Attention is drawn to the order prohibiting publication of certain information in this determination at paragraph [16]

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2024] NZERA 19
3152321

	BETWEEN	ROCKIT PACKING COMPANY LIMITED First Applicant
	AND	ROCKIT TRADING COMPANY LIMITED Second Applicant
	AND	ROCKIT GLOBAL LIMITED Third Applicant
	AND	AUSTIN PAUL MORTIMER Respondent

Member of Authority:	Rowan Anderson
Representatives:	Peter Crombie, counsel for the Applicants Nick Logan, counsel for the Respondent
Investigation Meeting:	8 and 9 August 2023 in Napier and 28 September 2023 by AVL
Submissions received:	6 October 2023 from the Applicants 13 October 2023 from the Respondent
Determination:	15 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Mortimer was employed as a Chief Executive Officer ("CEO") by Rockit Trading Company Limited ("RTC"). There is some contention as to whether Mr Mortimer was also employed by Rockit Packing Company Limited ("RPC") and/or

Rockit Global Limited ("RGL"), the applicants submitting that was the case including because Mr Mortimer also acted as CEO for those two entities.

[2] Mr Mortimer entered into a record of settlement ("ROS") with RTC, signed on 6 June 2022, which culminated in his leaving his employment. Pursuant to the ROS, the relevant termination date was 3 July 2020, that being the date on which Mr Mortimer's resignation would take effect.

[3] Following the termination of Mr Mortimer's employment, the applicants say that they became aware that Mr Mortimer, via a trust, had held an interest in Cylinder Pac International Limited ("CPI"). CPI were an unrelated entity that was the supplier of Maria machines (packaging machines for the packing of apples) and associated equipment, and who had entered into supply agreements with RPC. Mr Mortimer had entered into supply agreements with CPI in his role as CEO.

[4] The applicants claim that Mr Mortimer's actions were in breach of his express and implied duties under his employment agreement, including having, and failing to disclose, a conflict of interest without disclosing and seeking approval, and by acting outside of a Delegated Authority Policy in entering into supply agreements with CPI. They also claim that Mr Mortimer breached the ROS by failing to serve the interests of his employer faithfully and diligently up to the date of termination. They seek the imposition of penalties against Mr Mortimer.

[5] Mr Mortimer accepts that he should have disclosed the relevant shareholding in a formal manner. He otherwise says that his omission was inadvertent and contends that he met his relevant obligations. He also says that the applicants have not suffered any loss or damage arising from his omission. Additionally, he claims that RTC has breached the ROS in that negative comments were made about him.

Issues

[6] The issues identified for investigation and determination are:

(a) Should any permanent non-publication orders be made?
(b) Was Mr Mortimer jointly employed?
(c) Has Mr Mortimer breached good faith obligations in terms of section 4 of the Employment Relations Act 2000?

(d) Has Mr Mortimer breached his employment agreement in relation to the following?

(i) a duty of fidelity, good faith and honesty;

(ii) clause 6 of the IEA

(iii) clause 43 of the IEA; and/or

(iv) clause 40 of the IEA;

If so, should any penalty be imposed upon Mr Mortimer?

(e) Has Mr Mortimer breached the settlement dated 6 June 2022? If so, should any penalties be imposed upon Mr Mortimer?

(f) Has the RTC breached the settlement dated 6 June 2022? If so, should a penalty be imposed upon RTC?

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

[7] The statement of problem lodged included a claim seeking damages. That claim was withdrawn well prior to the investigation meeting and need not be considered. The statement in reply alleged that the claims made by the applicants amounted to an abuse of process. The withdrawal of the claim for damages resolved that issue and it was not an issue developed by Mr Mortimer in submissions.

The Authority's Investigation

[8] At the investigation meeting, the Authority heard from John Loughlin, Chairperson, Grianne O'Callaghan, Legal Advisor, Stuart Dykes, Innovation Manager, and Callum Ross, Technical Manager, in support of the applicants' case. Mr Mortimer and Darren Williames, the sole director of CPI, gave evidence in support of Mr Mortimer. All witnesses attended the investigation meeting and answered questions under oath or affirmation.

[9] As permitted by s 174E of 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.

Non-publication orders

[10] Mr Mortimer seeks that permanent non-publication orders be made by way of continuation of interim orders made by the Authority on 8 August 2023 as to the names and identity of the parties.

[11] Mr Mortimer submitted that the principle of open justice should be displaced, including on the basis that the publication of identifying details could be detrimental to his future job and professional prospects, in particular having regard to the nature of the allegations said to be made by the applicants. Mr Mortimer also submitted that non-publication orders were necessary in order to ensure compliance with the record of settlement. It is claimed that there is no broader public interest in the proceedings, that the proceedings do not involve employment standards as defined at s 5 of the Act, and that deterrence would be achieved absent Mr Mortimer being identified.

[12] The applicants did not oppose the making of interim orders but reserved their position as to any permanent orders. They referred to *WN v Auckland International Airport Ltd*[1] and submitted that the party applying for an order must establish sound reasons for the making of such orders so as to displace the presumption in favour of open justice. In doing so, they noted that the vast majority of such applications involve employees seeking vindication of their employment rights and the granting of orders where a party may be prejudiced by seeking such enforcement. They say that does not apply in the present case.

[13] The applicants submitted that if its claims are upheld, in part or in whole, that the principle of open justice should not be displaced. It was also asserted that publication in such a case provides an element of deterrence, that senior employees who breach their employment duties should be accountable for their actions, and that there is no utility is making the orders sought given previous publicity of the claim. On that final point, the applicants referred to an article published in the National Business Review on 5 April 2022 and denials contained in that article said to be attributable to Mr Mortimer's former counsel.

[14] I am not persuaded that the issues raised by Mr Mortimer are sufficient to displace the presumption in favour of open justice. Mr Mortimer is the respondent in these proceedings, and this is not a case where, having regard to my findings, he is seeking to enforce his employment rights. Instead, the proceedings relate to claims by the applicants that Mr Mortimer breached his obligations.

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[1] *WN v Auckland International Airport Ltd* [2021] ERNZ 684, at [41] to [45].

[15] I am also not persuaded that the making of orders is justified on the basis of the ROS. Further, while I do not consider the publication of the 2022 article would result in any non-publication orders being entirely futile, I consider the presence of that information in the public domain a factor leaning against the granting of the orders sought.

[16] I decline to make the permanent non-publication orders sought. However, the interim orders made on 8 August 2023 will remain in place for a period of 28 days from the date of this determination. The interim orders are as follows:

> I order, pursuant to clause 10 of the second schedule of the Employment Relations Act 2000, on an interim basis until any further order or determination:
> (a) that the names, identity, and any identifying details of the First, Second and Third Applicant be prohibited from publication; and
> (b) that the name, identity, and any identifying details of the Respondent be prohibited from publication.

Background

[17] Mr Mortimer was employed as the CEO of RTC. Mr Mortimer signed an individual employment agreement (IEA) with the Havelock North Fruit Company Limited on 11 May 2015. Following a change in company structure, Mr Mortimer's employing entity then became RTC, as of 10 March 2017, on the basis that the parties would continue to be bound by the pre-existing terms and conditions of employment.

[18] The relationship between the applicants, and their functions, was described by Mr Loughlin in his written evidence as follows:[2]

> 3. Rockit Global Limited ("**RGL**") holds an exclusive global licence from Prevar Limited who own the plant variety rights for the Rockit apple. The exclusive licence allows Rockit Global to internationally commercialise the Rockit variety which is grown in a number of countries including New Zealand under sub-licences issued by RGL. RGL markets and sells Rockit branded apples in many countries. Rockit apples are marketed as a healthy snack food option.
>
> 4. RGL is the sole shareholder of Rockit Packing Company Limited ("**RPC**") and Rockit Trading Company Ltd ("**RTC**"). RPC and TTC are part of the Rockit Group of Companies. Rockit sales, marketing administration and management staff are employed by RTC. RPC is the

[2] Statement of John Loughlin dated 11 November 2022, at [3] to [5].

operations company in the group which is primarily responsible for the packing and cool storing the fruit.

5. It is the entity that contracts with most service and equipment providers. RPC employs most of the packhouse, cool store and supply chain staff in the Rockit Group of companies. While group staff are employed by RTC the management team and most of the office staff work for all of the entities in the Rockit Group of Companies.

[19] Mr Williames was the owner of Auzfresh Holdings Pty Ltd ("Auzfresh"), an Australian company specialising in the manufacturing of fruit packaging. Mr Mortimer and other representatives from Rockit took a trip to view Mr Williames operations in Australia as part of a project to source alternative packaging and innovative manufacturing methods. Mr Mortimer, in effect, said the significant drivers were the pursuit of a just in time manufacturing process and a more environmentally friendly packaging solution that could ultimately replace blow moulded plastic tubes that were being used.

[20] The interaction with Mr Williames led to the development of an initial prototype 'maria' machine. Mr Mortimer said that Mr Williames proposed a business model involving limited risk to Rockit with modest capital investment required on the basis that CPI would benefit from payments under a supply agreement on a per cylinder basis if the tubes were ultimately produced. The project (the "Maria Project") subsequently involved the development of various prototype machines, testing, and the entering into of three separate supply agreements between CPI and RPC. The three separate supply agreements were signed on 18 February 2019, 11 September 2019, and 26 June 2020.

[21] Cylinder Pac (NZ) Limited ("CPNZ") was incorporated in New Zealand. Mr Mortimer said that occurred after Mr Williames had expressed an interest in expanding his reach into New Zealand and asked Mr Mortimer to become a director of CPNZ.

[22] CPI was incorporated, according to Mr Mortimer, because Mr Williames wanted to change the name of CPNZ to correct a spelling error and to reflect a more global name. Mr Mortimer said that he was not a director of CPI, but that he did have a shareholding as a beneficiary of the relevant trust shareholding. Mr Mortimer said that he wanted to assist Mr Williames given his efforts on behalf of Rockit and to ensure the development of sustainable packaging for Rockit.

[23] Mr Mortimer claims that his interests in CPI came about due to his desire to have control in the event he wanted to get out of the company and wind it up. He further

explained this on the basis that his interest would provide security for a loan that he had discussed with Mr Williames. Mr Mortimer says that he had agreed, if needed, to provide a loan to CPI. He said that he anticipated the arrangement with CPI being short term. He also claims that he had discussed the loan arrangement with Mr Loughlin, whilst accepting that he should have formally disclosed the matter to RPC's board.

[24] After Mr Mortimer's employment had ended, he emailed Mr Loughlin advising that a personal loan he made to CPI had been repaid and that that would trigger a release of his shareholding. That email asserted that the shareholding had been held in trust as a security over the loan and asserted that the arrangements had been discussed with Mr Loughlin previously. Mr Loughlin denies such discussion occurred.

Was Mr Mortimer jointly employed?

[25] The applicants claim that Mr Mortimer was jointly employed by each of the three applicant entities. Mr Mortimer rejects that claim and maintains that his employer was RTC.

[26] It was submitted by the applicants that the real nature of the relationship was that Mr Mortimer served all three entities as their CEO. In making that submission, the applicants referred to *E Tu Inc v Raiser Operations BV*[3] as supporting the position that a finding of joint employment may arise where multiple entities are sufficiently connected and exercise common control over an employee. The applicants also referred to the Employment Court's consideration of joint employment in *Orakei Group (2007) Ltd v Doherty*[4] and the need for a sufficient degree of relationship between the entities, and additionally the element of common control.

[27] Mr Mortimer submitted that the evidence of Mr Loughlin showed that the corporate structure was such that the three applicants held different roles in relation to intellectual property holdings, shareholding investment, storage and ownership of fruit, and employment and management. He submitted that the real nature of the relationship is as set out in the ROS which bound RTC only as the sole employer.

[28] It was further submitted by Mr Mortimer that the claim of joint employment arises from the applicants concern that alleged breaches of the IEA may not succeed

[3] [2022] NZEmpC 192, at [88].
[4] EC WC12A/08, at [56].

because the supply agreements with CPI were entered into by RPC, as opposed to RTC. He submitted that there is no relevant evidence such as would meet the high bar for piercing the corporate veil. It was also submitted that RPC and RGL would, if they in fact were employers, have failed to provide Mr Mortimer minimum employment entitlements.

[29] It was not just the written employment agreement that provided that RTC was the employer, it is a matter also recorded in the ROS. I consider that fact evidence that the prior written agreements recording the employer as being RTC were a real and genuine reflection of the intention of the parties and the real nature of the relationship.

[30] The written documents recording the relationship are not determinative. However, I do not consider this a situation where the employment morphed over time to become something different than was initially intended, nor was there a change resulting in a different or additional employer. Mr Mortimer served as the CEO of each of the three corporate entities. However, I consider that was a product of his employment with RTC.

[31] The applicants referred to Mr Mortimer's participation in, and signing of, an employee shareholding scheme. Mr Mortimer signed a deed in relation to that scheme in 2018 which included reference to RGL as being the "company" for the purposes of the scheme and the deed reflecting that the intending shareholder was an employee of the company.

[32] I am not persuaded that the shareholding arrangement indicates that either the intention of the parties or real nature of the relationship was such that Mr Mortimer was employed by RGL. RGL, as described by Mr Loughlin, was the entity through which intellectual property was held and in which shareholders invested. I find that the shareholders agreement, despite reference to employment, was not intended to be a reflection of the actual employment arrangements, but rather a mechanism through which Mr Mortimer would be entitled to a shareholding due to his employment with RTC.

[33] Further, whilst the absence of salary and benefits being paid by RPC and RGL may not be determinative, there is an absence of any evidence as to consideration of that issue or arrangements being made reflecting that position.

[34] I consider that the real nature of the relationship was that Mr Mortimer was employed solely by RTC. To the extent it is claimed that there was joint employment, I find that to be inconsistent with the objective intentions of the parties and the real nature of the relationship.

[35] I find that RTC was Mr Mortimer's employer, and that Mr Mortimer was not, jointly or otherwise, an employee of RPC or RGL.

Did Mr Mortimer breach any terms and conditions of employment and/or relevant obligations?

Mr Mortimer's good faith duties

[36] Mr Mortimer owed a statutory duty of good faith to RTC. That duty required that Mr Mortimer not do anything, directly or indirectly, to mislead his employer[5], and to be responsive and communicative[6]. The applicants submitted that Mr Mortimer breached his duty of good faith and that the breach was deliberate, serious and sustained, or was intended to undermine the employment relationship[7].

[37] The applicants submitted that Mr Mortimer breached his duty of good faith by failing to disclose to the board of directors any matters that might impact their business, anything that might compromise the trust and confidence in the employment relationship, and any matter that might give rise to a conflict or perception of a conflict. The applicants' contentions related both to the conflict of interest and to alleged failings as to the supply agreements.

[38] Mr Mortimer accepts that his failure to disclose his interest in CPI and to obtain relevant approval until the first half of 2020 was in breach of his duty of good faith. He contends that the breach was not deliberate and that he made no attempt to conceal his involvement with CPI, including in that he was listed on publicly available records.

[39] I find that Mr Mortimer breached the duty of good faith he owed RTC by failing to disclose his interests in CPNZ and CPI and relevant shareholding arrangements. Further, I find that he breached his duty of good faith by entering into the relevant supply agreements absent disclosure of his conflicts. I am not satisfied that it was clear that Mr Mortimer was otherwise required to obtain board approval when entering the

[5] Employment Relations Act 2000, s 4(1)(b).
[6] Employment Relations Act 2000, s 4(1A)(b)
[7] Employment Relations Act 2000, s 4A.

supply agreements. However, I find that by failing to disclose the relevant conflicts whilst remaining intimately involved in the relevant transactions, that he acted in a manner that was likely to mislead and deceive RTC.

[40] Having regard to all of the evidence, including that of Mr Mortimer relating to the shareholding held in CPI via a trust, I am satisfied that the failures by Mr Mortimer were deliberate, serious and sustained. On balance, I find that Mr Mortimer knew that his involvement amounted to a conflict of interest and that he proceeded to enter the supply agreements in that context. Those actions occurred over a protracted period, and they were serious having regard to Mr Mortimer's position of responsibility and the nature of the commercial arrangements.

[41] I find that Mr Mortimer breached the s 4 duty of good faith owed to RTC.

Other duties and obligations

[42] Mr Mortimer accepts that he breached his duty of fidelity, good faith, and honesty by failing to disclose his interest in CPI until the first half of 2020. He otherwise denies any breach because he did not do anything which injured RTC's business. He submitted that his duties and responsibilities required him to engage with CPI and that, having regard to his employer being RTC only, he was not in any breach as to RPC who entered into the relevant supply agreements. He says he did not owe RPC a duty of fidelity and that RTC was not involved with the supply agreements or contractual arrangements with CPI. He also says that he did not do anything which caused loss or injury to the applicants.

[43] In relation to claims that Mr Mortimer had a conflict of interest and failed to disclose the same, he submitted that it is unclear on what basis such a separate obligation is said to have arisen. He submitted that any such implied term was subsumed within the duty of fidelity and that no separate breach arises. Mr Mortimer took a similar position in relation to the alleged breach of duties said to have been owed to RGL as to his negotiation of the supply agreements.

[44] Mr Mortimer referred in submissions to claims made by the applicants that he acted in breach of his statutory duties under the Companies Act 1993. He submitted that the allegations were first raised in the applicants' submissions and should not be considered by the Authority. He also submitted that the Authority does not have

jurisdiction to consider the claims. The statutory context may go to whether the duty of fidelity has been breached[8]. However, I consider I do not need to take that matter further given I otherwise find that Mr Mortimer breached his duty of good faith.

[45] I find that Mr Mortimer owed a duty of fidelity, good faith and honesty to RTC. Having regard to Mr Mortimer's very senior position, the duty of fidelity owed was elevated.[9] He did not owe such a duty to RPC nor RGL. However, I find that Mr Mortimer's actions, including in entering into the Third Supply Agreement on RPC's behalf, breached his obligations to RTC. The entities are very clearly related and the interests of the entities clearly linked. By taking the action he did, Mr Mortimer acted against the interests of RTC in a manner that, viewed objectively, undermined the necessary trust and confidence between employee and employer[10]. At the very least, he did so by taking action that was contrary to RTC's interests.

[46] I find that Mr Mortimer breached the implied duty of fidelity that he owed to RTC.

Mr Mortimer's duties under the IEA

[47] Clause 6 of the IEA forms part of the introduction to the IEA and provides as follows:

> During your employment you agree to act in an open and honest manner and to undertake your duties and responsibilities in a professional manner at all times, with a commitment to good relationships with clients and other persons or companies with whom the Company has business relationships or potential relationships. Your obligations to the Company extend to conduct outside of work where such conduct can be linked back to your employment.

[48] I am satisfied that Mr Mortimer breached clause 6 of the IEA. Clause 6 contains broad statements as to the way an employee is expected to act. The relevant duty, such as it is, is to "undertake your duties and responsibilities in a professional manner at all times". By failing to disclose his conflicts of interest, and by entering into the supply agreements in those circumstances, Mr Mortimer failed to act in an open and honest manner and did not undertake his duties in a professional manner.

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[8] *Lowe v Tararua District Council* [1994] 1 ERNZ 887 (EmpC).
[9] *Morris v Interchem Agencies Ltd* [2003] 1 ERNZ 93 (CA).
[10] *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507 (CA).

[49] Clause 43 of the IEA deals with conflicts of interest, and provides:

> You agree that without prior written approval from the Company you will not engage in any other employment or retain an interest in any other business (other than by virtue of holding normal investments in Company shares of a Company listed on an official stock exchange) which either directly or indirectly will place you in competition with the Company, or which, in the opinion of the Company might interfere with the proper performance of your duties to the Company.

[50] Mr Mortimer accepts he breached his employment agreement by failing to disclose an interest in CPI and by failing to seek approval in relation to that interest. He accepts that his duties and responsibilities required him to engage on behalf of RTC and that his interest in CPI might interfere with the proper performance of his duties.

[51] I find that Mr Mortimer breached clause 43 of his IEA.

[52] Clause 40 of the IEA deals with the application of company policies and procedures, and provides:

> You agree to read and comply with Company policies, procedures and house rules including disciplinary procedures.
>
> Such rules, policies and procedures do not form part of your employment agreement and can be changed, replaced or withdrawn at any time at the discretion of the Company. Breach of any of the Company's rules, policies or procedures may result in disciplinary action being taken against you.

[53] Mr Mortimer denies any breach of RGL's Delegated Authority Policy on the basis that the supply agreements did not bind the RPC for any sustained period of time. Mr Mortimer said that the Chief Financial Officer at the relevant time was responsible for enforcing the Delegated Authority Policy, was a co-signer on all payments made to CPI, and that no concerns were raised by them.

[54] Mr Mortimer submitted that the Delegated Authority Policy was otherwise unclear in that referred to supplier contracts but noted that multi-term agreements required board approval. He also referred to Mr Loughlin's evidence that no training was provided in relation to the policy.

[55] Further to clause 40 of the IEA, Mr Mortimer submitted that the Delegated Authority Policy did not form part of his employment agreement. He submitted that clause 40 of the IEA, such as it required compliance with company policies and procedures, applied only to RTC, and that the policy was not RTC's but rather was RGL's.

[56] I am not satisfied that Mr Mortimer breached clause 40 of his IEA. I am neither satisfied that it was clear that the Delegated Authority Policy was a policy and procedure of RTC, nor that the Delegated Authority Policy required Mr Mortimer to obtain approval from the board in relation to each of the three supply agreements. I would, in any event, have considered the relevant conduct of the same nature as the alleged breach of clause 43 of the IEA.

[57] Additionally, I would have declined to issue a penalty in relation to this alleged breach on the basis that I would have considered the alleged conduct inadvertent rather than deliberate, noting that whilst approval was not sought from the board, I do not consider Mr Mortimer's conduct such that indicates an understanding that approval was required in accordance with any policy or procedure.

[58] I conclude that Mr Mortimer breached his s 4 duty of good faith, his implied duty of fidelity, and clauses 6 and 43 of his employment agreement. Those breaches related to his employment with RTC as his sole employer.

Does the ROS preclude the claims made against Mr Mortimer?

[59] Paragraphs 14 and 15 of the record of settlement provide:

> 14. This Agreement is a full and final settlement of any claims of any kind arising out of the Employee's employment with the Employer (including the termination of the employment relationship) that the Employee may have against the Employer, its agents, employees, directors or shareholders and any related entities to the Employer including Rockit Global Limited.
>
> 15. The terms of this agreement are final and binding on both parties.

[60] I find that the ROS does not preclude the claims made against Mr Mortimer. The ROS, while expressing the terms to be full and final on both parties, only seeks to bar any claims by Mr Mortimer. It does not include a reciprocal bar to claims made by RTC or its related entities.

Has Mr Mortimer breached the ROS?

[61] Paragraph 3 of the Record of Settlement provides:

> The Employee will faithfully and diligently serve the interests of the Employer up to the Termination Date. During the notice period the Employee will work closely with and report to the Chairman of the Employer's Board of directors who will act as Executive Chairman during that period. The Employee will use

> his best endeavours to ensure a smooth handover of duties and all business information on the Termination Date to the person nominated by the Employer.

[62] Mr Mortimer denies any breach of the ROS and says that entering into the Third Supply Agreement during the relevant period before the end of the employment was in accordance with his duty to faithfully and diligently serve the interests of RTC. He contends that the duty is clearly limited to RTC and that the actions alleged to have been in breach had no impact on RTC's interests.

[63] I do not accept Mr Mortimer's submissions as to RTC's interests. While I accept the duty is limited to RTC, I find RTC had interests that were impacted. Those interests included that any work performed by Mr Mortimer met appropriate ethical and commercial standards. Mr Mortimer's involvement with the Third Supply Agreement was as an employee of RTC. I do not consider the fact that RTC was not a signatory to the Third Supply Agreement to be an impediment to the claim in circumstances where the commercial interests of the three applicants were intertwined and Mr Mortimer's actions were undertaken in the course of his employment.

[64] I find that Mr Mortimer breached the ROS by entering into the Third Supply Agreement not having disclosed his conflict of interest.

Has RTC breached the record of settlement?

[65] Mr Mortimer claims that RTC has breached the record of settlement by making negative comments about him. He submitted that Mr Dykes' response to questioning was that negative comments had been made by senior management of RTC. Mr Mortimer also gave evidence as to what he claims was information relevant to the allegations.

[66] Clause 12 of the record of settlement provides:

> Neither the Employer nor the Employee will speak negatively of the other privately or publicly to any third party. For the purposes of this clause the Employer includes its board of directors and senior management team.

[67] Mr Mortimer's evidence was that he was aware that Mr Loughlin had informed several individuals that Mr Mortimer had behaved "very dishonestly". In effect, Mr Mortimer's claims were little other than assertions made about conduct that he was not witness to. Further, I consider the evidence of Mr Dykes insufficient to establish Mr Mortimer's claims. Ultimately his evidence was that any comments about Mr Mortimer

were not derogatory nor any different to "odd quips" that were made about anyone else. There was an absence of direct evidence in support of Mr Mortimer's claims.

[68] I am not satisfied that Mr Mortimer's claims have been made out and his claim that RTC breached the ROS is unsuccessful.

Should a penalty, or penalties, be imposed upon Mr Mortimer?

[69] Mr Mortimer submitted that any claim for penalties is out of time in terms of s 135(5) of the Act for two reasons. First, he contends that there was a conversation between he and Mr Loughlin in the first half of 2020 the result of which made his earlier failure to disclose his interest in CPI known to RTC. That alleged discussion is a matter of evidential contention. In the alternative, Mr Mortimer submitted that his prior interest in CPI became known, based on the evidence of Mr Ross, Mr Dykes, and Mr Loughlin, prior to 29 September 2020.

[70] As to the second contention, Mr Mortimer referred to the evidence of Mr Loughlin compiling a chronology on 5 October 2020 after earlier being advised of the concerns about Mr Mortimer's interest in CPNZ. Mr Mortimer submitted that Mr Ross' evidence was that his search was conducted not long after Mr Mortimer had left Rockit, that in questioning he confirmed that it occurred in July or a month after Mr Mortimer's employment ended, and that Mr Ross's employment ended in October 2020.

[71] Mr Mortimer submitted that Mr Loughlin's evidence as to his further discovery of issues on 5 October 2020 should be treated with caution given an absence of any supporting documents and the method said to have been used to contact the board members about the discovery and concerns, that being to call them each individually rather that raising the issue in correspondence to all of them.

[72] While there was an initial concern raised following the records being viewed by Mr Ross, I am not satisfied that that establishes that the courses of action included in the statement of problem first became known, or should have become known, to RTC at that time. I find that further information was necessary in order to sufficiently understand the situation, whether any wrongdoing had occurred, and what if any course of action was available. I accept Mr Loughlin's evidence as to the timing of the relevant matters coming to his attention and I find that the claims were made within the relevant limitation period.

[73] It is also claimed by Mr Mortimer that RPC and RGL were not party to the relevant employment agreement, regardless of any finding of joint employment, and that as such they have no standing to pursue an action for recovery of a penalty. I accept that submission.

[74] I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT* Ltd[11] and had regard to the mandatory considerations at s 133A of the Act.

[75] The maximum penalty in this case for a single breach is $10,000.[12] There are a total of five breaches in relation to which I need to consider further the issue of penalty. I consider the breaches of clause 6 and 43 of the IEA, the implied duty of fidelity, and duty of good faith to be sufficiently linked such as to globalise them. The breach of the ROS is in my view of a different character, having regard to the objects relevant to such settlements and s 149(4) of the Act.

[76] I consider that the appropriate course it to take a starting point that there are two distinct breaches, the total maximum penalties amounting to $20,000.

[77] The breaches are not trivial, and I find that all the breaches are serious.

[78] I consider the breaches relevant to the disclosure of the conflict of interest were deliberate rather than inadvertent. While I do not find that the failure to disclose the conflict of interest was necessarily motivated by personal gain, I find that Mr Mortimer, as an otherwise diligent CEO, was aware that he was required to disclose any such interest and that he should not have proceeded to enter the supply agreements, at least absent disclosure. Even if I were wrong about that, I would have found that his actions were seriously reckless in circumstances where he should have known that disclosure was required as an otherwise competent CEO.

[79] While Mr Mortimer, on the face of it, sought to raise and/or resolve the issue of his shareholding and conflict in the email sent to Mr Loughlin, I do not accept that that approach was genuine. I find that Mr Mortimer sent the email in knowledge that questions had been raised about his involvement in CPI in order to try and avoid further

[11] [2016] NZEmpC 143.
[12] Employment Relations Act 2000, s 135(2)(a).

scrutiny. While I consider that to be the case, I do not find that Mr Mortimer was necessarily motivated by personal gain when entering the Third Supply Agreement.

[80] Despite his assertions to the contrary, I find that Mr Mortimer stood to financially benefit from his shareholding in CPI. Such benefit would have been conditional on the ongoing commercial arrangements continuing and the ongoing supply of product to RPC. There is no evidence to suggest Mr Mortimer derived any actual financial benefit from the arrangements, and that is not what has been claimed. The fact that Mr Mortimer was in a position where that was possible is sufficiently problematic.

[81] There is no apparent history of similar compliance issues relating to Mr Mortimer. Having regard to the severity of the breaches, and mitigating and aggravating factors, I consider an appropriate starting point as being 30 percent in relation to each of the two breaches. Having considered the issue of proportionality, I consider a global penalty in the total sum of $6,000 appropriate.

[82] I order that Austin Mortimer make payment, within 28 days, of a penalty of $6,000. $3,000 of that sum is to be paid to the Authority via the Crown account, and $3,000 to Rockit Trading Company Limited.

Summary of orders

[83] I order that Austin Mortimer make payment, within 28 days, of a penalty of $6,000. $3,000 of that sum is to be paid to the Authority via the Crown account, and $3,000 to Rockit Trading Company Limited.

Costs

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

[85] If they are not able to do so and an Authority determination on costs is needed the applicants may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Mortimer would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[86] 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.[13]

Rowan Anderson
Member of the Employment Relations Authority

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