waikato University. Prior to working for 1st Call he had also worked for a different, large recruitment business. He had recalled that his employment agreement with that prior employer had contained restraint terms because some special arrangements were made about the application of those terms at the time he started work for 1st Call.

[19] Mr McArthur's actions after the end of his employment at 1st Call on 16 September 2016 had to be assessed on the basis that he was subject to a reasonable and enforceable restraint against solicitation for a six month period. Until 17 March 2017 he could not, for the purposes of his own business, lawfully contact or provide recruiting services to any 1<sup>st</sup> Call's clients for whom he had done work while he was employed by 1<sup>st</sup> Call. His freedom to use his skills and experience was not unreasonably fettered by that clause because he could have canvassed many hundreds of other businesses about providing them with recruitment services, rather than relying on his previous contacts and connections with those 1<sup>st</sup> Call clients.

### **Breaches**

[20] Mr McArthur's own evidence confirmed he breached that non-solicitation clause. He contacted 19 clients of 1st Call during the restraint period.

[21] He registered MRL and set up a website for "Mac Recruitment" in late 2016. The website included the following description of Mr McArthur:

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<sup>5</sup> *Fuel Espresso v Hsieh* [2007] NZCA 58 at [18].

Hamish is an experienced recruiter having worked in the Hamilton market for over 4 years. Prior to working in recruitment Hamish was General Manager of a large Engineering company with divisions in both Hamilton and Auckland. Hamish has recruited across a wide range of industries from manufacturing through to transport and logistics and civil construction. He brings an ability to quickly understand a client's business and its drivers and turn that into successful candidate selection. **With an honours law degree he has an excellent understanding of risk and how to successfully manage it in employment relationships.** (*bold emphasis added*)

[22] Mr McArthur said he began actively promoting Mac Recruitment and contacting 1st Call clients from 12 January 2017. He said he had waited four months from the end of his employment with 1st Call to start that activity. He said this was because he could not recall whether there was a restraint term in his employment agreement with 1st Call but, if there were, he thought it was likely to be the same four month period that had applied in the recruitment business he worked for before joining 1st Call. If that were so, Mr McArthur took the risk, and must bear the consequences of not having taken the simple step of properly checking with 1<sup>st</sup> Call about the extent of his obligations if he were genuinely unsure about the reference to them in the settlement agreement.

[23] He continued to run that risk with two clients he contacted after 1st Call served notice of legal action on him on 6 March 2017. Although those papers clearly alerted him to the fact that a six month restraint was still effective, Mr McArthur went ahead with contacting 1<sup>st</sup> Call client on 9 March and another on 14 March. He said he had done so after getting legal advice about the extent of his obligations.

[24] Mr McArthur candidly accepted, when asked at the Authority investigation meeting, that he was 'trading off' his previous role 1st Call when he contacted the identified 19 clients. He had succeeded at gaining at least some business from six of those clients. Even if that business (of finding and placing temporary workers) had taken place after the expiry of the restraint period, Mr McArthur accepted as a "fair description" that the 'seed' for that transaction was planted by his calls to those clients before 17 March. Mr McArthur had dealt with some of the personnel at those client businesses while in his previous recruitment business role before joining 1<sup>st</sup> Call, but he had sustained those relationships while he was 1st Call's payroll. And 1st Call was thereby entitled to retain, as its proprietary interest, the benefit of those sustained

relationships to generate ongoing work for its business rather than for Mr McArthur to use them for his own advantage after this employment at 1<sup>st</sup> Call ended.

### **Was 1st Call entitled to an award of damages?**

[25] 1st Call's statement of problem sought an order for damages "in a figure to be advised prior to any substantive investigation meeting". No such quantification was provided. The evidence of Ms Singleton and Mr van Syp suggested 1st Call had suffered loss as a result of Mr McArthur's activity, particularly in relation to the business from six clients he accepted he had conducted following contact with them. However what Ms Singleton and Mr van Syp said did not compellingly establish 1st Call would necessarily have got all of that business or had subsequently missed out on orders that would have been made in the future. Questions about their evidence established there were a range of factors that also likely had some effect. Those factors included changing business needs depending on clients' workflow, changes at some clients in personnel who dealt with recruitment arrangements, and some seasonal demand fluctuations. Their evidence did not sufficiently discount or account for the extent those factors may have affected likely orders, rather than being solely or mainly due to Mr McArthur's activity.

[26] And even if what he did was established to have resulted in quantified loss, there was a problem in 1st Call establishing that it had done what could reasonably have been done to mitigate such loss. Mr McArthur had not made a great secret of his activity. It was apparent from his LinkedIn profile and Facebook posts from December 2016. Mr van Syp, more likely than not, knew about that activity then. And Ms Singleton certainly did from mid-January 2017 when she heard about Mr McArthur's activity from another source and began investigating it. However 1<sup>st</sup> Call took no immediate steps to caution Mr McArthur about what seemed to be breaches of his obligations. Almost two full months passed before he was sent an early version of 1st Call's statement of problem on 6 March 2017. The reason Mr van Syp gave for that delay was that 1st Call was busy during those months and was gathering evidence of Mr McArthur's breaches. The consequence of that approach, however, was that 1st Call had not established it had, once learning of apparent breaches, then taken reasonably prompt steps to mitigate its loss by telling him to stop.

[27] A consequence of 1st Call's failure to identify and quantify its alleged damages was that 1st Call could only, as it did in its closing submissions, rely on Mr McArthur's own verbal evidence of the profit he made from his dealings with 1st Call clients. That profit totalled \$811.05. This amount has not been awarded as damages in this determination because 1st Call's evidence did not establish to the necessary standard the causation and mitigation elements required for such an award to be made.

### **Should Mr McArthur be ordered to pay penalties?**

[28] In closing submissions 1<sup>st</sup> Call sought an order for penalties totalling \$40,000 against Mr McArthur and MRL. It suggested Mr McArthur should be ordered to pay most of that amount personally, rather than the company. This determination has considered that submission on the basis of, first assessing Mr McArthur's liability, secondly assessing MRL's liability and lastly, quantifying penalties on the basis of those assessments.<sup>6</sup>

[29] Mr McArthur's actions made him liable for a penalty. What he did, when he did it, broke a term of his employment agreement that continued after the employment relationship ended. His own evidence established Mr McArthur thought he was probably subject to a restraint from soliciting clients for a certain period, which he thought was four months because that was what had applied in the recruitment firm he worked before 1<sup>st</sup> Call. He had not kept a copy of the 1<sup>st</sup> Call employment agreement he signed in 2014. Because he was unhappy over how his employment with 1<sup>st</sup> Call ended in late 2016, he did not contact 1<sup>st</sup> Call to ask for that information about the length of the restraint. By not doing so, he took the risk of breaching those terms. As the extract from his own website referred to earlier showed, Mr McArthur had said of himself that "[w]ith an honours law degree he has an excellent understanding of risk and how to successfully manage it in employment relationships". Given his business experience, legal knowledge and previous experience of the use of restraint terms in the recruitment industry, he could not reasonably be excused from the consequences of breaking the terms to which he had agreed.

[30] Mr McArthur's own evidence about his initial contact with 1<sup>st</sup> Call clients showed his first call was made on 12 January 2017. That day was within the period

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<sup>6</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [47]-[48].

that would have applied had he been subject only to a four month restraint from soliciting clients he had contact with at 1<sup>st</sup> Call. However most of his contact activity was from 17 January onwards, with five calls made on that day. It was a reasonable inference that he acted as if he was free from that day to canvas 1<sup>st</sup> Call clients. Given the true situation regarding his enduring obligations at that time, his actions to build his own business were from that date, at the least, reckless.

[31] On 6 March 1<sup>st</sup> Call had served Mr McArthur with a copy of the first version of its statement of problem. That statement included details of the applicable restraint term, which effectively ran to 17 March. If Mr McArthur had truly forgotten the details of the restraint term, by 6 March his knowledge was refreshed. Despite this, he went ahead with contacting two clients on 9 and 14 March. Those two actions were undeniably deliberate breaches of his employment agreement. And, as 1<sup>st</sup> Call submitted, Mr McArthur's liability was not negated by his evidence that he had acted on legal advice about his obligations at that time.

[32] The harm done to 1<sup>st</sup> Call by Mr McArthur's breaches of the enforceable non-solicitation clause included, as a matter of likelihood, the loss of some business. He placed some recruits with six of those clients' businesses. In his oral evidence, he declared a profit of around \$811 from those transactions. In their oral evidence Ms Singleton and Mr van Syp suggested the value of the actual loss to 1<sup>st</sup> Call was greater than that amount. This was in part because, they said, Mr McArthur had undercut the price or margin 1<sup>st</sup> Call would have gained if those placements had been made through its business. They also suggested at least one client no longer dealt with 1<sup>st</sup> Call as a result of Mr McArthur's contact and they had no repeat business from a number of others. However other factors may have affected that ongoing custom, including changes in the needs of client businesses and seasonal factors. Although the evidence on that point lacked precision, 1<sup>st</sup> Call had more likely than not suffered some harm by reduced security and continuity in some of its customer relationships on which Mr McArthur had sought to trade.

### **Should MRL be ordered to pay penalties for abetting breaches?**

[33] The incorporation of MRL created a separate legal personality. Mr McArthur's identity as director of that company, operating his business under the trading name of Mac Recruitment, were technically separate from his personal identity as a former employee of 1<sup>st</sup> Call. On that technical analysis his actions as a

director aided and abetted his breaches of his personal obligations as a former employee of 1<sup>st</sup> Call. In some cases this would be sufficient grounds under s 134(2) of the Act for a penalty to be imposed against such a company for inciting or helping someone breaching their employment agreement with their former employer. However the role of the Authority is to make determinations on employment relationship problems “according to the substantial merits of the case, without regard to technicalities”.<sup>7</sup> In this particular case that purpose could best be achieved without imposing a penalty while still meeting the Authority’s statutory obligations, acting consistently with the terms of the employment agreement and the legislation, and acting in equity and good conscience.<sup>8</sup> For the following three reasons I have exercised the discretion to dismiss 1<sup>st</sup> Call’s claim for a penalty against MRL.<sup>9</sup>

[34] Firstly, imposing a penalty on both Mr McArthur and MRL was too artificial in the particular circumstances. It did not reflect the reality that his personal actions and the actions of MRL were, in effect, one and the same. Apart from a small, nominal shareholding by his wife, there were no other people involved as employees or officers of the company or active in conducting its business. Secondly, there was a risk of double punishment by imposing penalties on him and MRL for what were, again in reality, the actions of the one and same person. Thirdly, an effective remedy could be provided for the wrong done to 1<sup>st</sup> Call by imposing a penalty on Mr McArthur alone.

[35] A further practical effect was that MRL might be able to avoid paying any penalty imposed by the relatively simple step of liquidation. Mr McArthur could not as easily avoid enforcement of a penalty for which he was found personally liable.

[36] Relevant to the conclusion that no useful purpose was served by imposing a penalty on MRL was Mr McArthur’s evidence that the company’s assets comprised a laptop computer and a phone. He said the business operated on the basis of money borrowed from his father’s family trust, a bank overdraft and a credit card credit limit. He was the personal guarantor for those funds.

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<sup>7</sup> Employment Relations Act 2000, s 157(1).

<sup>8</sup> Employment Relations Act 2000, s 157(2) and (3).

<sup>9</sup> Employment Relations Act 2000, s 135(4).

[37] A different conclusion might be warranted where such a company has significant assets or income or involved people other than the former employee found to be in breach of her or his employment agreement.

### **What amount of penalties should be ordered?**

[38] Four steps broadly guide the assessment of penalties in the particular circumstances of each case.<sup>10</sup> Firstly, the nature and number of the breaches are identified to calculate the maximum penalty after considering whether globalisation would be appropriate for any of the breaches. Secondly, the severity of the breach is assessed along with any mitigating or ameliorating factors. Thirdly, means and ability of a party to pay penalties is considered. Fourthly, the proportionality of the provisional penalty is assessed before confirming a final figure.

#### *Nature and number of breaches*

[39] Mr McArthur's admitted actions in contacting 19 clients covered by the terms of his non-solicitation clause during the restraint period could be taken as 19 separate breaches. This would include his course of conduct in subsequent communication with some of those clients, including some that resulted in business transactions. The notional maximum penalty, at \$10,000 per breach, would then be \$190,000. However the nature of those breaches, more closely considered, warranted some differentiation. The two breaches committed after 6 March 2017, with indisputable knowledge of the restraint terms, warranted separate penalties. The six instances of business transactions, resulting from contact with clients during the restraint period, also warranted individual penalties. The remainder of the contact with the other clients could reasonably be globalised as a single breach. For a resulting total of nine breaches, the notional maximum for a provisional penalty was \$90,000.

#### *Severity of breach*

[40] While the breaches were committed recklessly or deliberately, the evidence of resulting and enduring harm was limited. One mitigating factor was the apparent candour of Mr McArthur in his evidence given in the Authority investigation, sometimes against his interests, about the nature and extent of his breaches. An aggravating factor was his also apparent lack of remorse for those breaches.

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<sup>10</sup> *Borsboom v Preet* [2016] NZEmpC 143 at [137]-[198].

[41] Weighing those factors an adjustment to 20 per cent of the maximum penalties could be made for the two breaches committed after 6 March and the globalised contract breach. For the six breaches that resulted in business transactions, the information about the relatively modest level of profit generated suggested the severity of the breach was so limited that an adjustment to ten per cent of the maximum was warranted. The resulting provisional penalty at this stage therefore totalled \$12,000.

*Financial circumstances of Mr McArthur*

[42] Mr McArthur's evidence suggested he had relatively limited personal financial means. He and his wife lived in rental accommodation. He owned a car worth around \$4000, owed around \$12,000 in student loans and had personal credit card debt of \$4000. He drew a salary of around \$600 a week from the company. His wife had a salary of around \$60,000 from her own business.

[43] He said his business had been loss making but was starting to break even. He expected the business, which had a seasonal nature, would pick up in the last quarter of 2017.

[44] While Mr McArthur submitted he did not have the ability to pay a penalty, his evidence about establishing the business showed he had been able to borrow funds. And he also had access to funds sufficient for two of his three children to attend private schools.

[45] The evidence did not establish that a requirement to pay a penalty would create real financial or other hardship to Mr McArthur. Rather his business was continuing to trade and this activity meant he was likely to have or be able to generate the means to pay a penalty. The circumstances might, however, support a provision that any penalty ordered may be paid by instalment.

[46] No further adjustment of the provisional penalty was required on this ground.

*Proportionality of outcome*

[47] This final step considers whether the provisional penalty reached through the three prior steps is proportionate to the seriousness of the breaches and the harm caused by them. It is a check that the staged approach has not overshadowed the need

to ensure that the amount of any penalty imposed is just in all the circumstances. Decisions in similar cases may be assessed so the result in the particular case is not inconsistent with others.<sup>11</sup>

[48] In submitting a total penalty of \$40,000 should be imposed 1<sup>st</sup> Call pointed to the Authority determination in *Zeald New Zealand Ltd v Bernard* as a similar case and a guide to a proportionate outcome.<sup>12</sup> In that determination Mr Bernard was ordered to pay penalties of \$50,000 for extensive breaches of terms about restraint of trade and use of information held by his former employer. However the details of that case showed a higher degree of preparation, deliberateness and more extended breaches by Mr Bernard compared with what Mr McArthur had done.

[49] More similar were the circumstances in *Aon New Zealand v West & Or (No 2)* where a penalty of \$8000 was imposed on Mr West for breach of restraint and confidentiality provisions.<sup>13</sup> In that case an associated company was also required to pay a penalty of \$5000 for abetting his actions.

[50] Smaller penalties have been imposed in other cases regarding breaches of similar terms in employment agreements. In *Lancom Technology Limited v Forman & Kang* Mr Kang, a former employee of Lancom, was ordered to pay a penalty of \$4000 for solicitation of Mr Forman, also a former employee, and for aiding and abetting a breach of duty by Mr Forman.<sup>14</sup> In *Caffe Coffee (NZ) Limited v Farrimond* the Employment Court ordered Mr Farrimond to pay a penalty of \$5000 for failing to observe a term of his employment that required him to get prior permission to act as a director of a competing business.<sup>15</sup>

[51] Having regard to the range of penalties in such cases and circumstances, a further adjustment to the provisional penalty was warranted to reach a proportionate outcome in the case against Mr McArthur. Considering what he had done and its effect, a total penalty of \$9000 under s 134(1) of the Act was a just amount in the particular circumstances. The penalty was to punish his breaches and to deter others

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<sup>11</sup> *Preet*, above n 9, at [147] -[148].

<sup>12</sup> [2013] NZERA Auckland 402.

<sup>13</sup> [2016] NZERA Auckland 74.

<sup>14</sup> [2017] NZERA Auckland 221.

<sup>15</sup> [2016] NZEmpC 65.

from not complying with reasonable and enforceable restraint terms. The amount was not so great that there was no real prospect Mr McArthur could not pay it.<sup>16</sup>

### **Penalty to 1<sup>st</sup> Call?**

[52] 1<sup>st</sup> Call asked for all of any penalty imposed to be paid to it. As the penalty related to breaches of terms of an employment agreement rather than statutory obligations, and there were no other redress to 1<sup>st</sup> Call for those breaches, such an order was appropriate. Mr McArthur must pay the whole of the penalty of \$9000 to 1<sup>st</sup> Call directly.<sup>17</sup>

### **Payment by instalments?**

[53] In closing submissions 1<sup>st</sup> Call proposed an order for payment of the penalty to it could also allow Mr McArthur to pay that amount by instalments. This arrangement was submitted to be preferable to reducing the total amount of penalty imposed to allow for any difficulty he might have in paying it in full immediately.

[54] Mr McArthur had the capacity to generate funds from his ongoing business activity or by borrowing against future income as a means of paying the penalty. As a matter of practicality, either option was more achievable if the penalty was to be paid to 1<sup>st</sup> Call by instalments. An order on that basis is to give effect to 1<sup>st</sup> Call's submission rather than because the evidence firmly established the limited grounds of s 135(4A) of the Act for an instalments order to be made because it was required by the financial position of the person paying the penalty.

[55] Accordingly, the order for Mr McArthur to pay the penalty of \$9000 to 1<sup>st</sup> Call directly is subject to an option that he may choose to exercise, to pay that penalty in monthly instalments of \$1500 over a six month period, starting with a first instalment to be paid on 1 February 2018. The remaining five instalments would be due on the first day of each consecutive month until 1 July 2018. Alternatively Mr McArthur must pay 1<sup>st</sup> Call the full penalty in a single payment of \$9000 on 1 February 2018.

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<sup>16</sup> *Preet*, above n 9, at [191].

<sup>17</sup> Employment Relations Act 2000, s 136(2).

## Costs

[56] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[57] If they are not able to do so and an Authority determination on costs is needed 1<sup>st</sup> Call 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 McArthur 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.

[58] If asked to determine costs the Authority's assessment typically applies a notional daily rate, unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>18</sup> As a preliminary view, it seems any award of costs to 1<sup>st</sup> Call should be based on the tariff for one day, not the two days taken by the investigation meeting. The meeting was unnecessarily lengthened by 1<sup>st</sup> Call pursuing points regarding damages, which it had not adequately quantified or mitigated, and regarding the non-competition clause it abandoned on the second day. By contrast, Mr McArthur had made a number of candid admissions and provided information that reduced the amount of time needed. This preliminary view is subject to submissions and information as yet unknown to the Authority, such as whether any prior offers to settle the matter might need to be taken into account.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>18</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].