IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 68
3015773

	BETWEEN	MATTHEW FORD Applicant
	AND	NEW ZEALAND DENTAL PARTNERS LIMITED PARTNERSHIP (IN LIQUIDATION) T/A CLINICO DENTURE AND HEARING First Respondent
	AND	AUSTRALASIAN DENTAL MANAGEMENT LIMITED (IN LIQUIDATION) Second Respondent
	AND	ALLAN DANIEL NICHOLSON Third Respondent

Member of Authority:	Robin Arthur
Representatives:	Toby Braun and Rochelle Hill, Counsel for the Applicant David Hayes, Counsel for the Third Respondent
Investigation Meeting:	27 February 2018 in Hamilton
Oral determination:	27 February 2018
Written record issued:	28 February 2018

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Matthew Ford's employment as an accounts administrator for Clinico Denture and Hearing, a Hamilton-based business, began on 12 October 2015 and ended on 7 April 2017. On 10 March 2017 he had been given notice of dismissal on the grounds of redundancy.

[2] Mr Ford had worked under the terms of an employment agreement with New Zealand Dental Partners Limited Partnership, which traded as Clinico Denture and Hearing (referred to in this determination as the partnership or Clinico). His application to the Authority said his dismissal for redundancy, and how it was decided on and carried out, was unjustified. He identified three respondents as liable for remedies if his allegations were accepted - firstly, the partnership; secondly, Australasian Dental Management Limited, a company identified as the initial general partner in the partnership's deed; and thirdly, Allan Nicholson. Mr Nicholson was a capital partner in the partnership, director and shareholder of the company and worked as chief executive of the Clinico business.

[3] Both the company and the partnership were placed in liquidation in late January 2018. Mr Nicholson's counsel, who was also on the Authority's record as counsel for the company and the partnership, advised the Authority of those liquidations on 19 February 2018, almost three weeks later. He provided a copy of a letter from the liquidator Kelera Nayacakalou, also dated 19 February and addressed to Mr Ford's counsel, advising that the liquidator did not consent to continuation of proceedings against the company and the partnership. The liquidator's first report on liquidation of the partnership included this statement about the reason for its failure:

> The Partners had intended to restructure and due to various threats of legal actions, the Partners have agreed to activate the Liquidation clause contained in their Limited Partnership Agreement.

[4] By operation of s 92 of the Limited Partnerships Act 2008 and s 248(1)(c) of the Companies Act 1993 Mr Ford's proceedings in the Authority against the company and the partnership could not continue unless he got an order from the High Court overruling the liquidator's position. He opted to continue only his claim against Mr Nicholson for a penalty under s 134(2) of the Employment Relations Act 2000 (the Act) and costs. The Act allows the Authority to impose a penalty of up to $10,000 on a person found, under s 134(2), to have incited, instigated, aided or abetted any breach of an employment agreement.

The issues for investigation

[5] The issues for determination of Mr Ford's claim against Mr Nicholson were:

(i) Was there any breach of implied or express terms of Mr Ford's employment agreement by Clinico in reaching the decision to end his employment on the grounds of redundancy?

(ii) If breaches of Mr Ford's terms of employment are found to have occurred, did Mr Nicholson instigate, aid or abet such breaches and, if so, should he have to pay a penalty, and if so, should any part of any such penalty be paid to Mr Ford?

(iii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[6] Mr Ford and Mr Nicholson, both under oath, confirmed written witness statements and provided further oral evidence by answering questions asked by me and the parties' representatives at the Authority's investigation meeting. The parties' representatives also had the opportunity to make oral closing submissions on the issues for determination.

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

The parties' obligations

[8] The partnership's employment agreement with Mr Ford included the following terms regarding redundancy:

> **13. 4 Definition of redundancy**
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> Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business.
>
> **13.5 Redundancy process**
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> In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to

> dismissal (such as redeployment to another role). In the course of this consultation the Employer shall provide to the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making a decision as to whether to make the Employee's position of employment redundant. Nothing in this clause limits the legal rights and obligations of the parties.
>
> **13.7 No Redundancy Compensation Payable**
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> In the event the Employee's employment is terminated on the basis of redundancy, the Employee shall be entitled to notice of termination of employment as specified in the termination clause, but shall not be entitled to any other payment, whether by redundancy compensation or otherwise.

[9] Those other legal rights and obligations of the parties referred to in the last sentence of clause 13.5 included the statutory duty of good faith. This duty required Clinico to provide Mr Ford with access to information relevant to the continuation, or otherwise, of his employment and the opportunity to comment on that information before making a decision on a proposal that would, or was likely to, have an adverse effect on the continuation of his employment.[1] Both Clinico and Mr Ford were required to be active and constructive in maintaining a productive employment relationship and be responsive and communicative while that relationship existed.[2]

[10] The statutory duty of good faith and the term of fair treatment implied in every employment agreement were to the same effect regarding Clinico's obligation to provide adequate relevant financial information about a redundancy proposal, and the opportunity for Mr Ford to comment on it, before any decision on the future of a position was made.[3]

Were there any breaches of the terms of Mr Ford's employment agreement?

[11] On 31 January 2017 Mr Nicholson and Clinico's business manager Arthur Whitfield told Mr Ford they were looking at a proposal to restructure the business and his job was likely to be affected. By letter of 7 February 2017 Mr Whitfield formally notified Mr Ford of "potential redundancies", called him to a meeting to discuss this on 9 February, told him he could ask for "more explanation" and "justifications", and assured him "this is not to do with the work performance of any individual staff

[1] Employment Relations Act 2000, s 4(1A)(c).
[2] Employment Relations Act 2000, s 4(1A)(b).
[3] See, for example, *Brake v Grace Team Accounting Limited* [2013] NZEmpC 81 at [59]-[62], upheld as part of the correct application of the statutory test of justification by the Court of Appeal in *Grace Team Accounting Limited v Brake* [2014] NZCA 541.

member". Mr Ford attended the 9 February meeting with an advocate and his parents. A discussion on a negotiated exit, held on a without prejudice basis, did not result in any agreement. By email on 14 February Mr Nicholson told Mr Ford that Clinico would "continue to follow the process set out" and called him to a meeting on 16 February. He also wrote that Clinico would "be happy to provide financial information to prove the companies (sic) financial position".

[12] On 16 February Mr Ford's present counsel advised Clinico that they now represented him. Mr Ford told Mr Nicholson and Mr Whitfield he would not attend the meeting scheduled for that day, as he had not had sufficient time to prepare. He left work and attended a medical appointment, providing Mr Nicholson later in the day with a medical certificate advising he was unfit to work until 25 February. A series of subsequent medical certificates declaring him unfit to work meant Mr Ford did not go back to work at the Clinico offices from then until his employment was terminated, apart from attending two meetings held there to discuss the restructuring proposal.

[13] Meeting notes of those two meetings – held on 27 February and 2 March – show there was considerable contest about the process being followed, the reasons for it and whether Mr Ford was provided with sufficient information to amount to fair consultation about the decision to be made. The tone of those discussions led to Mr Ford opting not to attend a third meeting, scheduled for 7 March. Instead he provided his final "feedback" in the form of a letter from his counsel. His feedback declined a request Clinico had made that he consider working only 10 hours a week but he offered to consider a job sharing arrangement or a reduction of his current hours to 20 a week. Clinico's lawyers responded with a letter on 10 March saying Clinico was "not in a position to provide confidential financial information … as this information is commercially sensitive". It rejected Mr Ford's proposal of reduced hours and advised Clinico had decided his position was redundant and gave him four weeks' notice of termination of his employment.

[14] Having considered the written and oral evidence of Mr Ford and Mr Nicholson, the parties' correspondence and other relevant documents they provided, and the submissions of the representatives, I have concluded Mr Ford's employment agreement with the partnership was breached in at least the following four ways.

[15] Firstly, Clinico failed to provide sufficient and reasonably requested financial information to enable Mr Ford to make any meaningful response to the proposition that his position was not sustainable. In doing so it acted contrary to its earlier undertaking to provide financial information, including in its correspondence of 7 and 14 February referred to above. All Clinico really provided was two bare facts – a net loss figure for the year to date and a percentage figure for the revenue spent on wages and contractors' fees. One topic Clinico had asked Mr Ford to prepare to talk about at the 27 February meeting was his "feedback as to how you see we could reduce overheads while still keeping your role active". He was denied access to the financial information needed to do so. Mr Nicholson's closing submissions, paraphrased broadly, argued he had reasonably refused to provide the requested information in reliance on legal advice that it was commercially sensitive. No evidence, apart from Mr Nicholson's assertion, supported a conclusion the information was reasonably withheld, that its disclosure would have unreasonably prejudiced Clinico's commercial position, or that safeguards could not have been put in place to protect any truly confidential information. Mr Nicholson's position, as put in his witness statement, was that Mr Ford knew much of that information anyway so the protection of commercially sensitive information was a flimsy excuse for the shortfall in providing Mr Ford with the necessary information to comment on.

[16] Secondly, Mr Nicholson, in his oral evidence, said he had carried out some financial analysis on the viability of both the administrator position held by Mr Ford and the accounts manager role held by Sally Nicholson, Mr Nicholson's wife. This analysis was not shared with Mr Ford, despite requests through his representatives. Although, as recorded in the notes of the 2 March meeting, Mr Nicholson told Mr Ford's counsel he could provide him with "enough information financially to get a picture" he also said "[w]e won't provide financials so to speak because we don't have financials". He had also confirmed that Mrs Nicholson's role was affected by the restructure but he then said "I'm not firing my wife". Mr Ford's counsel had asked for "financial information to prove the company's financial position" so that Mr Ford could "have a look at that and we'll be able to discuss perhaps other alternatives". The failure to provide that information, including the analysis that Mr Nicholson said in his oral evidence had been done, meant Clinico failed to provide Mr Ford with access to information relevant to the continuation of his employment and the opportunity to comment on it before any decision was made. It was a breach of

Clinico's statutory duty, and therefore also its contractual obligation of fair treatment to Mr Ford, as well as an express, specific and clear breach of its clause 13.5 obligation to provide "sufficient information to enable understanding and meaningful consultation … before making a decision". A suggestion in Mr Nicholson's closing submissions to the effect that providing the information would not have made any real difference was not compelling. The statutory and contractual protections for consultation and the opportunity to comment on relevant information, at the time they are to be provided, are not limited on the basis of whether, in hindsight, they may or may not be deemed of any value or effect.

[17] Thirdly, Clinico breached its duty of fair treatment through the derogatory comments Mr Nicholson made to Mr Ford's counsel at various times through the process. Mr Ford had a right under s 236 of the Act to appoint a representative and to have his representative treated with the same degree of respect and courtesy he was entitled to be accorded as an employee being consulted in a proposed redundancy situation. Comments Mr Nicholson made to belittle Mr Ford's representatives and to dissuade Mr Ford from using their services failed to meet this standard. In emails Mr Nicholson described Mr Ford's counsel as "a complete shit stirring snake", a "slippery little worm", "scheming like a slippery snake" and described Mr Ford as "allowing [his counsel] to confuse him and cloud his judgement". In one meeting Mr Nicholson described Mr Ford's representatives as "idiots" and asked Mr Ford and Mr Ford's parents to speak directly with him rather than through counsel. In the same meeting he gave this response to counsel's request for financial information: "Bullshit is what I've got to say to that". When asked to set a date for providing information he replied: "Don't be stupid, I can't just give you a date out the bottom of my ass".

[18] Fourthly, the failure to deal with Mr Ford on a good faith basis, and therefore breaching his contractual right to fair treatment, was compounded by Mr Nicholson threatening to sue Mr Ford for distress Mr Nicholson said he and his wife had suffered as a result of the process. He made the threat during the redundancy process, while Mr Ford was still an employee of Clinico and was doing nothing other than seeking to exercise his right to get information and have an opportunity to comment on it before a decision was made on the future of his job.

[19] There was a potential fifth breach based on the allegation that Clinico's decision to dis-establish the role held by Mr Ford was, in part at least, due to some

earlier personal or performance issues mentioned by Mr Nicholson in his written witness statement and expanded on in his oral evidence. If it were, compliance with good faith and fair treatment obligations would have required those issues to be addressed openly in the process conducted in February and March 2017. However Mr Nicholson was adamant in his oral evidence that those issues were irrelevant to the consideration and decision made regarding the account administrator position. For the purposes of this determination Mr Nicholson's assurance on that count has been accepted and any concerns he may have had with Mr Ford in 2016 have, in the same way, been treated as irrelevant.

Did Mr Nicholson incite, instigate, aid or abet those breaches?

[20] In his role as chief executive of Clinico Mr Nicholson was in charge of the process that led to Mr Ford's dismissal for redundancy and made all the decisions about what was done and how it was done. While the legal entity of the partnership was responsible for the resulting breaches of the terms of Mr Ford's employment agreement, Mr Nicholson's actions plainly brought him within the scope of s 134(2) of the Act as a person who instigated and abetted the breaches on behalf of the "legal personality" of the partnership.

[21] There was no doubt Mr Nicholson was aware of the employment agreement and had to be deemed to know its terms, including the obligations of the employer considering redundancy of a position. His actions that amounted to the breach of those terms were carried out deliberately, not inadvertently or negligently. What he did and the manner in which he did so instigated and abetted the identified breaches of Mr Ford's employment agreement. There is ample authority in case law to confirm that, as the architect of the non-compliance with the terms of Mr Ford's employment agreement, Mr Nicholson was liable to a penalty as a director or manager, even if he thought he could rely on legal advice that the impugned actions were lawful.[4]

[4] *Service Workers Union ofAotearoa Inc v Southern Pacific Hotel Corp (NZ) Limited* [1993] 2 ERNZ 513 at 536. See also *Peacock v The New Zealand Performance Workers Union* [1990] 2 NZILR 257 (CA) at 260 and *NZ Timber Industry Employees IOUW v Waimate Timber Company Limited & Ors* (1990) 3 NZELC 97,890 (LC) at 97,913.

What penalty should be imposed for Mr Nicholson's role in those breaches?

[22] In determining an appropriate penalty for Mr Nicholson's role in instigating, and abetting those breaches, s 133A of the Act requires the Authority to have regard to the following matters:

(a) The object of the Act to build productive employment relationships, including by promoting good faith behaviour and addressing the inherent inequality of power in employment relationships; and
(b) the nature and extent of the breaches or his involvement in them; and
(c) whether the breaches were intentional, inadvertent, or negligent; and
(d) the nature and extent of any loss or damage suffered by Mr Ford, or gains made or losses avoided by Mr Nicholson, because of the breaches or Mr Nicholson's involvement in them; and
(e) whether Clinico or Mr Nicholson had paid an amount of compensation, reparation, or restitution, or had taken other steps to avoid or mitigate any actual or potential adverse effects of the breaches; and
(f) the circumstances in which the breaches, or his involvement in them, took place, including and vulnerability of Mr Ford; and
(g) whether Mr Nicholson has previously been found by the Authority or the Employment Court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

Addressing the objects of the Act

[23] A penalty is warranted because of the way in which Mr Nicholson exercised his power as chief executive and decision maker in carrying out the redundancy process in breach of the terms of employment, including the good faith obligations regarding fair consultation and provision of information, of a junior staff member.

Nature and extent of the breaches

[24] While pleaded as a single breach, there was in reality a course of conduct amounting to multiple related breaches through the period from when Mr Ford was told of the prospect of redundancy on 31 January to the notice of dismissal being given to him on 10 March.

Intentional breaches

[25] Mr Nicholson's actions that amounted to breaches were intentional, not inadvertent or negligent. He was asked to provide financial information and chose to provide only two bare facts, refusing to provide more. His evidence that he took that stance relying on legal advice confirmed what he did was done intentionally.

Losses to Mr Ford

[26] As a result of the breaches Mr Nicholson instigated and abetted Mr Ford lost the opportunity to participate in any meaningful way. This effectively also denied him any prospect of persuading Mr Nicholson to consider other alternatives.

No compensation or other mitigation for effects of breaches

[27] Mr Nicholson has not compensated Mr Ford or otherwise mitigated the consequences on him of those breaches in any other way. Neither, due to the liquidation of the partnership and the company, does Mr Ford have the prospect of any compensation or other mitigation of those breaches. There was no risk of Mr Nicholson, either directly or indirectly, being doubly penalised for the same actions.

Other circumstances

[28] Mr Ford was hit hard by the way he was treated and how his job came to end. He suffered panic attacks and other symptoms of an anxiety condition that had to be addressed through an extended period of medication and counselling. Whether such health problems were new experiences for him, or whether how he was treated had triggered previous, similar problems was irrelevant. Mr Nicholson had to take Mr Ford as he found him.

No prior findings of similar breaches

[29] There is no evidence of any similar, prior breaches by Mr Nicholson or entities through which he had conducted business.

Assessment of penalty

[30] Given the deliberate, repeated and extended nature of the breaches an award of a penalty for the total amount claimed, $10,000, was warranted to mark disapproval of

how Mr Nicholson acted.[5] A penalty at that level was required not only to punish Mr Nicholson's conduct but also, in the public interest, to deter other employers from failing to comply with clear statutory and contractual obligations for full consultation during restructuring exercises.

[31] As Mr Ford directly and solely experienced the consequences of those actions, it was also appropriate that a further order be made for the whole of the penalty to be paid to Mr Ford.[6]

Summary and orders

[32] Mr Nicholson instigated and abetted breaches of the terms of Mr Ford's employment agreement with the partnership. As a consequence for those deliberate actions he must pay a penalty of $10,000 directly to Mr Ford.

[33] Costs of $4000 are also awarded to Mr Ford on the tariff basis for an investigation meeting that did not require the full day.

[34] Those payments must be made to Mr Ford within 28 days of the date of issue of the written record of this determination.

Robin Arthur
Member of the Employment Relations Authority

[5] Employment Relations Act 2000, s 135(2) and (4). See, for example, *Bryan v Ultimate Ltd (in liq) & Ors* [2013] NZERA Auckland 584.
[6] Employment Relations Act 2000, s 136(2).