

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 592

		3045952
	BETWEEN	BROCK ARMSTRONG Applicant
	A N D	SMARTLIFT SYSTEMS LIMITED Respondent
		3046773
	BETWEEN	GRAEME HAIKA Applicant
	AND	SMARTLIFT SYSTEMS LIMITED Respondent
		3047593
	BETWEEN	SMARTLIFT SYSTEMS LIMITED Applicant
	AND	BROCK ARMSTRONG First Respondent
	AND	GRAEME HAIKA Second Respondent
Member of Authority:	Peter van Keulen	
Representatives:	Chrissy Gordon, advocate for Brock Armstrong and Graeme Haika Lynda Mathieson, advocate for Smartlift Systems Limited	
Investigation Meeting:	5 and 6 June 2019	
Submissions Received:	21 June 2019 and 28 June 2019 from Ms Gordon 23 June 2019 and 28 June 2019 from Ms Mathieson	
Date of Determination:	16 October 2019	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Graeme Haika and Brock Armstrong both claim that Smartlift Systems Limited unjustifiably dismissed them. They were both dismissed as a result of a restructuring process undertaken by Smartlift.

[2] Mr Haika and Mr Armstrong claim the consultation over the proposed restructuring was flawed. Their complaints include that the information they were provided with was inadequate, that they were unable to provide any meaningful feedback on the proposal, that Smartlift did not respond to the feedback they did provide and that they were not able to comment on selection criteria used to select them for redundancy.

[3] Smartlift denies that it unjustifiably dismissed Mr Haika and Mr Armstrong. It says it did provide sufficient information about the proposed restructure but Mr Haika and Mr Armstrong chose not engage in any meaningful consultation as they had started a business in competition with Smartlift, and they were always going to leave their employment in order to operate that business on a full time basis. Smartlift believes Mr Haika and Mr Armstrong only went through the consultation and redundancy process in order to bring claims against it. In any event, Smartlift says its process was justified and the selection of Mr Haika and Mr Armstrong for redundancy was justified.

[4] Mr Haika and Mr Armstrong raised personal grievances for unjustified dismissal. They subsequently lodged statements of problem in the Authority for those grievances seeking compensation and reimbursement.

[5] Mr Haika also seeks a penalty for a breach of the duty of good faith as he alleges that Smartlift misled him by attempting to pass off an employment agreement as his when it was Mr Armstrong's employment with the name changed to his. Alternatively, Mr Haika seeks a penalty for Smartlift's failure to keep a copy of his signed employment agreement.

[6] In terms of the allegation that Mr Haika and Mr Armstrong had started a business in competition with it, Smartlift says this is a breach of their contractual obligations of confidentiality and a breach of the duty of fidelity. Smartlift lodged a claim against Mr Haika and Mr Armstrong for these alleged breaches. Mr Haika and Mr Armstrong deny these alleged breaches.

Unjustified dismissal

[7] Smartlift dismissed Mr Haika and Mr Armstrong after consulting with employees over a proposed restructuring that involved the potential disestablishment of several roles. As part of that restructuring Smartlift decided to disestablish two foreman roles out of six roles, and then it decided that it would not appoint either Mr Haika or Mr Armstrong to the remaining roles, preferring the four other foremen. Smartlift came to this decision by applying a selection matrix, assessing Mr Haika and Mr Armstrong's work against the other foremen.

[8] The issue for the unjustified dismissal claim, arising out of this restructuring and redundancy scenario, is was Smartlift's dismissal of Mr Haika and Mr Armstrong justified.

[9] The starting point for justification is s 103A of the Employment Relations Act 2000 (the Act). In *Grace Team Accounting v Brake*¹, the Court of Appeal considered s 103A in a redundancy situation and said at [85]:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

[10] Justification requires Smartlift to prove that its decisions to dismiss Mr Haika and Mr Armstrong for redundancy were genuine and in coming to those decisions, it met the notice and consultation requirements of the Act.

Was the redundancy genuine?

[11] So, first I must consider if the redundancy was genuine. That involves considering the underlying business reason for the dismissal.

[12] In *Scarborough v Micron Securities Products Ltd*², the Employment Court said:

Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Court of Appeal has recently confirmed the Court was entitled to inquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

¹ See *Grace Team Accounting Ltd v Brake* [2014] NZCA 541

² *Scarborough v Micron Securities Products Ltd* [2015] NZEmpC 39

[13] This means, when assessing if the redundancy was genuine it is not my role to substitute my business judgment for that of Smartlift. I must consider the analysis made by Smartlift to determine that disestablishing two of the foreman roles was required. Based on this analysis, I must decide whether the decision to disestablish two of the six foreman roles was one that a fair and reasonable employer could have made in the circumstances.

[14] Craig Burrell, a director of Smartlift, gave evidence about the business conditions in April and May 2018, which prompted the decision to look at restructuring Smartlift's operations.

[15] Mr Burrell explained:

- (a) Smartlift had been established and developed in response to repair work required on buildings after the 2011 Christchurch earthquakes.
- (b) Much of the work undertaken from the outset was through a sub-contracting arrangement with Hawkins Construction who were a Project Management Organisation for insurers.
- (c) At the busiest point of repair work in Christchurch, Smartlift had 14 work teams of four to five men in each team.
- (d) Since that peak time earthquake repair work began to decline.
- (e) In addition to the natural decline in repair work, insurers and the government moved away from undertaking repairs for building owners to settling claims with cash pay-outs, leaving owners to arrange their own repairs. This also led to a reduction in work for Smartlift.
- (f) Over a period of 18 months from 2015, Smartlift reduced its team number down to seven and in early 2018 it reduced the number of teams again, down to five teams.
- (g) The decline in repair work continued through 2018 and in April and May 2018 work was scheduled out for only two weeks, from a previous average of 16 week schedule.
- (h) Prior to June 2018 Smartlift had contracted some of its employees out on a labour hire basis to another business in order to keep them working.

[16] It was in June 2018 that Smartlift proposed to restructure its teams again, in response to the continued decline in repair work. That proposed restructure was based around a reduction in the number of teams so that only four foremen would be required and reconfiguring the workers in each team so that one carpenter role and eight trade assistant roles would be disestablished.

[17] Having reviewed this evidence I am satisfied that Smartlift's decision to effect the proposed restructure was genuine; it was a decision a fair and reasonable employer could have come to in all of the circumstances.

Was the process of consultation a fair one?

[18] In *Grace Team Accounting*, the Court of Appeal confirmed that the other aspect of the justification of a dismissal for redundancy is whether the process by which the consultation over the proposed redundancy occurred was a fair one. And, in this regard, the requirements of s 4 of the Act and s 103A of the Act are the starting point for that.

[19] In *Stormont v Peddle Thorp Aitken Limited*³ Judge Inglis (as she was then) summarised the consultation requirements as follows:

[54] The key requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[20] Based on ss 4 and 103A of the Act and the guidance in *Stormont* it is my view that I need to consider:

- (a) Did Smartlift make a genuine effort to consult with Mr Haika and Mr Armstrong over the proposed disestablishment of two foreman roles:
 - i. Were Mr Haika and Mr Armstrong given sufficient information about the proposed disestablishment of the foreman roles, to enable them to provide feedback;

³*Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71

- ii. Did Smartlift give them an adequate opportunity to respond and provide that feedback; and
 - iii. If it did give Mr Haika and Mr Armstrong an opportunity to respond, did Smartlift then consider those responses?
- (b) Once a decision was made to disestablish two of the foreman roles, did Smartlift sufficiently consult with Mr Haika and Mr Armstrong over their selection which resulted in them not being appointed to the remaining foreman roles, again:
 - i. Were Mr Haika and Mr Armstrong given sufficient information about their proposed selections;
 - ii. Did Smartlift give them an adequate opportunity to respond and provide feedback; and
 - iii. If it did give Mr Haika and Mr Armstrong an opportunity to respond, did Smartlift then consider those responses?
- (c) Did Smartlift consider and discuss alternatives to dismissal with Mr Haika and Mr Armstrong⁴?

[21] Smartlift's consultation over the restructuring included:

- (a) On 1 June 2018, the General Manager for Smartlift attended the various sites that Smartlift employees were working at. He conducted meetings with the employees explaining to them about the possibility of restructuring and setting out why that might take place.
- (b) Following these meetings, Smartlift commenced the formal process of consulting over the proposed restructure. This involved Smartlift's Operations Manager holding meetings with the employees in which he explained the proposed restructure and outlined the reasons for it.
- (c) After these meetings the employees were given letters dated 11 June 2018, which confirmed the proposed restructure, set out the rationale for the

⁴ Particularly redeployment, applying *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102

restructure and set out the remaining steps in the consultation process, including inviting feedback from the employees.

- (d) The Operations Manager then conducted individual meetings with employees on 13 June 2018 to obtain any feedback on the proposed restructure.
- (e) Once the consultation meetings were completed Mr Burrell reviewed the feedback that had been received and decided to proceed with the restructure, by disestablishing roles as proposed and selecting various employees for redundancy; this selection process excluded the site foreman roles.
- (f) On 15 June 2018, Mr Burrell then met with the employees who had been selected for redundancy and discussed why and what would happen, including that he had been able to secure offers of labouring work for each of them with another business.
- (g) Once the redundancies for these employees had been confirmed, Mr Burrell then moved on to contemplate what to do with the site foremen, having decided that two foreman roles would be disestablished.
- (h) Mr Burrell gave each of the foremen a copy of the selection criteria he intended to use and then he proceeded to review each foreman's performance against the criteria, together with his management team.
- (i) The result of this assessment was that Mr Haika and Mr Armstrong scored the lowest two totals of the six foremen, so Mr Burrell decided that they would be made redundant.
- (j) Mr Burrell then met with each of Mr Haika and Mr Armstrong to tell them they had been selected for redundancy.

[22] I am satisfied that Smartlift's consultation over the proposed restructure was fair as that relates to Mr Haika and Mr Armstrong:

- (a) Mr Haika and Mr Armstrong were given sufficient information about the proposed disestablishment of the foreman roles, to enable them to provide feedback.

(b) Mr Haika and Mr Armstrong had an opportunity to respond and provide that feedback, which they did in writing.

(c) Smartlift did consider those responses (and other feedback) and responded to it; also in writing.

[23] However, when Smartlift then moved into the selection part of the proposed restructuring it did not follow a fair process. This is evident in the detail of Smartlift's consultation with Mr Haika and Mr Armstrong over their possible selection for redundancy as a result of the restructure being implemented.

[24] On 15 June 2018, when Mr Burrell attended the various sites and spoke to employees about the redundancies, he also met with Mr Armstrong. He told Mr Armstrong about the outcome of the process with the other employees. He then gave him the written response to the feedback provided by Mr Armstrong and told him that Smartlift was now moving on to disestablish two of the foreman roles as proposed. Mr Burrell explained there would be a selection process amongst the foremen and he gave Mr Armstrong a copy of the selection matrix and asked if he had any questions.

[25] Mr Burrell did not meet with Mr Haika to explain that Smartlift was proceeding with disestablishing two of the foreman roles and he did not explain the selection that was to occur nor did he give him a copy of the selection matrix. Mr Haika did receive a copy of the selection matrix from Mr Armstrong.

[26] After the selection of Mr Haika and Mr Armstrong for redundancy had been made, Mr Burrell met with Mr Armstrong and then Mr Haika separately. Mr Burrell says he met with each of them so he could explain their scores and that they were being made redundant and to discuss alternative work that he could offer them with another company.

[27] The evidence about these two meetings and what was discussed conflicted on key parts.

[28] Mr Haika, Mr Armstrong and Mr Burrell all agreed there was no real discussion about the scores awarded in the selection process; they do agree that Mr Burrell told Mr Armstrong and Mr Haika that they had scored the lowest in the selection process and they would be made redundant. Mr Burrell says he offered both employees the chance to review their individual

score sheets and discuss the outcomes but neither was interested, rather they just wanted to know what notice they would be paid and when they could leave. Mr Armstrong and Mr Haika both say Mr Burrell did not offer to explain the scores.

[29] All three also agree there was then discussion about alternative work being available in a related building company.

[30] For Mr Armstrong the discussion progressed constructively and Mr Armstrong appeared amenable to accepting the new role but he subsequently declined it. Mr Armstrong says he turned down the new role because Mr Burrell wanted him to sign a resignation from Smartlift as part of accepting the new role.

[31] Mr Haika says he was not interested in the new role because he did not believe Mr Burrell would deliver on the offer, so he did not accept it. He also says Mr Burrell wanted him to resign before he could take the new role.

[32] Mr Burrell says he did not require either employee to sign a resignation but he wanted to keep his offer for resolving both redundancies confidential, so he wanted Mr Armstrong and Mr Haika to agree to confidentiality before the offers could be accepted. He did however discuss the offers with them, although he says there was less discussion with Mr Haika and it was not productive; he says the discussion with Mr Armstrong was productive and he thought Mr Armstrong wanted the new role and was interested in resolving his redundancy.

[33] Having heard the evidence, I am satisfied that in respect of the two separate meetings Mr Burrell had with Mr Haika and Mr Armstrong about their selection for redundancy and alternative employment:

- (a) Mr Burrell did tell both employees they had scored the lowest of all of the foremen and they had been selected for redundancy.
- (b) Mr Burrell did not discuss the individual selection scores with either Mr Haika or Mr Armstrong. I accept that neither Mr Haika nor Mr Armstrong wanted to discuss their scores and made this clear to Mr Burrell.

- (c) Mr Burrell did have alternative employment for both Mr Haika and Mr Armstrong and he did want each of them to agree to confidentiality around the offers.
- (d) Mr Haika did not want to accept any role offered by Mr Burrell, given his selection for redundancy and his own subjective view that Mr Burrell could not be trusted to deliver on his promises, so he did not engage constructively in the discussion about the alternative employment.
- (e) Mr Armstrong was interested in the alternative employment initially but subsequently changed his mind given his view of the condition imposed with accepting that work.
- (f) The discussion about the alternative employment was not sufficient to meet Smartlift's obligation to consider and discuss redeployment with Mr Haika and Mr Armstrong. This is because the work was with a different company (so it did not avoid the redundancies being effected) and there were restrictions imposed on Mr Haika and Mr Armstrong accepting it - whether that was that they resigned or signed some form of confidentiality is of no real consequence to this.

[34] Concluding my analysis of whether Smartlift carried out a fair consultation process, my findings show that Smartlift failed, as follows:

- (a) Whilst Smartlift provided Mr Haika and Mr Armstrong with a copy of the selection criteria matrix it did not discuss this with them before it was used.
- (b) Once Smartlift had completed the matrix, it did not discuss the scores with Mr Haika and Mr Armstrong before confirming their selection and redundancy; it simply told them of the result.
- (c) Smartlift did not discuss alternative roles within Smartlift, which might mean redundancy could be avoided, with Mr Haika and Mr Armstrong. Although Smartlift did have alternative work for them with a related company this was a flawed proposition given the conditions imposed.

[35] Because of these various failures, the consultation process was not fair and therefore not justified.

[36] So, I conclude that Mr Haika and Mr Armstrong's dismissals were not justified.

Remedies

[37] Having determined that Mr Haika and Mr Armstrong were unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act. In this regard, both Mr Haika and Mr Armstrong seek compensation and reimbursement.

Compensation

[38] Pursuant to s 123(1)(c) of the Act I can award compensation for humiliation, loss of dignity and injury to feelings. This is about compensating each of Mr Haika and Mr Armstrong for the humiliation, loss of dignity and injury to feelings they suffered because of the actions giving rise to their grievance.

[39] The evidence shows that as a result of the way he was treated Mr Haika was:

- (a) humiliated and annoyed by the scores he was given in the selection process, becoming bitter and angry about how he had been treated; and
- (b) concerned about finances, in particular the potential loss of his rental home due to his dismissal.

[40] The evidence shows that as a result of the way he was treated Mr Armstrong:

- (a) Was upset at, and "gutted" by, the scores he had been given in the selection process and felt let down by Smartlift;
- (b) Became stressed and worried about finances and providing for his family; and
- (c) Suffered from sleeplessness, for which he was prescribed sleeping tablets.

[41] For both Mr Haika and Mr Armstrong it appears that the humiliation, loss of dignity and injury to feelings arose largely from the scores Smartlift gave them in the selection process and the financial concerns they had over losing income.

[42] Their evidence of how these two aspects affected them was quite similar. They were angry and annoyed by the scores and upset and bitter over them, feeling let down and embarrassed; they both described some loss of confidence as well. And they both became stressed about finances given the loss of income.

[43] Having identified the harm, that is, the humiliation, loss of dignity and injury to feelings caused to Mr Haika and Mr Armstrong and the loss suffered as a result I must now quantify that harm and loss.⁵ In doing this I have regard to where the loss sits on the spectrum of loss and quantum of compensation, particularly with regard other awards of compensation.

[44] A degree of embarrassment or humiliation because of what happened; feeling a bit of anger or annoyance at an employer for the way it acted; and suffering some loss of self-esteem, is not trivial but in the scheme of harm and loss suffered by employees it is modest. Added to this are the financial concerns that arose for both Mr Haika and Mr Armstrong. I am satisfied that for both Mr Haika and Mr Armstrong the loss suffered, and the quantum of any compensation, is at the lower end of the spectrum.

[45] I assess the level of compensation for Mr Haika to be \$10,000.00.

[46] I assess the level of compensation for Mr Armstrong to be \$12,000.00.

Reimbursement

[47] Mr Haika and Mr Armstrong seek reimbursement for the earnings they have lost as a result of their unjustified dismissals pursuant to ss 123(1)(b) and 128 of the Act.

[48] The first step in awarding reimbursement is analysing the amount of lost remuneration; I must be satisfied that each of Mr Haika and Mr Armstrong has lost remuneration as a result of their unjustified dismissal.

[49] In this case I find there is actually no lost remuneration as there has been a failure to mitigate by both Mr Haika and Mr Armstrong. Mr Haika and Mr Armstrong made the decision to continue to operate their business and to advance that on a full time basis. In fact, from the end of June 2018 whilst they were both still employed and being paid wages by

⁵ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

Smartlift, Mr Haika and Mr Armstrong quoted for work on a property in Christchurch and knew that their quote had been accepted.

[50] As they have failed to mitigate their loss, Mr Haika and Mr Armstrong's lost remuneration flows from this not from the unjustified dismissal.⁶ And, therefore I cannot award any reimbursement.

Contribution

[51] As I have awarded compensation to Mr Haika and Mr Armstrong, I must now consider whether each of them contributed to the situation that gave rise to their grievances.⁷ When assessing if their actions contributed to the situation that gave rise to their grievances I am looking for a causal link between their actions and the situation that gave rise to the unfair consultation, being their grievances. If I am satisfied that there is a link, then I must consider whether their behaviour was culpable or blameworthy, which would require a reduction in remedies.⁸

[52] Given the circumstances of the consultation I am not satisfied that there is any behaviour by Mr Haika or Mr Armstrong that amounts to contribution and warrants a reduction in remedies.

Breach of good faith and failure to retain a signed copy of an employment agreement

[53] I am not persuaded that Smartlift breached its obligations of good faith in the manner alleged by Mr Haika and, in any event, if it did that a penalty should be imposed.

[54] Smartlift was unable to produce a signed copy of Mr Haika's employment agreement and it is appropriate to impose a penalty against it for this breach. Considering the quantum of penalties imposed in similar breaches and the relevant factors, I order Smartlift to pay a penalty of \$500.00. Mr Haika has not requested that the penalty be paid to him, and in any event, I am not sure that would be appropriate in this case anyway, so I order that the penalty be paid to the Authority for on payment to the Crown.

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

⁷ Section 124 of the Act.

⁸ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

Breach of contract and duty of fidelity

[55] Smartlift says Mr Haika and Mr Armstrong set up a company in early 2018 and then throughout the year it promoted its business and undertook work in competition with Smartlift. It alleges that these actions by Mr Haika and Mr Armstrong are breaches of their contractual obligations not to use confidential information and breaches of the common law duty of fidelity.

[56] Mr Haika and Mr Armstrong accept that they incorporated a company, Precise Building Solutions Ltd in February 2018. Their intention was to go into business together, using Precise Building, in 2019. In preparation for this they did some things in 2018, including setting up bank accounts, obtaining advice from an accountant and setting up software for tax purposes, creating a company logo, producing templates for quotes and invoices, creating a Facebook page and posting on it.

[57] Whilst Mr Haika and Mr Armstrong did not intend to start operating the Precise Building business until some time in 2019, in April 2018 they were presented with an opportunity to undertake some work outside of their employment and they took this up.

[58] This work was to fill voids in the foundations for two front town houses in a group of five units in Manchester Street, Christchurch.

[59] The owner of the Manchester Street properties had retained Smartlift to repair the foundations for the three rear town houses. In the course of carrying out that work, for Smartlift, Mr Haika discovered voids in the foundations. Mr Haika was then asked to check the front two units and he discovered voids in the foundations of those units.

[60] The owner then approached Smartlift and requested a quote to repair the voids for these two units. The owner's evidence was that Smartlift's quote was high and after telling Smartlift this he decided Smartlift was not interested in the job and he would look elsewhere to get the work done. The owner asked his site foreman (not a Smartlift employee) about getting another quote and the site foreman approached Mr Haika to see if he was interested in doing the work and if so quoting for it.

[61] What followed was that Mr Haika quoted for the work on behalf of Precise Building, this quote was accepted and then Mr Haika and Mr Armstrong did the void filling work, through Precise Building, in their own time. Mr Haika and Mr Armstrong completed the work in April 2018, Precise Building billed for the work and the owner paid Precise Building.

[62] Then in June 2018, the owner of a house in Rocking Horse Road, Christchurch, contacted Precision Build inviting it to quote for repair work, which included re-levelling the house.

[63] Smartlift had previously quoted for repair work on this property, in April 2018. Since that time the owner had changed the scope of the work he wanted completed and then in June, rather than going back to Smartlift, he approached Precise Building directly on a recommendation made to him.

[64] The date of the first contact between the owner of the Rocking Horse Road property and Precise Building is not entirely clear but appears to have been mid June 2018, based on drawings made by Mr Haika or Mr Armstrong of the house and garage at Rocking Horse Road dated 21 June 2018. The owner's evidence was that Mr Haika and Mr Armstrong were on site shortly after he first contacted them.

[65] In any event, Mr Haika and Mr Armstrong provided two quotes for Precise Building to undertake the work; the second quote dated 29 June 2018 was accepted by the owner.

[66] Precise Building subsequently undertook the repair work at Rocking Horse Road, billed for it and was paid.

[67] It is against these events that I must determine if Mr Haika and Mr Armstrong breached:

- (a) Their contractual obligations of confidentiality; and/or
- (b) Their implied duty of fidelity.

[68] I can deal with the alleged breach of confidentiality obligations succinctly. First, in relation to Mr Haika, as there was no signed employment agreement that evidenced his acceptance of the confidentiality obligations I cannot find there is a breach as alleged. Second, for Mr Haika (in any event) and Mr Armstrong, there is no evidence to show they

breached the obligation in the preparatory work they did in setting up their company and then seeking work nor in the work they did do.

[69] The implied duty of fidelity is, however, less straight forward.

[70] Turning firstly to the duty and the obligations owed by Mr Haika and Mr Armstrong, in *Walden v Barrance*⁹ Chief Judge Goddard stated at page 616:

In New Zealand, the duty of fidelity can be seen to be represented by the judgment of the majority of the Court of Appeal in *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243, and the unanimous judgments of that Court in *TISCO Ltd v Communication & Energy Workers Union Inc* [1993] 2 ERNZ 779 and *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507. These judgments are binding on Court and require it to hold that, from 29 March 1990, the respondent's employment contract was subject to an implied term that he was under a duty of fidelity to his employer to abstain from conduct likely to do damage to the employer's business or having potential to undermine the relationship of trust and confidence. Obviously an employee who has given notice must be entitled to make preparations for departure and his or her future working life. There is nothing wrong with that. For example, the respondent was perfectly at liberty in his spare time to look for premises and order stationary, as he says he did. However, conduct will be of a different colour if the preparations are at the expense of injury to the goodwill of the employer's business or involve some serious dereliction of the continuing duty of trust and confidence.

[71] Chief Judge Goddard then went on to explain that the cases had established a number of rules relating to the duty of fidelity and he set out four rules that were relevant to that case. For this case the first rule Chief Judge Goddard outlined is relevant (also at page 616):

Rule 1: During the employment the employee is under a duty (called the duty of fidelity) to do nothing deliberately that is likely, by ordinary standards of foresight, to injure the employer's business. The prohibition includes competing with the employer directly or by working at the same time for a competitor. Competing for this purpose can in turn include hostile acts during the employment in preparation for competing after it has ended. Common examples are removing, copying, memorising, or compiling for the employee's as opposed the employer's purposes a list of customers or any other information, soliciting clients prior to departure, and any other acts by the employee that involve an actual incompatibility in important respects with the employment relationship or a conflict with the interests of the employer, to serve which it remains the employee's duty so long as the employment subsists: *Blyth Chemicals v Bushnell* (1993) 49 CLR 66.

⁹ *Walden v Barrance* [1996] 2 ERNZ 598

[72] So the duty of fidelity, insofar as it is relevant to this case, is an implied duty imposed on employees not to undertake actions:

- (a) Which are likely to damage an employer's business, including its goodwill; or
- (b) Which have potential to undermine trust and confidence.

[73] This means, amongst other things, that during their employment employees:

- (a) Cannot compete with their employer; and
- (b) Cannot prepare to compete with their employer once their employment has ended, if such actions are harmful to the employer's business.

[74] An example of how the duty of fidelity, in the terms expressed above, operates can be seen in the Employment Court decision in *Rooney Earthmoving v McTague*.¹⁰ After considering the steps taken by Mr McTague, with colleagues, to set up a business that competed with Rooney earthmoving, whilst still employed by Rooney Earthmoving, the Court concluded:

[157] The preparatory steps taken by Mr McTague, while still in the employ of [his employer], to establish BMW with a view to competing with [his employer], by incorporating BMW, arranging funding and purchasing or hiring of plant and equipment, did not amount to a breach of the duty of fidelity or trust and confidence in the absence of evidence that such steps in themselves undermined [his employer] during the currency of Mr McTague's employment.

[158] However, the following are breaches of his duties of fidelity and trust and confidence:

- Acting in concert with Messrs Bartlett and Whiting to secure customers for BMW while the defendants were still in the employ of [their employer];
-

[75] Another example can be seen in *Morris v Interchem Agencies Limited*¹¹ where the Court of Appeal heard an appeal from the Employment Court. The Employment Court had found that Mr Morris had secured an agency, which Interchem had, for himself before his resignation and he failed to pass on concerns expressed by the principal about Interchem. In considering the appeal from that finding, the Court of Appeal stated:

¹⁰ *Rooney Earthmoving v McTague* (2008) 6 NZELR 774

¹¹ *Morris v Interchem Agencies Limited* (2003) 1 NZELR 413

[38] Mr Thorp's alternative argument is that, even if the arrangement to take the agency had been made before the termination of the employment, there was no breach of the duty of fidelity. This argument is rejected. It is of no moment who makes the first approach. The duty of an employee in such circumstances is to reject categorically any such approach, to report it to his or her employer along with any perceived shortcomings. A similar argument was rejected by Havers J in the case of *Sanders v Parry* [1967] 1 WLR 753 (QB), referred to with approval by Cooke J (as he was then) in his judgment in *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243.

[76] Applying all of this case law to the current claim I have found the following:

- (a) The preparatory work done by Mr Haika and Mr Armstrong during their employment with Smartlift to set up Precise Building and to get it ready to operate a building business in competition with Smartlift, was not a breach of the duty of fidelity.
- (b) Any preparatory work by Mr Haika and Mr Armstrong would need to involve "hostile acts" toward Smartlift, that is, damaging actions such as using confidential information or badmouthing Smartlift to current or prospective customers in order to win their business. I am not satisfied that Mr Haika or Mr Armstrong acted this way.
- (c) The work undertaken by Mr Haika and Mr Armstrong through Precise Building, in April 2018 on the Manchester Street units was work in competition with Smartlift and therefore a breach of the duty of fidelity.
- (d) Quoting for the work on the house and garage in Rocking Horse Road whilst still employed – Mr Haika and Mr Armstrong were under notice of redundancy but still employed at the time – was a breach of the duty of fidelity as it was securing work for Precise Building in competition with Smartlift.
- (e) What Mr Haika and Mr Armstrong were required to do in respect of both sets of work they secured for Precise Building whilst they were employed by Smartlift, was speak to Smartlift about the opportunities including passing on any comments from the owners about Smartlift's previous quotes. They failed to do this.

[77] As Mr Haika and Mr Armstrong have breached the duty of fidelity, I must consider what remedies Smartlift is entitled to. The starting point is that damages flowing from a breach of the duty of fidelity are normally assessed on a loss of a chance basis. That is, in the case of Smartlift, calculating the value of the lost chance to secure the work from the two owners of the properties at Manchester Street and Rocking Horse Road. In order to do this I need to assess the value of the work to Smartlift and then reduce that by the percentage reflecting the chance of Smartlift obtaining that work.

[78] The difficulty I have in applying that assessment in this case is I do not have evidence of the value of the work to Smartlift, which would be based on the profit component of a reasonable price for the work.

[79] And there are some evidential constraints in properly assessing the chance that Smartlift would have obtained the work, had Mr Haika and Mr Armstrong reported the two work opportunities to it. My broad-brush assessment of the situation is that the chance of Smartlift obtaining the work is low. So, notwithstanding that I do not know the value of the work to Smartlift my assessment is the amount would be minimal.

[80] In this case, Smartlift has also sought penalties against Mr Haika and Mr Armstrong for breaching their employment agreements, being the implied duty of fidelity. Given the difficulties with assessing damages based on loss of chance, it seems more appropriate to consider imposing penalties and ordering that any penalties, if imposed, be paid to Smartlift to reflect its loss.

[81] The Authority has previously imposed a penalty for breaching the duty of fidelity on the basis that it is a breach of an implied term in an employment agreement.¹²

[82] Having considered the Authority determination in *Solar Bright*, and having reviewed the Employment Court's guidance on imposing penalties in *Allan Nicholson v Matthew Ford*¹³ and given the difficulties in assessing damages I consider it appropriate to impose penalties against Mr Haika and Mr Armstrong for their breaches of the duty of fidelity. I have also been guided both of these decisions in terms of quantum, firstly assessing the relevant factors set out by Chief Judge Inglis in *Nicholson* and comparing that to the Authority

¹² *Martin and Anor v Solar Bright Limited (In Liquidation), Solar Bright Limited (In Liquidation) v Maretin and Anor* [2019] NZERA 463.

¹³ *Allan Nicholson v Matthew Ford* [2018] NZEmpC 132

determination in respect of the amount awarded there, being \$2,000.00 for a single breach of the duty.

[83] In all of the circumstances, I consider a penalty of \$4,000.00 for each of Mr Haika and Mr Armstrong is appropriate based on two breaches by each of them and assessing the relevant circumstances of the breaches. I also consider it appropriate that the penalties be paid to Smartlift to reflect the loss I was not able to properly assess for it.

Conclusion

[84] This determination, reserved at the conclusion of a one day Investigation Meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[85] Smartlift unjustifiably dismissed both Mr Haika and Mr Armstrong and in satisfaction of these grievances Smartlift must pay:

- (a) Mr Haika \$10,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) Mr Armstrong \$12,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[86] Smartlift failed to keep a signed copy of Mr Haika's employment agreement and must pay a penalty of \$500.00. This is to be paid to the Authority and the Authority will then pay it into a Crown bank account.

[87] Mr Haika and Mr Armstrong breached the duty of fidelity and must pay penalties of \$4,000.00 each. These penalties are to be paid to Smartlift in lieu of any damages being assessed.

Costs

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

[89] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority