IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 197
3078832 & 3080278

	BETWEEN	DAVID WOOLFORD Applicant in 3078832 and Respondent in 3080278
	AND	TECH DATA ADVANCED SOLUTIONS (ANZ) LIMITED Respondent in 3078832 and Applicant in 3080278

Member of Authority:	Robin Arthur
Representatives:	Mark Kirkland and Julia Leenoh, counsel for David Woolford Rosemary Wooders and Charlotte Joy, counsel for the Tech Data Advanced Solutions (ANZ) Limited
Investigation Meeting:	11 and 12 February 2021
Determination:	11 May 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 30 July 2019 Tech Data Advanced Solutions (ANZ) Ltd (Tech Data) gave David Woolford one month's notice of dismissal on the grounds of redundancy.

[2] The company's business primarily operates in Australia. Mr Woolford worked for Tech Data as a business development manager and was part of its small three-member New Zealand team, based in Auckland.

[3] After his employment ended Mr Woolford raised a personal grievance for unjustified dismissal and disadvantage. He said Tech Data's restructuring of its business in New Zealand, by disestablishing his position, was done without following proper procedural steps.

[4] In his application to the Authority Mr Woolford sought remedies of lost wages and distress compensation for his grievance. He also sought orders requiring Tech Data to pay him commission for work done on deals which were completed after his employment ended and to pay him a "severance payment".

[5] Before his employment ended Tech Data had offered Mr Woolford a severance payment of $8,666.67 if he signed a deed of release. The deed included a term that would have barred him from making any claims in relation to his employment and its termination. Mr Woolford did not sign the deed and Tech Data did not pay him the offered amount.

[6] Mr Woolford raised his grievance after Tech Data's lawyers wrote to him in early September 2019 alleging he had, shortly before his employment ended, sent confidential information from his work computer to his personal email address. Their letter said Mr Woolford had confirmed to a Tech Data manager that the emails contained information about sales plans and quotes and that he intended contacting clients of Tech Data about deals he had worked on for the company.

[7] In responding to Mr Woolford's application to the Authority Tech Data said it had acted fairly in the restructuring process which led to his dismissal. It denied Mr Woolford was entitled to the remedies and other payments, including commission, he claimed.

[8] In a separate application of its own Tech Data sought a finding that Mr Woolford had breached his employment obligations by sending information from his work computer to his private email address and by making plans to use that information for his own purposes. It asked for orders requiring Mr Woolford to comply with his obligations of confidentiality that still applied from his former employment agreement with Tech Data and to pay damages and penalties for breaching them.

[9] In reply to Tech Data's application Mr Woolford said he had sent emails to his personal computer for legitimate work purposes, denied making admissions to a Tech Data manager about plans for using information in those emails and opposed any of the orders sought being granted.

[10] The parties' applications were investigated jointly.

The Authority's investigation

[11] Three witnesses attended the Authority investigation meeting in person to answer questions, under oath or affirmation, about written statements lodged in advance:

- Mr Woolford;
- James Johnston, a technical product specialist, who was one of the three employees in Tech Data's Zealand office; and
- Nadine Lane, Tech Data's New Zealand country sales manager and the third member of its New Zealand team.

[12] A fourth witness, Anthony Daly, attended the investigation meeting by audio-visual link from Australia. Mr Daly is Tech Data's senior human resources manager. He had attended a meeting held on 23 July 2019 with Ms Lane and Wendy O'Keeffe, Tech Data's country general manager for Australia and New Zealand, where the decision to disestablish Mr Woolford's role was made.

[13] Mr Woolford was given notice of dismissal in a letter Ms Lane handed him on 30 July 2019. Ms O'Keeffe was the signatory of that letter. She did lodge a witness statement for the Authority's investigation but by the time of the investigation meeting was held Ms O'Keeffe had left Tech Data's employment. Her statement was put aside as its contents could not be tested with her and ultimately was not necessary. Ms Lane and Mr Daly were able to give direct evidence of relevant events and conversations.

[14] In addition to asking questions of the witnesses, the parties' representatives provided detailed closing submissions on the facts and issues for determination.

[15] As permitted by s 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. This determination has not needed to refer to specific client names and details of the financial information given in the evidence. General references to those names and details were sufficient for the parties to understand, thereby avoiding making public some information which might be commercially sensitive.

Issues

[16] From the investigation the following issues required determination:

(a) Did Tech Data act as a fair and reasonable employer could have done in making its decision to dismiss Mr Woolford on the grounds of redundancy and how it carried out that decision?

(b) If Tech Data acted unjustifiably in dismissing Mr Woolford, or otherwise disadvantaged him in how that decision was reached or carried out, what remedies should be awarded, considering:

- Lost wages, under s 123(1)(b) of the Act 2000;
- The severance amount offered but not paid to him, as compensation for loss of a benefit under s 123(1)(c)(ii) of the Act; and
- Compensation for humiliation, loss of dignity and injury to his feelings under s123(1)(c)(i) of the Act?

(c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Woolford that contributed to the situation giving rise to his grievance?

(d) Is Tech Data liable for a penalty for a breach of good faith?

(e) Does Tech Data owe Mr Woolford commission on any of his sales?

(f) Did Mr Woolford breach terms of the employment agreement, either before or after his employment ended, by taking and/or using confidential information of Tech Data?

(g) If Mr Woolford did breach confidentiality obligations:

- should an order for compliance with those terms be made and, if so, what should that order be;
- has Tech Data suffered any loss caused by that breach and, if so, what losses and what order for damages, if any, should be made; and
- should a penalty for breach of an employment term be imposed on Mr Woolford?

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

The law on dismissal for redundancy

[17] A dismissal for redundancy concerns a situation where an employer's reason for terminating a worker's employment is attributable, wholly or mainly, to the fact that

the position filled by a worker has or will become superfluous to the needs of the employer. When called on to determine whether an employer acted justifiably in dismissing someone on the grounds of redundancy, the Authority does not substitute its own view for the employer's judgement as to whether the position was surplus to the employer's business needs. Rather, the Authority's role is to determine whether what the particular employer did, and how the employer did so, was what a fair and reasonable employer could have done in all the circumstances at the time.[1]

[18] Two aspects are considered in assessing whether the employer's actions met this objective standard. One aspect concerns whether the employer has shown its decision to disestablish a position was made for genuine business reasons, and not as a pretext for dismissing a disliked employee.[2]

[19] The other aspect considers whether the employer followed a fair process in reaching its decision about the viability of the position held by the worker and then also acted fairly in whatever steps the employer took in carrying out its decision. An employer proposing to make a decision likely to have an adverse effect on the continuation of a worker's employment must observe its good faith obligations. Those obligations require the employer to provide the affected worker with access to information relevant to the continuation of the worker's employment and a reasonable opportunity to comment on that information before the employer makes its decision.[3]

[20] The requirements for such consultation in the context of potential redundancy have been summarised in this way:[4]

> Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and 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 a 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.

[21] An employer who, acting fairly, has concluded a worker's present position is no longer needed, should also consider whether there is any alternative role available to

---

[1] Employment Relations Act 2000, s 103A.
[2] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].
[3] Employment Relations Act 2000, s 4(1A)(c).
[4] *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54].

which the worker could reasonably be redeployed rather than be dismissed.[5]

[22] How much else may be needed to meet the obligations of fairness and good faith will vary to some degree, depending on the resources available to the employer.[6] However, a fair employer acting reasonably could be expected to talk with the worker about the timing and implementation of any decision to terminate their employment on the grounds of redundancy and what help might be able to be given to the worker in searching for future work or whatever next step the worker may take in life when the employment ends.[7] Instances of such help may include providing time off during the notice period to attend job interviews, access to technology to prepare and send job applications and the employer checking through its own business networks whether other employers might have possible job opportunities. Such measures are consistent with the nature of genuinely-made redundancy dismissals as a 'no fault' termination of the employment, primarily resulting from business reasons rather than from some wrongdoing or failure by the worker in the performance of their duties.

[23] The statutory obligations are also considered in light of the terms of the worker's employment agreement. Tech Data's employment agreement with Mr Woolford included the following term on redundancy:

> In the event of redundancy, one (1) month's notice of termination will be provided in writing. This notice is in substitution for, and not in addition to, any other notice period specified within this agreement.

[24] It made no provision for payment of any redundancy compensation.

The redundancy decision and the process – a failure of consultation

[25] Acting under guidance given by Mr Daly in Australia Ms Lane arranged a meeting with Mr Woolford on 30 July 2019. In that meeting she handed Mr Woolford the letter signed by Ms O'Keeffe and dated that day. The letter, in part, read as follows:

> Tech Data has over the last few months being consulting you with regard to your role and the business challenges we have been facing in New Zealand.
>
> As a result of these business challenges, we have made the decision to review your role with an option of making your role redundant. We have today discussed with you the proposed organisational structure resulting in two (2)

[5] *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142 at [43].
[6] Employment Relations Act 2000 s 4(1A) and s 103A(3)-(5).
[7] *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, 619 (CA).

> roles remaining in our New Zealand business, that of a technical/solutions resource and the role of Country Sales Manager.
>
> At the meeting today with Nadine Lane, we have provided you with an opportunity to review our proposal and provide your feedback.
>
> Having taken your feedback from those discussions today with Nadine into account as well as your feedback over the last few months, Tech Data now wishes to confirm that your role will be terminated on the basis of a genuine operational redundancy with effect from 31st August 20919.
>
> As discussed, we request that you work out your notice period but we are happy to provide you with opportunities to attend interviews ensuring that you keep Nadine informed of your whereabouts.
>
> The enclosed Deed of Release sets out relevant terms of our separation, inclusive of payments for the notice period as per your employment contract and the accrued by unused leave entitlements.

[26] The Deed of Release referred to in the letter included a clause headed "Release by Employee". The clause said the employee acknowledged payments made under the deed were in full and final settlement of all claims arising out of the employment and said the employee agreed not to commence any such claims.

[27] The evidence of Ms Lane and Mr Daly established that the description given in the letter of 30 July was far from an accurate or fair description of the procedure followed and the reasons given for the decision. Broadly summarised, four such inaccuracies were incorporated in the letter.

[28] Firstly, Tech Data had not been "consulting" Mr Woolford regarding his role over the last few months. Rather, he and the two other New Zealand team members had been involved in a concerted campaign since April 2019 to increase sales with existing vendors and to win new business with other vendors.

[29] Tech Data's business involves acting as an intermediary between vendors and resellers of information technology hardware and software. In March 2019 a major vendor partner terminated its contract and Ms Lane identified that potential sales from another vendor, if achieved, would be for significantly lower amounts than that vendor had previously advised.

[30] In light of those developments Ms O'Keeffe told Ms Lane in early April that the New Zealand business would need to reduce its headcount by one employee to save costs. However Ms Lane believed there was a reasonable 'pipeline' of potential sales, relying particularly on one large deal, which could generate enough revenue to sustain

the New Zealand business. She persuaded Ms O'Keeffe to postpone any decision on staffing under the end of the second quarter (Q2) in Tech Data's business calendar, which was until 31 July 2019.

[31] On 12 April Ms Lane met with Mr Johnston and Mr Woolford to discuss the business situation. She told them about the deadline Ms O'Keeffe had agreed for improving sales and revenue figures. She advised them of necessary changes to the budget and sales targets and told them that TechData proposed to "reduce the headcount" by one employee if those goals were not reached by the end of Q2.

[32] In talking with Ms Lane and Mr Johnston about those plans Mr Woolford said he believed he would be the person to go if the targets were not met and a decision was made to "reduce headcount". He also referred to having a "Plan B" of looking for work elsewhere if they did not succeed.

[33] In subsequent weekly meetings Ms Lane, Mr Woolford and Mr Johnston discussed progress with work on meeting their targets, sharing information about plans and forecasts.

[34] In one of those meetings, on 4 June, Mr Woolford again referred to the prospect that he might have to leave Tech Data if financial results did not improve. However, as Ms Lane explained in her witness statement, she had replied that they would continue to work hard to avoid that possibility and to look for other solutions, including working with other vendors to spread that budget targets more widely across Australia and New Zealand.

[35] Her evidence established the focus of their discussions remained on sales and business plans to the end of Q2. Consequently, what they talked about did not amount to consultation with Mr Woolford about the future of his role in the way defined in the case law referred to earlier in this determination. There was no specific proposal from Tech Data for his position to be disestablished and no precise information about that prospect because the New Zealand team was still working to win the sales necessary to meet the Q2 end target.

[36] A second inaccuracy in the 30 July letter given to Mr Woolford was its reference to having provided him with an opportunity to review a proposal on the redundancy of his role and having considered his input that day. On that day Ms Lane gave him the

letter signed by Ms O'Keeffe, containing the notice of dismissal, without any such opportunity having taken place. The letter, written and signed in advance, therefore described supposed conversations and considerations which had not, in fact, taken place.

[37] A third inaccuracy was the letter's description of the decision to terminate his employment as being made after considering his feedback in discussion with Ms Lane on 30 July. As the evidence of Ms Lane and Mr Daly revealed, the decision had, in fact, been made by Ms O'Keeffe in a meeting she had with them on 23 July. Mr Woolford was not part of that 23 July meeting and did not know about. Neither was there any other occasion when Ms O'Keeffe talked directly to Mr Woolford or sought any direct input from him before making the decision. There was therefore no prospect any feedback or comment Mr Woolford might have given or made on 30 July could have been taken into account. The die had been cast seven days earlier, a week before the end of the Q2 period set for meeting their targets.

[38] The fourth inaccuracy concerned the reference to the decision having taken into account Mr Woolford's "feedback over the last few months". The evidence of Ms Lane and Mr Daly established a misconceived reliance had been placed on informal comments Mr Woolford had made during those months about the likely prospects for his role if the Q2 targets were not met. In his evidence Mr Woolford acknowledged that he said he thought it would be him and not Mr Johnston or Ms Lane who would lose their job if the targets were not met and he had talked about what other job opportunities there might be elsewhere for him. However those comments by him were speculative. They could not reasonably be taken to be consent to ending his employment without an opportunity to comment on a specific proposal about when and how that might happen. While he knew from weekly meetings that their sales figures and plans were not meeting targets, he was not given the opportunity to comment on precise and up-to-date information before Ms O'Keeffe made her decision.

[39] As Ms Lane emphasised in her evidence she had only ever referred to a "reduction of headcount" in the team. She had not specifically referred to redundancy or identified Mr Woolford's job as the one which would likely go.

[40] The analysis of those inaccuracies in the 30 July letter established that Tech Data had not taken the minimum steps necessary in consulting Mr Woolford before making the decision that had an adverse effect on the continuation of his employment.

[41] Mr Woolford submitted there were two other factors which made Tech Data's actions not only procedurally inadequate but also made its decision substantively unjustified.

[42] Firstly, he criticised the financial rationale on which Tech Data relied in deciding it could not afford to continue to resource his role. His argument, summarised broadly, was that more revenue had been generated than previous years and the new targets set were unrealistically high. However, as clear from Ms Lane's evidence, Mr Woolford's criticism did not adequately take account of the reliance Tech Data had placed on the income generated from the major vendor partner it lost in March to fund his position. Tech Data's decision about its desired level of income, and necessary sales targets needed to meet that level and to keep resourcing the role, was a business judgement within a range that an employer in those circumstances could reasonably have made.

[43] Secondly, Mr Woolford submitted that the decision masked criticisms of his performance in his role rather than, predominantly, being made for genuine commercial reasons. However the evidence did not support a finding that the redundancy decision was made for some mixed motive related to his performance. While Mr Woolford had not met budgeted targets, nothing established that Ms Lane and Ms O'Keeffe believed this was mainly the result of poor performance by him rather than the difficult commercial context.

[44] Consequently, the focus remained on the procedural failings. Such failures may be held to be an unjustified dismissal where those defects in the process followed by the employer were more than minor and resulted in the worker being treated unfairly.[8]

[45] The extent of defects, apparent from the analysis of the inaccuracies in the 30 July letter, was clearly more than minor because they amounted to a complete failure to observe the statutory consultation obligations. The question is really whether that

[8] Employment Relations Act 2000, s 103A(5) and *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 40 at [15].

resulted in Mr Woolford being treated unfairly? It can be answered by considering the counterfactual scenario of what difference talking to him before making the decision might have made.

[46] Two relevant points arose from Mr Woolford's evidence. The first was that Mr Woolford referred to a strategy he believed he could have pitched, given the chance, that may have delivered more revenue for both the New Zealand and Australian parts of the business. This would have involved working with a Tech Data staff member who had recently been employed in Australia and who had strong relationships with a vendor important to Tech Data's business there. However such work went beyond the end of Q2 and the other employee in Australia was well placed to pursue it there without input from Mr Woolford. It was not likely Mr Woolford would have been able to persuade Tech Data to continue his employment on that basis.

[47] The second point where consultation may have made a difference concerned the opportunity to suggest options other than outright dismissal. Mr Woolford said, given the chance, he could have asked Tech Data to consider alternatives such as a reduction in his base salary, increasing the 'at risk' portion of earnings to be generated by commission, or going part time. Both options would have provided some reduction in the level of labour costs that were of concern to Tech Data but also could have enabled him to keep working. Ultimately Tech Data might not have accepted such proposals or Mr Woolford might have decided they were not options he wanted to pursue. However he was treated unfairly because the sudden news of his dismissal denied him the chance to put forward such options, if he wanted to, and to have them genuinely considered by Tech Data before its final decision was made.

[48] Accordingly Mr Woolford had established a personal grievance for unjustified dismissal for which an assessment of remedies could be made.

Remedies for the grievance

Lost wages

[49] The grievance Mr Woolford established concerned procedural failures, not the business rationale for his dismissal for redundancy. In those circumstances the measure of lost wages is reached from an assessment of how long it might have taken Tech Data to fairly consult him before reaching what, most likely, would have been the same decision due to the underlying business needs. In the particular circumstances of this

case that period would have been two weeks. The resulting appropriate amount for reimbursement of wages lost as a result of the grievance was two weeks' ordinary time remuneration.[9] For Mr Woolford, on his base salary of $104,000, this was $4,000.

No severance payment

[50] Mr Woolford had no contractual entitlement to compensation for redundancy. The severance payment proposed in the Deed of Release given to him on 30 July 2019 was offered on terms Mr Woolford was not prepared to accept. He had the opportunity to seek advice on it during his notice period. By not signing the deed Mr Woolford retained an incontrovertible right to pursue his personal grievance. But, having made that decision, he had to rely on whatever remedies accrued in the event of settlement of that grievance, either privately or by the eventual outcome in an Authority determination. His claim for an order for the amount offered in the deed, but not accepted, fails.

Compensation for humiliation, loss of dignity and injury to feelings

[51] Mr Woolford must have suspected by mid-July that the writing was on the wall for the future of his job with Tech Data. In April and June he had speculated, informally in conversation with Ms Lane and Mr Johnston, what his options for future work elsewhere might be. However, at the time of doing so, he expected that he and his colleagues had until the end of Q2 before that prospect would be further discussed and decided. The news delivered unexpectedly early to him on 30 July was a shock.

[52] He was "gobsmacked" by the suddenness of the decision and too embarrassed by his dismissal to tell his wife about it until several days after getting the news. He was entitled to an award of compensation for that shock and the effect it had on him during the two weeks or so that Tech Data should have been engaging in proper consultation with him. In the particular circumstances, and considering the general range of awards, $9,000 was an appropriate amount of compensation under s 123(1)(c)(ii) of the Act.

No reduction for any blameworthy contributory conduct

[53] Where remedies are awarded the Authority must consider whether actions of the worker contributed to the situation giving rise to the grievance. Where such actions

[9] Employment Relations Act 2000, s 123(1)(b) and s 128 (2).

amount to blameworthy conduct, the Authority must reduce remedies that would otherwise have been awarded.[10]

[54] This case concerns a dismissal for redundancy which is, by its nature, considered to be a 'no fault' termination of employment. And Mr Woolford was not responsible for Tech Data's failure to fairly consult him, which was the substance of his grievance. Accordingly, no reduction of remedies was required because he had not contributed to the situation giving rise to his grievance.

[55] However Tech Data submitted that an exception to that orthodox conclusion applied in this case because, after his employment ended, a check of email traffic from Mr Woolford's computer showed he had sent himself some confidential information and was said to have confirmed he had plans to make use of some of it for his own purposes.

[56] The Court of Appeal has indicated, in a majority judgment, that subsequently discovered misconduct which is "so bad" it would have warranted dismissal if the employer had known about it at the time, should be taken into account in setting awards of lost wages and distress compensation under s 123 of the Act rather than those remedies then being adjusted through reduction under s 124 of the Act.[11] The minority judgment suggested subsequently acquired evidence must be reasonably connected to why the dismissal occurred before a deduction of remedy may be made.[12]

[57] However the circumstances on which the conclusions in *Salt v Fell* were reached differed significantly from the 'no fault' redundancy situation in which Mr Woolford's grievance arose. And, unlike the employer in *Salt*, the subsequently discovered conduct concerning potential misuse of confidential information was the subject of a separate application by Tech Data. Its application was being jointly investigated by the Authority along with Mr Woolford's grievance application but sought separate remedies for the alleged wrong about confidential information – that is a compliance order, an inquiry into damages and penalties. Justice could be addressed, if needed, through those remedies rather than adjusting the remedies for Mr Woolford's grievance. Blurring the lines between the two applications also risked double jeopardy for Mr

[10] Employment Relations Act 2000, s 124.
[11] *Salt v Fell* [2008] NZCA 128 at [98], [101], [102] and [104] per Chambers and Robertson JJ.
[12] *Salt*, above n 11, at [67] per Hammond J.

Woolford, by having grievance remedies reduced in one and also being penalised in the other.

[58] Accordingly, no reduction of remedies is made for Mr Woolford's grievance. Tech Data must, within 28 days of the date of this determination, pay Mr Woolford $4,000 for lost wages and $9,000 as compensation for humiliation, loss of dignity and injury to his feelings.

A penalty for breach of good faith

[59] Mr Woolford asked for a penalty to be imposed on Tech Data under s 4A of the Act for breaching its good faith obligations. Those breaches concerned its failure to properly consult him and the misleading nature of its 30 July letter.

[60] This is one of the relatively rare cases where there is straightforward evidence of the misleading and deceptive nature of the impugned behaviour, showing a failure to comply with the statutory duty of good faith in a way that intentionally undermined the employment relationship.

[61] The 30 July letter refers to the decision to dismiss Mr Woolford for redundancy being made that day after considering feedback from him given that day. Both Mr Daly, who drafted the letter, and Ms Lane, who delivered it knew that was not true. They both knew, as did Ms O'Keeffe who signed the letter, that the decision was made on 23 July 2019.

[62] The deceptive nature of the behaviour is confirmed by the content of an email from Mr Daly to Ms Lane dated 26 July – that is three days after the 23 July decision was made and four days before Mr Woolford was told about it. Mr Daly's email set out a script and guideline for Ms Lane to talk to Mr Woolford prior to giving him the letter of dismissal about what it referred to as "the proposed plans of making his role redundant". She was advised to talk to Mr Woolford about whether his previous references to a "Plan B" have changed and become a "Plan C" and for her to pause "to think about this for a moment" if he said anything different from earlier discussions. As it happened, no such discussions took place because Ms Lane did not initiate any discussions with Mr Woolford about this topic before calling him to the meeting on 30 July where she delivered the signed letter. The intention however was clear throughout, to deliver the same outcome whatever Mr Woolford may have had to say.

[63] Section 133A of the Act, and Employment Court decisions applying those statutory criteria and other relevant considerations, identify the factors to weigh in determining an appropriate penalty for this misleading and deceptive behaviour.[13]

[64] The Act places the highest store on promoting good faith behaviour as the means of building productive employment relationships. This includes what must be done when those relationships may be nearing an end, which is clear from the specific references in s 4(1A)(c) to providing information and the opportunity to comment before final decisions are made. A penalty is warranted to punish Tech Data for its breach of that standard and to deter employers generally from doing so in potential redundancy situations. Those good faith consultation rights must be firmly upheld because workers in such situations are particularly vulnerable to the inherent inequality in access to relevant information at such times.

[65] In this case Tech Data's premature decision and cynical approach to consultation was an intentional business decision rather than inadvertent. Although Mr Daly accepted that Tech Data "could have had a more robust consultation process", no contrition or remorse was demonstrated in the evidence of the company's witnesses or its closing submissions. There was no information about similar previous conduct or anything to suggest Tech Data was not able to pay a penalty.

[66] A penalty of up to $20,000 may be imposed on a company found liable under s 4A of the Act. Weighing the factors noted above, including the need for deterrence and for the need to promote good faith behaviour, the appropriate penalty in this case was $4,000.

[67] Tech Data must pay a penalty of $4,000 to the Authority within 28 days of the date of this determination.

[68] On recovery the penalty is to be transferred to a Crown Account.[14] There were not, in this case, grounds for any part of the penalty to be paid to Mr Woolford as the wrong done to him has been addressed in the remedies awarded for his grievance.

---

[13] *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].
[14] Employment Relations Act 2000, s 136(1).

Commission claim – no arrears due to Mr Woolford

[69] Mr Woolford sought an order for payment of commission on a deal he had worked on prior to his dismissal. He said he was entitled to such a payment as the fruit of his efforts.

[70] Tech Data submitted Mr Woolford was not entitled to any commission, relying on the following provisions of his terms of employment:

> Where your employment ceases in circumstances other than redundancy, you will be paid your commission up to your last employment date. Orders must be invoiced to receive all applicable commission payments.
>
> Where your employment ceases due to redundancy, your commission payment will be made to the end of the applicable month your employment ends.
>
> The commission is payable monthly in arrears, subject to you remaining employment by the company on the date that the commission becomes payable.

[71] This issue had to be resolved on a point of fact, concerning when the deal was completed, and a point of law, applying the relevant terms of employment.

[72] On the point of fact, Ms Lane said the relevant transaction was not completed and invoiced until December 2019. Mr Woolford's written evidence also referred to the deal being "finalised and completed after my last day of employment". In his oral evidence Mr Woolford accepted what Ms Lane had said about the deal not being closed until December 2019.

[73] On the point of law, the terms of his employment clearly provided that Mr Woolford was not entitled to commission for a transaction completed well after his employment ended. Even if his employment had lasted some weeks longer, while Tech Data completed a fair redundancy consultation, that process would not have lasted long enough to take him to the time that the deal was finally completed some months later. Mr Woolford's claim on that account is dismissed.

Taking and use of confidential information

[74] Immediately after Mr Woolford's employment ended Mr Daly arranged access for Ms Lane to the inbox for Mr Woolford's work email account on Tech Data's computer system. Through that access Ms Lane found an email Mr Woolford sent to his personal email account on this last day of employment, 30 August 2019. The email

had a range of attachments of concern to her. These included a number of emails from a major vendor partner of Tech Data providing quotes for various customers. Those emails included contact details for personnel of the vendor and Tech Data customers and information about customers of the vendor and amounts spent on their products. He also sent himself emails concerning Tech Data's commission plans.

[75] Mr Daly contacted Mr Woolford by telephone on 3 September 2019 to ask about those emails. On his account of the ensuing conversation Mr Daly said Mr Woolford confirmed he had taken confidential information which included company sales plans, quotes and contact information of vendors and customers and his intention to contact individual clients of Tech Data.

[76] A further check of Mr Woolford's email traffic found some other emails he had sent from his work computer to his personal email address in May. They contained information about his sales forecasts and business plans of two customers.

[77] Mr Woolford's employment agreement included conventional terms about access to confidential information of Tech Data in the course of carrying out his duties and prohibiting use or disclosure of that information during or after his employment. Such information was defined as including details of clients and customers, marketing information and third party information disclosed in confidence.

[78] A further similarly conventional term required him to return all confidential information, including lists of customers and plans, at the end of his employment.

[79] Mr Woolford's evidence, tested by questioning during the Authority investigation, failed to establish a legitimate reason for sending most of that material to his personal email address, particularly so very late in his employment.

[80] He did have a plausible reason for sending himself some information about the operation of the company commission scheme as that was relevant to his wish to pursue the issue of whether he had been properly paid all his entitlements on that account. However he had no similarly valid reason for sending himself all of the vendor quote information that he did. He suggested that he had needed the information in order to refer to it during the afternoon of his last day of work if he received a telephone call from a vendor representative about a purchase order that Mr Woolford hoped would be made that day, which would then generate an entitlement to some further commission

for deals completed before his employment ended. It was not a persuasive excuse as he had sent those emails in the morning of 30 August and then handed in his work laptop soon after. If he had a legitimate need to access that information he could have arranged to keep the laptop for longer during that day. He also did not talk to Ms Lane about the need to access that information or the possibility of a call from a person about paying an invoice. His activity was covert.

[81] Mr Daly's oral evidence did not confirm the more emphatic proposition, given in his written evidence, that Mr Woolford had admitted during their telephone conversation on 3 September that he was taking confidential information for his own use. Mr Daly conceded they were not Mr Woolford's exact words and Mr Daly could not recall what was actually said. Such an admission would have been unlikely anyway.

[82] However Mr Woolford accepted in his oral evidence in the Authority investigation that much of the material he took was not information he should have kept after the end of the employment relationship. He said he took a video of himself permanently deleting the emails from his computer on 6 September and provided that as evidence of no longer possessing any of Tech Data's confidential information.

[83] This did not resolve the matter to Tech Data's satisfaction as Mr Woolford refused to sign an undertaking drafted by its lawyers committing to complying with the confidentiality clause in his employment agreement. Something of a stand-off developed subsequently, in part, because Mr Woolford felt aggrieved about the circumstances in which his employment was terminated and, from his point of view, being short changed by not being paid any further commission.

[84] The difficulty with Mr Woolford's position was that, as he must have known, a video of him deleting emails did not confirm that information was not copied to other devices or forwarded elsewhere before he did so. The inevitable inference remained that he had intentionally taken some confidential customer and pricing information for his own use. The act of taking it was a breach of the terms of his employment agreement and he failed to take adequate steps for its return and deletion.

No compliance order

[85] On that finding the remedies sought by Tech Data required consideration. While, technically, a compliance order could be made there was, practically, no clear benefit to doing so given the time that has since passed.

No loss established

[86] Neither could an assessment of losses or damage realistically be made because there was no evidence of any financial or other commercial loss or damage actually resulting from the taking of the information. Ms Lane referred to one instance where she believed a comment made in a meeting by a competitor may have been informed by some knowledge of pricing that could have come from the information Mr Woolford had taken. However Ms Lane, properly, conceded that was at best only supposition and she could not say the information could only have come from Mr Woolford.

A penalty for a breach of a term of employment

[87] There were, however, grounds for a penalty to be imposed on Mr Woolford for the act of taking confidential information from his workplace at the time and in the way that he did. While he may have developed strong feelings about how his employment came to end, he was not entitled to take information which was commercially sensitive for Tech Data and which could be used to his own advantage in subsequent employment. The breach created a risk for Tech Data which it was entitled to believe it had removed through the term in his employment agreement not to take or use its confidential information. Mr Woolford was liable to a penalty for breach of that term of his employment.

[88] To uphold the statutory object of trust and confidence and to deter intentional breaches of agreed terms of employment, an appropriate amount to order Mr Woolford pay as a penalty under s 134(1) of the Act was $2,000. Tech Data was subject to the wrong marked by this penalty and, in the particular circumstances of this case, could appropriately be awarded the full value of it under s 136(2) of the Act. Mr Woolford is to pay the penalty by way of deduction of its value from the amount in remedies Tech Data must pay to him for his personal grievance.

Orders

[89] In summary, and for the reasons given, the following orders are made in resolution of the respective applications of Mr Woolford and by Tech Data.

[90] By no later than 28 days from the date of this determination, after offsetting the sum of $2,000 which Mr Woolford must pay to Tech Data as a penalty for breach of a term of his employment agreement, Tech Data must pay to Mr Woolford the balance of the following sums:

(a) $4,000 as lost wages (less any applicable tax); and

(b) $9,000 (to which no tax is applicable) as compensation for humiliation, loss of dignity and injury to his feelings.

[91] And, also by no later than 28 days from the date of this determination, Tech Data must pay to the Authority the sum of $4,000 as a penalty for its breach of the duty of good faith. On recovery of the penalty from Tech Data, the Authority must transfer that amount to the Crown.

Costs

[92] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed any party seeking costs 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 the other party is to have up to 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.

[93] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[15]

Robin Arthur
Member of the Employment Relations Authority

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