

ATTENTION IS DRAWN TO  
THE ORDER PROHIBITING  
PUBLICATION OF CERTAIN  
INFORMATION REFERRED  
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 182  
3030058

BETWEEN            AN ENGINEERING  
                             CONSULTING FIRM  
                             Applicant

A N D                PQR  
                             Respondent

Member of Authority:    David Appleton

Representatives:        Charlotte Parkhill and Ellie Domigan, Co-counsel for  
                                 Applicant  
                                 Respondent in person

Investigation Meeting:    5 July, 27 and 28 August 2018 at Dunedin

Submissions and further  
information received:    18, 20 September, 29 October & 30 November 2018  
                                 from Applicant  
                                 31 August, 17, 24 October 2018 and 7 December 2018  
                                 from Respondent

Date of Determination:    12 December 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A.    I grant the prohibition from publication orders sought by the applicant.**
- B.    The respondent breached the terms of the record of settlement**

**between the parties by making disparaging remarks about the applicant and its employees in relation to project A, retaining documents belonging to the applicant in relation to project A, and failing to treat his employment relationship problem as fully and finally settled in relation to project A.**

- C. The respondent did not breach the terms of the record of settlement between the parties in relation to project B.**
- D. Compliance orders are made against the respondent.**
- E. A penalty of \$8,000 is imposed upon the respondent.**
- F. Costs are reserved.**

### **Employment relationship problem**

[1] The applicant, an engineering professional services consulting firm, alleges that the respondent, a chartered structural engineer formerly employed by it, has breached the terms of a record of settlement between them by:

- (a) making disparaging remarks about it and its employees,
- (b) retaining documents belonging to it without its consent; and
- (c) not treating matters arising out of the employment relationship as being fully and finally settled.

[2] The applicant seeks compliance orders pursuant to ss 137 and 151 of the Employment Relations Act 2000 (the Act). It also seeks the imposition of a penalty upon the respondent in relation to the alleged breaches of the record of settlement.

[3] The respondent asserts that he has not breached the terms of the record of settlement as comments made by him relied upon by the applicant were protected disclosures made pursuant to the terms of the Protected Disclosures Act 2000. He also argues that documents retained by him were excluded from the scope of the terms of the record of settlement as they were held digitally, and/or that the time within which to return the documents had expired.

[4] The applicant also seeks wide prohibition from publication orders which the respondent opposes.

[5] In his submissions in reply, the respondent sought “punitive damages against the claimant of sufficient magnitude to discourage a corporation like [the applicant] from undertaking unlawful actions as identified here in contradictions of sections 6, 17 and 18 of the PDA 2000 Act”. I shall take this purported action no further as it was not pleaded as a counterclaim. In any event, it is not at all clear on what legal basis such an action could be pursued in the Authority.

[6] I note that the respondent has attempted to introduce new evidence and new allegations into his submissions that the applicant has not had the chance to address in cross examination and its own evidence in chief. This new evidence includes:

- (a) An allegation that there has been an “unlawful, corrupt or irregular use of public funds or resources of a public sector organisation...”;
- (b) That Messrs X and Y made (and continue to make) “repeated calculation errors, such as with Chc(Tp) and Chi”;
- (c) An apparent “peer review” of the seismic assessment of Building A; and
- (d) An “IT Forensic Analysis of the 90% calculations first draft file”.

I address some of this new evidence in more detail below but, in summary, I decline to allow it to be admitted at this very late stage.

### **Prohibition from publication orders**

[7] The applicant has applied for non-publication orders which are opposed by the respondent. The applicant seeks suppression of the parties’ names, the names of the engineers referenced in the evidence, the consulting projects in relation to which the respondent has criticised the applicant’s work and all details that may identify these elements. The applicant’s reasons are that:

- (a) The respondent has made serious and unsubstantiated allegations about the safety of a building and engineering practices of the applicant’s engineers which the Authority

does not have the technical expertise to verify. Any airing of the issue in the public domain could lead to significant and unjustified concerns about the safety of the building at the centre of one of the respondent's complaints. This in turn could have an impact on people who are not a party to the Authority's proceedings.

- (b) A public determination recording the complaints about the two engineers who are the main focus of the respondent's complaints would prolong and increase the distress they have already been caused. One of the two has not given evidence and a third engineer who was also criticised by the respondent has also not done so.
- (c) The applicant itself risks having its reputation damaged by allegations of malpractice which the Authority is not in a position to determine.
- (d) Identification of the respondent would lead to the applicant, and the engineers, being identified.

[8] The respondent opposes the application for prohibition from publication orders. His reasons may be summarised as follows:

- (a) The application is an attempt to muzzle him so as to suppress embarrassing data from public viewing.
- (b) It is in the public interest for the data to be made public.
- (c) The applicant could have rebutted the respondent's claims by way of its own engineering data.
- (d) Non publication orders would be in breach of the United Nations 1948 Universal Declaration of Human Rights and the New Zealand Human Rights declarations for free speech and freedom of expression.

*Discussion of the application for non-publication orders*

[9] The Authority has a wide discretion to follow any procedure it considers appropriate (s 160(1)(f) of the Act) and has the express right to order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published,

and any such order may be subject to such conditions as the Authority thinks fit (Clause 10(1) of Schedule 2 of the Act).

[10] The starting point is that the principle of open justice should be observed by the Authority in its proceedings. However, there are a number of aspects of this case which provide convincing reasons to depart from that principle:

- (a) I have found for the reasons set out in the body of this determination that the respondent breached the terms of the record of settlement by which he was bound by making disparaging remarks about the applicant and three of its engineers in respect of what I have called project A and building A.
- (b) I have also found that the respondent is not protected by the Protected Disclosures Act in respect of these disparaging remarks.
- (c) It would wholly defeat the purposes of the non-disparagement clause in the record of settlement to identify the company and engineers who were the subject of the disparaging remarks.
- (d) The respondent relies on technical engineering arguments to justify his remarks about the unsafe condition of building A which the Authority neither has the expertise to verify, nor the jurisdiction to decide. I have been able to determine that the respondent did not have reasonable grounds for believing the disclosures he made about project A without having to address those technical arguments. However, it would not be appropriate for the applicant to have to address these technical arguments about the safety of building A in a public forum, which it may have to if they were made public.
- (e) Only one of the three engineers criticised by the respondent has had the opportunity to address the criticisms in detail before the Authority. None of the engineers are parties to these proceedings. The criticisms of two of the engineers are extremely serious and could have very serious adverse effects upon their professional standing in the eyes of the public. Engineering New Zealand (ENZ) has already considered these criticisms within the scope of its jurisdiction and has rejected them. It could do real harm to the

professional standing of these engineers to be publically identified as the subjects of these criticisms.

- (f) The reputation of the applicant company itself could also be unfairly harmed by being identified.
- (g) The respondent is not being muzzled, as he put it, as I have taken into account the limits of the scope of the non-disparagement clause in the compliance orders I make at the end of this determination. The respondent has the protection of the Protected Disclosures Act, provided he uses it in good faith, and there are professional bodies such as ENZ and the local territorial authorities to which he can apply if he has genuine concerns about the safety of specific buildings.
- (h) Airing these concerns in a public forum via his defence of the applicant's proceedings, however, is not the appropriate approach. This is especially the case as he has now sought to significantly widen his allegations against the applicant and two of the engineers via his written submissions without having given the applicant the opportunity to cross examine him about them. Having said that, these new allegations have no place in the current proceedings in any event and they are quite irrelevant to the application before the Authority.
- (i) It is therefore important that these serious allegations are not aired in public through the publication of this determination as they have the potential to cause public anxiety about the safety of buildings before any competent analysis has been carried out.

[11] Having reached these conclusions, I accept that it is appropriate for wide ranging prohibition from publication orders to be made, primarily to protect the applicant's employees. The following prohibition from publication orders, coupled with the compliance orders at the end of this determination, are made in order to ensure that any concerns genuinely held by the respondent are raised in an orderly way, and through the proper channels.

[12] I prohibit from publication on a permanent basis any information, save as otherwise set out in this determination, that could lead to the identification of:

- (a) the applicant company;

- (b) the three engineers who were the subject of criticisms by the respondent in respect of project A and building A (defined below). They shall be referred to in this determination as Mr X, Mr Y and Mr Z, respectively;
- (c) the design project carried out by the applicant on which the respondent worked prior to his leaving the employment of the applicant, which is the subject of comments made by the respondent to ENZ relied upon by the applicant as evidence of a breach of the record of settlement. The project shall be referred to as project A and the building which was the subject of the project as building A;
- (d) the seismic assessment project carried out by the applicant in relation to another public building, in respect of which the respondent sat on its works committee. The project shall be referred to as project B and the building which was the subject of the project as building B;
- (e) the respondent. He shall be referred to as 'PQR<sup>1</sup>' or 'the respondent' in this determination.

[13] I include the identity of the respondent in this prohibition from publication order because identifying him would very likely lead to the identification of the applicant, and then of the three engineers, and the two projects.

### **Brief account of the material events**

[14] Until 24 November 2016 the respondent was employed by the applicant as a structural engineer with significant experience in the design of buildings, professional consulting and research experience as an earthquake engineer. He has a special interest and expertise in the assessment of buildings for potential seismic hazards.

#### *Project A*

[15] In 2013 the applicant company was tasked with assessing the seismic strength of a heritage building A. It was later tasked with designing the strengthening work with the assessment in mind. The work was to be done in three stages. The first stage, an initial seismic assessment, was completed in 2013. The respondent was not involved in that stage.

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<sup>1</sup> These are randomly selected initials bearing no relation to the respondent's name

The second stage was the preparation of a detailed seismic assessment (a DSA) which the respondent authored. This was completed and delivered to the building owner client around December 2014. The third stage was the completion of strengthening design work to assist in bringing the building up to 67%NSB (New Building Standards). The respondent was primarily responsible for that strengthening design work as well, and it was carried out between August 2015 and February 2016.

### *The DSA*

[16] The DSA was authored by the respondent and reviewed and approved for release by Mr Y, a senior structural engineer who was in charge of that stage of the work. There were a number of key findings in the DSA which need to be noted, as they are relevant to the assessment of whether the respondent had reasonable grounds for asserting that there had been malpractice by the applicant and by Mr X and Mr Y, and that Building A presents a risk to public health and safety.

[17] First, the DSA assessed the seismic resistant capacity of the original parts of the building as 35%NBS. This means that it was assessed as not being earthquake prone<sup>2</sup>, and so was an important finding in terms of remediation work that was required. A more recent addition to Building A was assessed at 58%NBS. It is important to note that, even if this particular building had been assessed as earthquake prone, its owners would still have had 25 years to remedy it under the Building Act 2004.

[18] In addition, the DSA stated that, if its strengthening recommendations were to be carried out, Building A would have a seismic capacity of 67%NBS, and so would not be considered to be “potentially an earthquake risk”. The strengthening recommendations were:

- (a) Repointing weathered mortar with a new lime mortar, prepared by an experienced stone mason in consultation with the project heritage consultant;
- (b) The installation “now” of stainless steel anchorages from the upper concrete floor to the stone walls;
- (c) The replacement of deteriorated rotting original roof framing “now or in the near future for the two storey stone section”;

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<sup>2</sup> Any assessment of 34%NBS or below would have deemed the building to be earthquake prone.

- (d) The installation of stainless steel anchorages between the top of the two story stone walls and the roof framing after the compromised roof framing had been replaced;
- (e) Repairing deteriorated roof framing and installation of anchorages in the one storey section in no more than fifteen years;
- (f) Bracing parapets greater than 500mm in height; and
- (g) Installing through-stones over the full wall thickness.

*The strengthening design work and quality assurance reviews of Project A*

[19] Around August 2015, the applicant was given the strengthening design work by the owners of Building A. In accordance with the quality assurance (QA) programme operated by the applicant a review takes place at various points of the design work carried out by a design engineer, although the respondent says this did not occur very often in reality when he was working there. Under the QA process, the reviews are potentially carried out at the 5%-10% stage of the project, the 50% stage and the 90% stage.

[20] According to the respondent, in early September 2015 at the 5% -10% point, he sent a calculation file of that stage of the project to the team leader, Mr X, for review. By mid-September 2015, the respondent's health had deteriorated, and he was required to undergo surgery. The respondent returned to work in November 2015 and then reminded Mr X that his 5%-10% calculations had not been checked. The respondent says he did the same on 20 January 2016, although he had by now reached the 50% point of his work. The respondent accordingly created a 50% calculation file, and later, a 90% calculation file.

[21] The respondent says that, sometime before 16 February 2016, a "graduate engineer" (Mr Z) carried out a review of the 5%-10% calculations, believing that he was reviewing the 90% calculations. According to the respondent this was a significant mistake. The respondent also says that the 50% and 90% reviews were never completed.

[22] According to Mr X, there is no trace of the respondent sending the 5%-10% file to him on 2 September 2015 for review and the timesheet records show that the strengthening design work did not commence till 25 November 2015 in any event. Mr X says that he carried out a 50%, high level review with the respondent at his desk on 2 December 2015 and that the

respondent sent him a calculation file to review the next day. Mr X says this is the first set of calculations sent to him by the respondent. The respondent on the other hand denies that a 50% review took place.

[23] Mr X says that the respondent sent him an updated calculation file to review on 20 January 2016, which the respondent sent again on 28 January. Mr X says that the document sent by the respondent in January 2016 is different to that sent in December the year before.

[24] On 29 January 2016 Mr X sent the respondent's January 2016 document to Mr Y for review, who reviewed the drawings but not the calculations as he could not understand them. Consequently, Mr X then sent the calculations to an "Intermediate Engineer<sup>3</sup>", Mr Z, on 17 February 2016 for checking and verification. The respondent was copied into this email, attaching the calculation file in question. Mr X says that he witnessed Mr Z and the respondent spend time working together on the calculations, which is reflected in the applicant's timesheets.

[25] On 18 February 2016, the respondent emailed to Mr X the revised calculations, saying "well done" to Mr Z for finding errors in the previous calculations. Mr Z was then asked to review these revised calculations. Mr Z and the respondent then spent more time working together to fix further errors in the calculations. The last day that the respondent worked on the calculations was 22 February according to the timesheets, although he sent further revised calculations to Mr X on 23 February. I note that Mr Z reviewed these on 24 February<sup>4</sup>.

[26] On 29 February 2016 the respondent emailed Mr Y and Mr X saying "the technical review of the calculations for the above referenced building has been successfully completed so you may distribute the PS1 and design statement to the client." Mr Y responds, saying "duly sent off". The respondent now says that he was "instructed" by Mr Y to send that email to Mr Y and Mr X.

[27] The PS1 is a 'Producer Statement' which is issued to the client and the territorial authority and which declares that the issuing engineer believes on reasonable grounds that the

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<sup>3</sup> The applicant says that Mr Z was not a "graduate engineer" as stated by the respondent, but had three years' experience at the time.

<sup>4</sup> Detailed comments were made by Mr Z on the respondent's calculations in "Technical Review Records", which were completed on 17, 18, 19 and 24 February.

building, if constructed in accordance with the drawings, specifications and the other documents provided or listed in the attached schedule, will comply with the relevant provisions of the Building Code and that the persons who have undertaken the design have the necessary competency to do so.

*Performance improvement process initiated*

[28] According to the applicant, the respondent spent 15 hours correcting the calculation errors that were found. The respondent denies he spent 15 hours correcting the errors but admits he spent time doing so. As a result of the errors found in the respondent's calculations, and because of other concerns about the accuracy of his work, a performance improvement process was then commenced.

[29] According to the applicant, soon after the respondent's performance concerns were raised with him, he went on sick leave and was away from work for over three months. In October 2016 the applicant wrote to the respondent regarding his ongoing absence and proposed terminating his employment for medical incapacity.

*The record of settlement*

[30] The parties then entered into negotiations at a formal mediation session facilitated by a mediator engaged by the Ministry of Business, Innovation and Employment, as a result of which a record of settlement was entered into by the parties on 24 November 2016. The respondent was represented by an organiser from the New Zealand Public Service Association at the mediation.

[31] One of the terms of the record of settlement was that the respondent would resign from his position as a senior structural engineer with immediate effect, and that he would be paid a compensatory sum. The following were also terms of the record of settlement:

4. That both parties agree not to make disparaging [sic] remarks about each other. In relation to [PQR] this includes not making disparaging remarks about officers or employees of [the applicant].
6. [PQR] agrees to return all property and documents belonging to [the applicant], including but not limited to any client related documents or [the applicant] intellectual property in [PQR]'s possession regarding issues raised at mediation and [PQR]'s mobile phone and access keys. [PQR] agrees to return this property by delivering this to Wains Hotel,

Princess Street, Dunedin by 12 noon on Saturday 25 November, 2016 in a sealed box or envelope marked for the attention of [redacted].

8. This is the full and final settlement of all matters between [PQR] and [the applicant] arising out of their employment relationship.

*Actions taken by the respondent after the settlement agreement*

[32] After the settlement agreement was entered into, the respondent says he was picnicking beside Building A in January 2017 and realised that the building “looked sick”. He says that major cracks were getting larger, some large enough to put his hand in. He says that a new cosmetic partial coating of “feeble mortar” had been applied but was falling off. He said that a parapet was loose and that there were severely cracked foundations.

[33] The respondent produced to the Authority at the investigation meeting on 5 July 2018 a number of photographs which appeared to depict these observations, although the Authority is not in a position to assess whether these issues render the building a risk to public health and safety. Mr X said in evidence to the Authority that the photographs do not disclose anything to suggest to an engineer that there is a risk to public health and safety and that the cracks have not got any worse since the initial assessment in 2013.

[34] On 9 February 2017 the respondent wrote to Mr X and Mr Y saying that the wrong calculation file had been reviewed, setting out a history of the events regarding the review of the file, and asking Mr X and Mr Y to “notify [the respondent] of any steps to redress these issues”. The respondent then wrote again to Mr Y, copying the email to Mr X, reiterating that the wrong file had been reviewed, referring to having been accused of “gross errors”, saying that Mr Z had used an incorrect method, and that he had not discovered that the wrong file had been reviewed until October 2016. He said that the PS1 that had been issued was based on the wrong calculations and needed to be retracted and the 90% calculations reviewed instead. He offered to help them get the “improper situation rectified”.

[35] No express mention was made in either of the emails to the respondent’s concerns about Building A being a risk to public health and safety. The focus was on the wrong file being reviewed and of him being accused of making gross errors.

[36] On 20 March 2017 Kensington Swan, on behalf of the applicant, wrote to the respondent’s PSA representative referring to the record of settlement and asserting that the

respondent had breached the non-disparagement clause, was still in possession of documents in breach of the return of property clause and was raising issues in breach of the full and final settlement clause of the record of settlement. The respondent says he never saw the letter because the PSA representative no longer acted for him. I accept that evidence.

[37] In or around April 2017 the respondent wrote to the Institute of Professional Engineers New Zealand (IPENZ), now known as Engineering New Zealand (ENZ), to say that he had been subject to an unfair disciplinary process, but IPENZ replied saying it did not have jurisdiction over companies and could not investigate employment issues. On 28 August 2017 the respondent corresponded again with IPENZ, and that later correspondence forms part of the basis for the applicant's action against the respondent.

#### *Further complaint to IPENZ*

[38] The respondent has taken a number of steps which the applicant relies upon in its claims against him. According to the applicant, since signing the record of settlement the respondent has made "inaccurate and critical claims against the applicant and its employees regarding [Project A]". The first action complained about is that the respondent wrote to IPENZ on 28 August 2017 making disparaging remarks about it and Mr X and Mr Y. The email was relatively long, but relevant extracts of the email to IPENZ are as follows:

This is a claim of structural engineering incompetence, negligence, malpractice, and lack of professionalism resulting in consequent public safety and health risks at the historic [Building A].

...

1/ The complaint is based on the behaviour of individual engineers [Mr X], and [Mr Y], around issues of competence, negligence, malpractice, and lack of professionalism. The complaint responds to my obligation to report where public safety is compromised - I wouldn't feel safe as an occupant of the subject building

It is hereby alleged that [Mr X] and [Mr Y] engaged in engineering practice that exhibited incompetence, negligence, malpractice, and lack of professionalism, in that they have performed engineering services in a negligent or incompetent manner as described in the Registration Act for chartered engineers.

...

5/ I made every effort to resolve these issues: Despite repeated emails requesting these issues be reviewed, over a period of 5 months, [Mr X] and [Mr Y] avoided discussing the issues of public safety and health. After my delivering a written alert to [Mr X] and [Mr Y] informing them that the wrong file was reviewed, and offering to help them correct the situation, my offer was dismissed.

I am now reporting an adverse consequence to you, after being unsuccessful to achieve resolution by direct communication with respondents, according to TM's responsibility as a chartered professional engineer and member of IPENZ.

It is argued that [Mr X] and [Mr Y] were operating in a dysfunctional section of the [the applicant's] corporate culture that caused the engineers to make mistakes on other projects, mistakes such as submitting projects as complete when no or inadequate quality assurance procedures were followed.

[39] The key allegations made by the respondent in relation to Project A are best summarised by replicating part of an email from IPENZ to Mr X and Mr Y dated 16 October 2017, asking for their comments. This stated as follows:

- [PQR] was involved in the seismic strengthening of a historical building located at [redacted - Building A].
- During the course of [PQR]'s work, a 90% internal peer review of [PQR]'s calculations, drawings and design concepts was ordered by Mr X. The review was undertaken by [Mr Z].
- On 24 February 2016, [Mr Z] issued his Technical Review Report on [PQR]'s work.
- [PQR] says that the wrong file was reviewed. He says that [Mr Z] reviewed his 5-10% complete file from September 2015 rather than his 90% completed file from February 2016.
- [PQR] says that he has serious concerns about the safety of the building. These concerns are centred around allowing 15 years to repair the severely deteriorated stone mortar and using cement rather than lime mortar in the building. [PQR] says that [Mr Y] and [Mr X] were told by the project conservation consultant that lime mortar must be used. [PQR] says that [Mr Y] and [Mr X] decided to conform with the owner's wish to use cement mortar despite the expert insisting on lime mortar.
- [PQR] says, according to the [the applicant's] Heritage Expert [redacted], the use of cement mortar can result in a chemical reaction with the subject historical stone building walls, is too brittle and should not be used.
- [PQR] says that [Mr Y] signed the PS1 using [PQR]'s name without [PQR]'s knowledge.
- [PQR] says that [Mr Y] did not have a detailed knowledge of the design of the seismic strengthening for the project to justify signing the PS1 himself.

[40] The respondent's complaint also stated that his 5%-10% file drew attention to issues with the existing decayed and rotten roof framing and that Mr X had advised to specify roof repairs by the owner, not an engineer, within 15 years, which "are two unprofessional practices that are a risk to public safety and health, and the reported 67%NBS rating was based on the assumption of new roof framing and new mortar".

[41] The respondent was essentially alleging that, because of the wrong calculation file being checked and the wrong mortar being recommended, the DSA report produced in respect of Building A over-estimated its seismic capacity. Whilst the DSA assessed its capacity at 35% NBS, the respondent alleged that Building A actually had a seismic capacity ranging from 17% NBS to near zero.

[42] As a result of the complaint, the legal adviser for ENZ wrote to Mr X and Mr Y asking a number of questions, which Mr Y answered in February 2018. These responses included the following points:

- (a) The applicant did not recommend one mortar over the other; it recommended that the client consult with specialist experts, including the Historic Places Trust, about the appropriate mortar to use.
- (b) The client had already been advised to repoint the stonework, and had confirmed it would take appropriate advice.
- (c) The respondent had written out the PS1, but not signed it, and had stated in writing that the PS1 could be released to the client. The client was chasing for the specifications and drawings, the respondent was out of the office, Mr Y knew the project, Mr X had checked the calculations and was satisfied the design was correct, and so Mr Y signed the PS1, (but with the respondent's name pp'ed). Also, the respondent was well aware of the PS1 being signed.

[43] After Mr Y had replied to IPENZ the respondent sent another email to IPENZ making further statements, including (but not limited to):

- (a) Pressure from the client had led Mr Y "to undertake a number of questionable actions".
- (b) Mr Y deliberately ignored structural concerns raised in the 90% calculations "at risk to public safety";
- (c) Mr Y "solicited a proposed draft of the PS1 from [the respondent] and subsequently dated and signed it himself";

- (d) “Had Mr Y been familiar with the project as claimed and had he looked at the 90% calculation file before signing the PS1 he would have noted that questions raised about rotten roof framing, the lack of mortar specifications, and the zero-mortar capacity of the stone-walls.....and thus concluded that the building ...was and is unsafe and unfit to occupy”.
- (e) Mr Y had “co-signed the DSA, he has claimed to have intimate knowledge of the project, but ostensibly did not realise the file submitted for TRR<sup>5</sup> review was the incorrect file”.
- (f) “There are four acts of engineering malpractice by Mr X and Mr Y that risk public safety:”

[44] In this email to IPENZ the respondent also set out what he says was proof that the wrong calculation file had been reviewed.

[45] On 11 December 2017, the respondent emailed the Central Otago District Council (CODC) stating that the DSA for Building A over-estimated its seismic capacity and asking a number of questions of the Council. This email does not make any directly critical remarks about the applicant, or of Mr X, Mr Y or Mr Z, although it refers to “a formal process ...being pursued regarding circumstances around this with the Engineer’s Registration Board – Engineering New Zealand”.

[46] ENZ rejected the respondent’s complaints on 22 August 2018. The current regional Business Manager for the applicant says in evidence that, with respect to Building A, and the respondent’s communication with CODC, the Council has advised him that the respondent’s concerns would be placed on file and that it has not taken any additional steps.

*Comments copied to the Works Committee of Building B*

[47] The applicant also alleges that the respondent has been “obstructive” on project B, writing to Mr X and Mr Y, the authors of a report to the works committee for Building B, with “substantive and largely unfounded criticism”.

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<sup>5</sup> Technical Review Record

[48] The respondent sits on the works committee of Building B, a large building open to the public, as its only structural engineer. It was he who originally introduced the works committee as a client of the applicant, although I have seen no evidence that the respondent himself worked on Project B while employed by the applicant. The communication complained about by the applicant was an email from the respondent to Mr Y dated 5 April 2018 addressing answers that Mr Y had given in response to questions posed by another person who was connected with the committee about Mr Y's structural assessment of Building B. The respondent's email was copied to three members of the committee.

[49] There are three comments in the email which the applicant complains of:

Your [applicant] data miss-quotes our [building B] questions in your tabular [applicant] response of March 12 below.

Your [applicant] email of 12 March is also misleading.

Nor do we wish to suffer higher insurance premiums for [Building B] because of unnecessarily low %NBS scores just for the sake of making it supposedly easier to raise grant funds – for much higher strengthening costs. This seems like false economics and inappropriate behaviour with regard to expenditures of public monies.

[50] The applicant's regional Business Manager says that he attended a meeting with the Chair of the works committee for Building B to discuss the respondent's concerns and that the Chair told him that the respondent's response to the applicant's report about Building B was not approved by the works committee and the applicant was asked to ignore it. The applicant's regional Business Manager states in evidence that the applicant is concerned that, if the respondent continues to disparage the applicant, and be critical of its work without foundation, it could seriously damage its professional reputation with other clients.

#### *Retention of documents*

[51] The applicant also argues that the respondent has retained a number of documents which should have been returned pursuant to the terms of the record of settlement. These documents comprise, at least, the DSA for Building A, various calculation documents for Building A<sup>6</sup>, the PS1 for Building A and a technical review record for Building A. The

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<sup>6</sup> One of these is a document which the applicant says was not produced on its system, and which has been created by the respondent on his own computer, based on calculations for Building A.

respondent says that the terms of the settlement agreement did not extend to electronic documents.

### **The issues**

[52] The following issues are to be determined by the Authority:

- (a) Has the respondent breached the terms of the record of settlement by making disparaging remarks about the applicant and its employees Mr X and Mr Y?
- (b) Has the respondent breached the terms of the record of settlement by failing to return documents belonging to the applicant?
- (c) Has the respondent breached the terms of the record of settlement by not treating the matters arising from his employment relationship with the applicant as fully and finally settled?
- (d) If the answer to any of these questions is in the affirmative, should:
  - i) penalties be imposed on the respondent?
  - ii) compliance orders be made?

### **Has the respondent breached the terms of the record of settlement by making disparaging remarks?**

[53] The remarks made by the respondent that I shall examine are those made in his complaint to IPENZ of 28 August 2017, essentially repeated in an email to ENZ (as it was then) dated 11 December 2017 about project A, and those made in his email dated 5 April 2018 to the works committee of project B. I shall not consider the remarks made in an email to IPENZ from the respondent dated 28 March 2017, as this email was not referred to in the statement of problem, nor in the applicant's briefs of evidence.

### *The legal framework*

[54] Section 151 of the Act allows the agreed terms of settlement to be enforced by compliance order under s 137, provided that the agreed terms of settlement are enforceable by the parties under s 149(3).

[55] Section 149 provides as follows:

### **149 Settlements**

(1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—

(a) who is employed or engaged by the chief executive to provide the services; and

(b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—  
may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.

(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—

(a) explain to the parties the effect of subsection (3); and

(b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.

(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017; and

(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

(3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.

(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[56] The record of settlement in question is signed by Jan Samuel, a mediator of the Ministry of Business Innovation and Employment, and contains the certification required by s 149. I am therefore satisfied that the record of settlement is one which is enforceable pursuant to s 151 of the Act.

[57] The respondent asserts that the statements he has made are protected disclosures pursuant to the Protected Disclosures Act. Relevant sections of the Protected Disclosures Act are as follows:

### **3 Interpretation**

(1) In this Act, unless the context otherwise requires,—

**appropriate authority**, without limiting the meaning of that term,—

(a) includes—

(i) the Commissioner of Police:

(ii) the Controller and Auditor-General:

(iii) the Director of the Serious Fraud Office:

(iv) the Inspector-General of Intelligence and Security:

(v) an Ombudsman:

- (vi) the Parliamentary Commissioner for the Environment;
- (vii) the Independent Police Conduct Authority;
- (viii) the Solicitor-General;
- (ix) the State Services Commissioner;
- (x) the Health and Disability Commissioner; and
- (b) includes the head of every public sector organisation, whether or not mentioned in paragraph (a); and
- (c) includes a private sector body which comprises members of a particular profession or calling and which has power to discipline its members

**employee**, in relation to an organisation, includes—

- (a) a former employee

**protected disclosure of information** has the meaning given to it by section 6(2)

**serious wrongdoing** includes any serious wrongdoing of any of the following types:

...

- (b) an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment;

...

whether the wrongdoing occurs before or after the commencement of this Act.

### **5 Purpose of Act**

The purpose of this Act is to promote the public interest—

- (a) by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation; and
- (b) by protecting employees who, in accordance with this Act, make disclosures of information about serious wrongdoing in or by an organisation.

### **6 Disclosures to which Act applies**

(1) An employee of an organisation may disclose information in accordance with this Act if—

- (a) the information is about serious wrongdoing in or by that organisation; and
- (b) the employee believes on reasonable grounds that the information is true or likely to be true; and
- (c) the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and
- (d) the employee wishes the disclosure to be protected.

(2) Any disclosure made in accordance with subsection (1) is a protected disclosure of information for the purposes of this Act.

(3) If an employee of an organisation believes on reasonable grounds that the information he or she discloses is about serious wrongdoing in or by that organisation but the belief is mistaken, the information must be treated as complying with subsection (1)(a) for the purposes of the protections conferred by this Act and by section 66(1)(a) of the Human Rights Act 1993.

(4) This section is subject to section 6A.

### **6A Technical failure to comply with or refer to Act**

(1) A disclosure of information is not prevented from being a protected disclosure of information for the purposes of this Act merely because—

- (a) of a technical failure to comply with sections 7 to 10 if the employee has substantially complied with the requirement in section 6 to disclose the information in accordance with this Act; or

(b) the employee does not expressly refer to the name of this Act when the disclosure is made.

### **7 Disclosure must be made in accordance with internal procedures**

(1) An employee must disclose information in the manner provided by internal procedures established by and published in the organisation, or the relevant part of the organisation, for receiving and dealing with information about serious wrongdoing.

(2) This section is subject to sections 12 to 14.

### **8 Disclosure may be made to head of organisation in certain circumstances**

(1) A disclosure of information may be made to the head or a deputy head of the organisation if—

(a) the organisation has no internal procedures established and published for receiving and dealing with information about serious wrongdoing; or

(b) the employee making the disclosure believes on reasonable grounds that the person to whom the wrongdoing should be reported in accordance with the internal procedures is or may be involved in the serious wrongdoing alleged in the disclosure; or

(c) the employee making the disclosure believes on reasonable grounds that the person to whom the wrongdoing should be reported in accordance with the internal procedures is, by reason of any relationship or association with a person who is or may be involved in the serious wrongdoing alleged in the disclosure, not a person to whom it is appropriate to make the disclosure.

(2) This section is subject to sections 12 to 14.

### **9 Disclosure may be made to appropriate authority in certain circumstances**

(1) A disclosure of information may be made to an appropriate authority if the employee making the disclosure believes on reasonable grounds—

(a) that the head of the organisation is or may be involved in the serious wrongdoing alleged in the disclosure; or

(b) that immediate reference to an appropriate authority is justified by reason of the urgency of the matter to which the disclosure relates, or some other exceptional circumstances; or

(c) that there has been no action or recommended action on the matter to which the disclosure relates within 20 working days after the date on which the disclosure was made.

(2) This section is subject to sections 12 to 14.

### **18 Immunity from civil and criminal proceedings**

(1) No person who—

(a) makes a protected disclosure of information; or

(b) refers a protected disclosure of information to an appropriate authority for investigation—

is liable to any civil or criminal proceeding or to a disciplinary proceeding by reason of having made or referred that disclosure of information.

(2) Subsection (1) applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice.

### **20 False allegations**

The protections conferred by this Act and by section 66(1)(a) of the Human Rights Act 1993 do not apply where the person who makes a disclosure of information makes an allegation known to that person to be false or otherwise acts in bad faith.

### **23 No contracting out of Act**

(1) This Act has effect despite any provision to the contrary in any agreement or contract.

(2) Any provision in any agreement or contract that purports to require an employee to withdraw or abandon a disclosure of information made under this Act is of no effect.

[58] Sections 12 to 14 of the Protected Disclosures Act address special rules and procedures relating to intelligence, security and international relations, none of which apply to this matter.

[59] In order to consider whether the respondent's comments to third parties were in breach of the record of settlement, the following sub-issues therefore need to be considered:

- (a) Were the comments disparaging of the applicant and/or its employees? If so,
- (b) Did the comments contain information about serious wrongdoing by the applicant or its employees? If so,
- (c) Did the respondent believe on reasonable grounds that the information was true or likely to be true? If so,
- (d) Did the respondent wish to disclose the information so that the serious wrongdoing could be investigated? If so,
- (e) Did the respondent wish the disclosure to be protected? If so,
- (f) Did the respondent disclose the information in accordance with ss 7, 8 or 9 of the Protected Disclosures Act?
- (g) Was the respondent otherwise obliged to disclose the information by virtue of the Chartered Professional Engineers of New Zealand Rules?

### **Were the comments disparaging of the applicant and/or its employees?**

[60] There appear in various hard copy and online dictionaries of English a number of different definitions of 'disparage'. These include the following:

The New Zealand Oxford English Dictionary<sup>7</sup>. 1. Speak slightly of; depreciate. 2. Bring discredit on.

Oxford Living Dictionary online Regard or represent as being of little worth.

Cambridge English Dictionary online. To criticize someone or something in a way that shows that you do not respect or value him.

Dictionary.com 1. Speak of or treat slightly; depreciate; belittle. 2. Bring reproach or discredit on; lower the estimation of.

Merriam Webster online – 1 To depreciate by indirect means; speak slightly of; 2 to lower in rank or reputation; degrade.

Black's Law Dictionary, 10<sup>th</sup> edition – 1. To speak slightly of; to criticize (someone or something) in a way showing that one considers the subject of discussion neither good nor important. 2. To degrade in estimation by disrespectful or sneering treatment.

[61] “Slighting” has the definition in the Oxford Living Dictionary online of “showing a lack of respect, insulting or disparaging”. “Depreciate” has, amongst its definitions in the Oxford Living Dictionary online, the meaning of “to belittle”.

[62] The respondent asserts that a disparaging remark has to be untrue, and relies on a definition contained in *Black's Law Dictionary*, 7<sup>th</sup> edition. I have been unable to access that edition, but upon checking the 8<sup>th</sup> edition<sup>8</sup> of this publication, I find that the third definition set out under “disparagement” is as follows:

A false and injurious statement that discredits or detracts from the reputation of another's property, product, or business. To recover in tort for disparagement, the plaintiff must prove that the statement caused a third party to take some action resulting in specific pecuniary loss to the plaintiff. Also termed *injurious falsehood*. -More narrowly termed *slander of title; trade libel; slander of goods*. See TRADE DISPARAGEMENT. Cf. *commercial defamation* under DEFAMATION. [Cases: Libel and Slander :>130, 133. C.J.S. *Libel and Slander; Injurious Falsehood* §§ 204-206, 209.]

[63] This definition is a specialist definition of the tort of injurious falsehood, and is not the one intended by the parties to the record of settlement I believe. The first and second definitions of “disparagement” in the 8<sup>th</sup> edition of Black's are as follows:

1. A derogatory comparison of one thing with another <the disparagement consisted in comparing the acknowledged liar to a murderer>. 2. The act or an instance of castigating or detracting from the reputation of, esp. unfairly

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<sup>7</sup> Deverson and Kennedy, *The New Zealand Oxford English Dictionary* (Oxford University Press, Victoria, Australia, 2005)

<sup>8</sup> Garner, *Black's Law Dictionary* (8<sup>th</sup> ed. Thomson West, USA, 1999)

or untruthfully <when she told the press the details of her husband's philandering, her statements amounted to disparagement>.

[64] In the 10<sup>th</sup> edition of Black's, there is added a gloss to the second definition of 'disparagement' as follows:

Although many disparagements are untruthful or otherwise unfair, falsity is not a requirement. Any statement cast in a negative light may amount to a disparagement in a general sense.

[65] Ms Parkhill has pointed out that the Employment Court has recently specifically stated, in *Lumsden v Skycity Management Limited*<sup>9</sup> that there is no additional requirement for untruthfulness or fabrication in the definitions of 'disparage'.

[66] "Disparage", therefore, has connotations of lowering the worth of, insulting and showing little regard for. I find that a disparaging remark may well be true, so long as it also lowers the worth of, insults and/or shows little regard for the subject or target of the remark.

[67] I also find that that was the intention of the parties in including that clause in the record of settlement. I say this because I believe that it is likely that the respondent wanted to restrain the applicant from repeating that he had made "gross errors". He has effectively admitted to the Authority that he did make such errors (saying they were "shocking"), and he is likely to have known that he had when he signed the record of settlement. Therefore, his intention was to prevent the applicant from making remarks about him which would have been true but which would have lowered his worth.

#### *Comments to IPENZ*

[68] When I regard the statements of the respondent in his complaint to IPENZ, I am satisfied that they are directly disparaging to Messrs X and Y. To say that a professional person has demonstrated "incompetence, negligence, malpractice, and lack of professionalism resulting in consequent public safety and health risks" clearly lowers the worth of, insults and shows little regard for that professional. There was criticism of Mr Z in addition, in that he was accused of having checked the wrong calculation file.

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<sup>9</sup> [2017] NZEmpC 30, at [37]

[69] In addition, the remarks are also disparaging to the applicant company itself, as the actions of Messrs X, Y and Z which were the focus of the respondent's criticisms were carried out in the applicant's name.

*Comments copied into the works committee of building B*

[70] Regarding the respondent's comments copied to the works committee, I believe that two of the three comments complained of do potentially constitute disparaging remarks. To accuse Mr Y of sending a misleading email, and to say that the %NBS scores for Building B were unnecessarily low and is inappropriate behaviour, do lower the worth of Mr Y, given his position as a professional engineer. To say his data misquotes the questions does not go that far, I believe, as the allegation could be seen to be flagging up an innocent error.

[71] However, it is necessary to consider to what extent the respondent can be restrained from making comments about the applicant and its employees which could be seen as disparaging, when the comments do not relate to matters arising out of the employment relationship between the parties. There must be a limit to the scope of non-disparagement restraints in order not to unreasonably fetter the right of a former employee from raising concerns about the performance of the functions of his or her former employer which do not relate to the former employment.

[72] By way of an example, if an individual was employed by a major bank and was subject to a binding settlement agreement with a non-disparagement restraint, and if that individual was also a customer of the same bank, the customer should not be prevented from raising concerns with the Banking Ombudsman, say, about the bank's service to him or her that arise post-employment.

[73] I believe that, if someone had said to the parties at the time of entering into the record of settlement "do you intend to be fettered from making potentially critical remarks about the other party in relation to matters that arise after this employment is over, and which do not relate to or arise from the employment?", they would have said no. The scope or reach of the clause cannot reasonably be interpreted to be unlimited, so as to cover all future possible relations between the parties. I find that the scope of the non-disparagement clause in this matter is limited to disparaging remarks which relate to or arise from the respondent's employment.

[74] I believe that the concerns that the respondent raised in his email regarding building B do not raise issues relevant to matters arising out of the employment relationship between the parties. They relate to work which had been done by the applicant after the end of employment. Furthermore, the respondent had standing as an adviser to the works committee which was not related to his former employment, and it was in that capacity that he wrote his email. The respondent was not happy with the approach taken by the applicant, and he had a legitimate reason to challenge it. He also had, I believe, a right to copy in members of the works committee as they had a direct interest in the works being proposed to building B.

[75] Therefore, I do not accept that the scope of the non-disparagement clause covers the communication made by the respondent and so the communication was not in breach of that clause.

[76] Having found that some of the remarks made by the respondent about the applicant, Mr X, Mr Y and Mr Z in respect of project A were disparaging I now need to determine whether the respondent has a defence under the Protected Disclosures Act.

**Did the comments made in the complaint to IPENZ contain information about serious wrongdoing by the applicant or its employees?**

[77] The comments made by the respondent to ENZ regarding Building A referred to alleged acts, omissions and/or a course of conduct of the applicant and its employees Mr X, Mr Y and Mr Z that, taken at face value, constituted a serious risk to public safety, as the respondent said that the building's seismic resistant capacity had been incorrectly assessed as being 35%NBS when it was significantly below that, and so the building was significantly earthquake prone.

[78] Whilst Ms Parkhill submits that the issues complained about (the mortar issue, the roof framing issue and the PS1 issue) did not constitute a serious risk to health or public safety or the environment, her arguments go more to the reasonableness of the respondent's beliefs about the issues, rather than the information being about serious wrongdoing.

[79] Adopting a plain reading of the requirement under s 6(1)(a) of the Protected Disclosures Act, I am satisfied that the information disclosed to IPENZ on 28 August 2017 was prima facie about serious wrongdoing in or by the applicant organisation.

**Did the respondent believe on reasonable grounds that the information was true or likely to be true?**

[80] The applicant asserts that the respondent is lying when he says that the incorrect calculation file was reviewed, and that the correct 90% file was assessed. The applicant says that the respondent only raised the complaint to IPENZ because he was still upset at having been accused of having made gross errors.

[81] The respondent says that his concerns about building A were reasonable and genuine. He relies partly upon a “peer review” which he has seemingly commissioned on building A since the Authority’s investigation meeting, carried out by a research assistant working in association with a Professor of the University of Auckland. The respondent disclosed an email from the research assistant sent to him on 25 September 2018. In the email the research assistant estimates the seismic rating of the building A at 9% to 12%NBS.

[82] It is impossible for the Authority to verify the accuracy of the research assistant’s calculation, as it lacks the expertise. In any event, the respondent has introduced evidence after the investigation meeting about which the applicant has not had the opportunity to question either the respondent or the research assistant. Furthermore, if the Authority were to admit this evidence, the applicant would have the right to instruct their own expert. In light of this, I decline to admit this late evidence, and put it to one side.

[83] When I review the respondent’s evidence which is admissible, I see a number of potential inconsistencies and illogicalities with it that cast significant doubt about its credibility. These are as follows:

*Wall height error*

[84] The respondent said in evidence that he corrected the errors when they were identified by Mr Z. One of the errors identified was that the respondent had designated the height of a wall in millimetres instead of metres (stating the wall was “2.9 mm” instead of 2.9 m). He says that he corrected this error. However, he also says that the 50% and 90% calculation files did not have this error in it.

[85] The evidence of Mr X is that the 50% stage had already been reached by 2 December 2015, as he did a review with the respondent on that date (which is supported by the

timesheets) and that the 90% stage had been reached by 17 February 2016, which is supported by an email from Mr X that date, asking him to prepare the PS1. Mr Z did not review the calculations (and identify the wall height error) until 17 February 2016.

[86] This brings into question why the respondent would have corrected the wall height error in the 5% calculations, unless he either knowingly corrected the 5% file (which seems pointless if he had by that point moved on to the 50% or 90% stage which did not contain that error anyway) or he himself mixed up the 5% calculations with his later calculations. Neither seems likely. The more likely explanation is that Mr Z was not working on the 5% calculation file, but the 90% calculation file.

#### *Timesheet evidence*

[87] The evidence from the timesheets for Project A strengthening shows that Mr Z and the respondent both worked on the calculations at the same time, after they had been sent to Mr Z by Mr X. Mr X also says in his evidence that he saw Mr Z and the respondent working together on the calculations. Furthermore, Mr Z reviewed the calculations on three separate occasions, between 16 and 24 February 2016 and the timesheets show that the respondent was working on the calculations between 18 and 22 February 2016. One of the respondent's timesheet entries, on 18 February 2016, states "respond to calculation review".

[88] It is highly unlikely, in my view, that the respondent would not have realised that the wrong calculation file was being reviewed given that he was actively working with Mr Z as part of the verification process over a number of days. Again, this calls into question whether the wrong file was reviewed.

#### *Email evidence*

[89] The respondent says that, when the 90% review was commenced prior to 16 February 2016, he was not notified in advance "so opportunities for senior level discussion were missed because another relatively junior engineer was appointed by [Mr X] to do the QA". However, the respondent was copied into the email from Mr X to Mr Z dated 17 February 2016 asking him to verify the attached calculations.

[90] The respondent also says that the 17 February 2016 email indicates that a QA review "of some unspecified form" was finally to be performed. However, he would have seen from

the email that the review was a verification of the calculations. These calculations were attached, so he could easily have seen for himself what was envisaged.

### *Inherent unlikelihood*

[91] Given the fact that Mr Z reviewed the calculations on three occasions, and that Mr X and Mr Y also reviewed the files, it is highly likely that either Mr X, Mr Y or Mr Z, or the respondent, would have realised that the wrong calculations were being reviewed, given the significant difference between the 5-10% stage and the 90% stage.

[92] In addition, for the reasons set out in paragraph 3.16 of Ms Parkhill's submissions dated 14 September 2018 about the mortar issue, the roof framing issue and the signing of the PS1, the respondent should reasonably have known that the applicant and Messrs X and Y had not committed an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment. Without replicating these submissions in detail, I would highlight the following:

- (a) Messrs X and Y made clear to the client of Project A that it needed to take specialist advice about the mortar, which it agreed to do at the construction stage, which the applicant was not going to be involved in;
- (b) The applicant notified the client that the roof needed to be checked and rotten timber replaced at the time of doing the seismic upgrade;
- (c) The respondent emailed Mr Y on 29 February 2016 saying that the calculation review had been completed and that Mr Y could email the PS1 to the client. I do not accept the respondent's evidence that he was told by Mr Y to send this email to him.

[93] Furthermore, the points at [92] a) and b) above show that the respondent's concerns, if genuine, were ones that he would have known needed to be raised with the building owner, which he admitted not having done himself in his evidence to the Authority.

### *Changes in evidence*

[94] In the first brief of evidence from the respondent at paragraph 37, he says that, when he received the first draft of the TRR about 20 February 2016, he "naturally assumed that the review was of the job file labelled 90% complete in the [applicant] job file". However, in his

second brief of evidence, at A.2h/ [sic], the respondent says about the review by Mr Z, “so for me the 10% (or 50% complete) QA review was finally being initiated”.

[95] In his oral evidence to the Authority on 5 July 2018, the respondent stated that he felt the DSA “was wrong”, and that he was “remiss in not raising concerns in 2014”. He also said that “I am totally taking partial responsibility for the incorrect assessment”, referring to the assessment of 35%NBS.

[96] The respondent also said in his oral evidence on the first day of the investigation meeting that the reason that Building A was assessed as being 35%NBS in the DSA, and not below, was because an assumption had been made that it was constructed of regular square bricks, whereas it was actually built of irregular, randomly spaced, rounder stones. Naturally, he said, that would make a difference to the assessment of how the building would behave in an earthquake.

[97] The respondent said he had been “remiss” in not raising his concerns in 2014 at Building A being assessed at 35%NBS in the DSA, rather than as an earthquake prone building. He agreed that he was partially responsible for this, and said during his oral evidence, apparently for the first time, that he had made “shocking errors in the calculations at the strengthening design stage”. He said that the errors should have been evident to him then, but he had been working “flat out” and had been “a little distracted”. My understanding of his evidence is that, at the time of preparing the DSA, the respondent had misgivings at Building A being assessed as having a 35%NBS capacity, but that he went along with it.

[98] However, in his second brief of evidence, at A.2d/, he says “to clarify, the DSA report is not ‘wrong’, but rather is conditional in that it declares a building capacity of 35%NBS provided specified urgent repairs are performed immediately”. In fact the respondent also recalculated the rating at 8%NBS in his second brief of evidence.

[99] Not only is this a complete volte face in terms of the respondent’s evidence, but the DSA report quite simply does not say that the rating of 35%NBS was conditional on the remedial strengthening work being carried out immediately. Rather it states: “[Building A], after all the strengthening recommendations are implemented, will have a capacity of approximately 67%NBS, and there should not be considered to be ‘Potentially an Earthquake Risk’”.

[100] It is also worth mentioning that the respondent never raised concerns in his complaint to IPENZ about the DSA nor said that the 35%NBS score was conditional on the remedial strengthening work being carried out.

*Delays in raising his concerns*

[101] According to his oral evidence, the respondent had concerns about the DSA from December 2014 at the latest. He then embarked on doing the strengthening design work between November 2015 and February 2016. He signed the record of settlement on 24 November 2016.

[102] The respondent reports in his first brief of evidence that he saw Building A in January 2017 while picnicking, and it “triggered him”. He emailed Mr X and Mr Y in February 2017, saying the wrong calculations were reviewed. No mention is made of a health and safety risk in relation to Building A. He emailed Mr Y, copying Mr X, again on 2 March 2017 repeating that the wrong file was reviewed, referring to being accused of gross errors, and asking for the PS1 to be retracted. Again, no mention is made of a health and safety risk in relation to Building A. Nor did he say that the building should be reassessed as at 17%NBS to near zero, as he subsequently did say to IPENZ.

[103] In or around April 2017 the respondent emailed IPENZ about being subjected to an unfair disciplinary process, and IPENZ declined to be involved as it did not have jurisdiction. Again, the respondent did not refer to a risk to public safety.

[104] It was not until 28 August 2017 that the respondent then sent a reframed complaint to IPENZ, saying for the first time that he had concerns about public safety in relation to Building A. It was only at that point, because of the reframed complaint, that IPENZ was able to investigate the complaint.

[105] Ms Parkhill submits that the fact that the respondent appears to have reframed his complaint to IPENZ, saying that the actions of Messrs X and Y were “unprofessional, negligent, malpractice and incompetent” so it would fit IPENZ’s jurisdiction, suggests that the respondent did not genuinely believe that that was true. I believe there is some strength to that submission.

*'Fabricated' document*

[106] The 90% calculation document that the respondent has produced in these proceedings as having been sent to IPENZ has been analysed by the applicant, and Mr X says that it does not exist on its computer system. Mr X says that its 'properties' (metadata) suggest that it was produced by the respondent on his own computer on 1 June 2018. This, however, cannot be correct because the applicant also says it was sent to IPENZ in 2017. I infer that the document was last modified on that date, probably when the respondent accessed it to send to the Authority.

[107] However, Mr X has given evidence to the Authority, and Ms Parkhill has supplemented these with submissions, pointing out passages in the 90% document which were corrections of errors found by Mr Z, and which post-date the document sent to Mr Z to review. Therefore, the applicant says, this 90% document could not have been the one that was mistakenly not corrected (but should have been) as it contains the very corrections identified by Mr Z. Furthermore, the applicant says, this 90% has been doctored by the respondent and contains extra pages not in the document originally sent to Mr Z.

[108] In other words, the applicant says that the respondent has created this document after he left its employment to make it look as if he never made the errors he was accused of, and to make it look as if Mr Z's corrections were all made to the 5% file.

[109] The comparison of the two documents carried out by the applicant does indeed irrefutably show that corrections to errors found by Mr Z were also in the document which was purportedly the correct document, but which was allegedly not sent to Mr Z. The allegation of fabrication is a very serious one, as it would mean that the respondent has attempted to mislead both the Authority and ENZ, the regulatory body of which he is a member, which would in turn, no doubt, lead to disciplinary proceedings against him.

[110] The respondent has annexed to his submissions an "IT Forensic Analysis on file '90% calculations first draft file'". The 'analysis' is simply pasted into a document and the identity of the analyst who carried out the analysis is not given. The applicant has had no opportunity to question this person as to his or her methodology, and nor has the Authority. I decline to admit this evidence therefore.

[111] However, I cannot safely come to the conclusion that this 90% calculation document has been deliberately fabricated by the respondent, because of the many versions of the calculation documents that are in existence. An alternative explanation is that the respondent himself has confused the documents, and that the one he says was the original 90% file was actually a document which was corrected, and which he sent to his home to work on, or incorporate into another document.

[112] This alternative explanation is certainly possible given that the various versions of the document are lengthy and technical and that it is difficult to accurately compare one version with another. The documents do not contain version numbers or dates.

[113] However, I can more safely rely upon the evidence of the timesheets which shows that Mr Z and the respondent worked on the calculations at the same time (and so must have been corroborating in respect of them) and the evidence of Mr X that he saw them doing so. It is inconceivable that the respondent would not have noticed that the wrong file was being verified by Mr Z, on three separate occasions, over three days, especially as the respondent says that it was the 5%-10% file that was mistakenly checked. One would expect that file to be quite different from the 90% file, as the strengthening design would have been so much more advanced.

### *Conclusion*

[114] My conclusion is that the inconsistencies in the respondent's evidence, and its lack of credibility strongly suggest that the respondent was not motivated in his complaints by a fear for public safety in respect of Building A, and was not truly of the opinion that Messrs X and Y and the applicant had committed serious wrongdoing, including that the wrong calculation file had been checked. If he did believe those things, he did not have reasonable grounds for doing so. Therefore, I conclude that the respondent did not believe on reasonable grounds that the information he provided to IPENZ was true or likely to be true.

[115] Regretfully, I am also of the view that the respondent acted in bad faith in making the complaint to IPENZ on 28 August 2017. I reach this conclusion for the same reasons that I have concluded that the respondent did not have reasonable grounds for believing that the information was true or likely to be true. The evidence strongly suggests that the respondent actually did not believe the information he disclosed to IPENZ be true, and the inference one

can draw is that he made the disclosures in order to damage the reputations of the applicant, Mr X and Mr Y. Therefore, pursuant to s 20 of the Protected Disclosures Act, the respondent cannot take advantage of that Act's protections.

[116] However, for completeness, I shall briefly consider the other requirements of the Protected Disclosures Act.

**Did the respondent wish to disclose the information so that the serious wrongdoing could be investigated?**

[117] Ms Parkhill submits for the applicant that the respondent is on a campaign of harassment against it and its employees, and is trying to retaliate for the manner in which he feels he was treated by the applicant, arising out of the allegations of poor performance.

[118] The fact that the respondent did not make reference to risks to public safety in his initial complaint to IPENZ in April 2017, and only did so in the reframed complaint to IPENZ on 28 August 2017, several months after he was supposedly "triggered" by seeing Building A in January 2017, certainly suggests that the respondent's motives were more to cause vexation to Messrs X and Y, and to the applicant, than to raise genuine concerns about public safety.

[119] On balance, I am of the view that the respondent did not wish to disclose the information so that serious wrongdoing could be investigated, but rather because he wanted to retaliate against Messrs X and Y and against the applicant.

**Did the respondent wish the Disclosures to be protected?**

[120] The respondent's evidence was that he did wish his disclosure to IPENZ to be protected. Nowhere in his comments to IPENZ did he state that he was making protected disclosures however. In addition, he did not utilise the applicant's internal "Whistleblower Protection Policy" which was in force at the time.

[121] I conclude that the respondent did not address his mind to his complaint being a protected disclosure at the time he made it in August 2017.

**Did the respondent disclose the information in accordance with ss 7, 8 or 9 of the Protected Disclosures Act?**

[122] Section 7 of the Protected Disclosures Act requires that an employee must disclose information in the manner provided by internal procedures established and published in the organisation for receiving and dealing with information about serious wrongdoing. The Protected Disclosures Act states that “employee” includes a former employee.

[123] The applicant had established and published an internal “Whistleblower Protection Policy” which was in force at the time the respondent made his complaints to IPENZ. The respondent did not utilise it, nor did he ask for a copy of it, or even whether one was in existence. Whilst he did email Messrs X and Y twice, the respondent did not make reference to serious wrongdoing or a risk to public health in those emails.

[124] Section 8 of the Protected Disclosures Act allows the disclosure of information to the head of the organisation in certain circumstances. However, even if those circumstances obtained, the respondent did not make the disclosure to the head of the applicant company. It would not have been difficult for him to have asked who that individual was, if he did not know.

[125] Section 9 of the Protected Disclosures Act allows the disclosure of information to an appropriate authority under certain circumstances. I believe that IPENZ was such a body in accordance with the Protected Disclosures Act, by virtue of being a private sector body which comprises members of a particular profession or calling and which has power to discipline its members.

[126] However, I do not believe that the circumstances set out in s 9 applied. There is no suggestion that the head of the organisation was involved in the alleged serious wrongdoing; there was no previous disclosure (so the expiry of the 20 working days’ time limit after disclosure did not apply) and the immediate reference to IPENZ was not justified by the urgency of the matter given that the respondent waited several months before reporting his purported public safety concerns. Nor, in my view, were there any other exceptional circumstances that prevailed.

[127] The respondent suggests that the failure to comply with the whistleblowing policy was a technical failure, which does not prevent the Protected Disclosures Act from applying. However, I disagree that they were merely technical failures. They were wholesale failures, and the requirements cannot simply be ignored.

[128] The respondent also says that he was forbidden on 8 August 2016 from contacting the applicant's staff by the then business manager, and that he could not access the applicant's intranet afterwards because he was no longer an employee.

[129] In support of the first assertion the respondent has annexed a letter to him from the then business manager which simply does not state that he was forbidden "to communicate with anyone at [the applicant]", as the respondent asserts in his submissions. The letter actually states:

I ask that there are no further instances of documents or reports being submitted in an incomprehensible manner such as this, including any feedback submitted during the performance management process.

[130] This statement was made against the context of the respondent having submitted to the business manager a document which was "115 pages long, with a high percentage of the content being unintelligible" according to the letter to him.

[131] The respondent's arguments would also have had more force if the respondent had stated to the business manager that he was raising protected disclosures when he made his complaints. However, he did not, and I believe that the respondent did not have whistleblowing in his mind at all when he contacted Messrs X and Y, and doubt that he intended to rely upon the Protected Disclosures Act until after he had been accused of breaching the terms of the record of settlement.

[132] I must therefore conclude that the respondent failed to comply with the requirements of s 7 of the Protected Disclosures Act. In addition, I am not satisfied that the failure was a mere technical one, so that s 6A saves the respondent.

[133] Having analysed the disclosures made by the respondent in the emails dated 28 August 2017 to IPENZ and 11 December 2017 to IPENZ (then ENZ), and the circumstances surrounding the disclosures, I do not accept that they were protected disclosures pursuant to

the Protected Disclosures Act. Therefore, s 18 of that enactment does not afford the respondent immunity from civil proceedings in the Authority.

**Was the respondent otherwise obliged to disclose the information by virtue of the Chartered Professional Engineers of New Zealand Rules?**

[134] There is also an argument that the respondent was required to make the disclosures he did by virtue of the Chartered Professional Engineers of New Zealand Rules (No. 2) 2002<sup>10</sup> (the Rules). Section 42D of the Rules states as follows:

**42D Report adverse consequences**

A chartered professional engineer who has reasonable grounds to believe that an engineering matter has, or could have, adverse consequences must bring the matter to the notice of the relevant regulatory body unless the engineer, having made enquiries, is satisfied on reasonable grounds that the matter is being dealt with through an appropriate process or in an appropriate manner.

[135] Part 3 of the Rules contains the Code of Ethical Conduct. Sections 42A contains a definition of “adverse consequences”, as follows:

- (a) Significant harm, or an unacceptable likelihood of significant harm, to the health or safety of people;

[136] It is understood that the applicant accepts that, if the respondent did have reasonable grounds to believe that an engineering matter has, or could have adverse consequences, then he would not be constrained by the terms of the settlement agreement. Such a position would be supported by the conclusions of the Employment Court judgment of *Jane Evans-Walsh v Southern District Health Board*<sup>11</sup> in which His Honour Judge Smith considered the interplay of s 149 of the Act and the Health Practitioner’s Competence Assurance Act 2003.

[137] However, I agree with the submissions of Ms Parkhill that a conclusion that the respondent did not have reasonable grounds for believing that there had been serious wrongdoing must lead the Authority to conclude that the respondent did not have reasonable grounds to believe that an engineering matter had, or could have had adverse consequences.

[138] Ms Parkhill also draws my attention to the code of ethical conduct issued by ENZ (the code of conduct) which is supported by practice note 8 – Engineers and Ethical Obligations

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<sup>10</sup> SR 2002/389

<sup>11</sup> [2018] NZEmpC 46

(the practice note). Ms Parkhill states that the code of conduct clearly anticipates any reporting of adverse consequences is to be preceded by meaningful inquiry. I believe she is referring to section 3 of the Code in making that assertion, which I agree with.

[139] Section 3 of the practice note also spells out that a member must make enquiries to satisfy themselves, on reasonable grounds, that the engineering matter of concern is being managed appropriately. For example, bringing the matter to the attention of an appropriate person. The member must then consider whether there are confidentiality concerns in reporting the matter, and if so, must discuss the matter with the person(s) to whom confidentiality is owed.

[140] Ms Parkhill submits that the respondent did not properly satisfy himself that there were reasonable grounds for his concerns prior to complaining to IPENZ and CODC. The respondent did, of course, email Messrs X and Y on 9 February and 2 March 2017. He did say that a 90% review had not been performed, and asked for help to get the “improper situation rectified”. However, there was no mention of significant harm, or an unacceptable likelihood of significant harm, to the health or safety of people in either email, and the focus was the allegation that he had made gross errors. Therefore, the respondent had not brought any concern about an adverse consequence to the attention of Messrs X and Y as required by the practice note.

[141] He also did not make enquiries of the owner of Building A, who Ms Parkhill argues is “an appropriate person”. He certainly did not discuss with the applicant his intended complaints to IPENZ and CODC despite having entered into a settlement agreement.

[142] In conclusion, I do not accept that the respondent was required to make the disclosures he did by virtue of the Rules, and therefore I also do not accept that the respondent can rely upon the Rules to justify his breach of the record of settlement in relation to his remarks concerning project A.

### *Conclusion*

[143] I find that the respondent has breached the terms of the settlement agreement by having made disparaging remarks about the applicant company, and its employees.

**Has the respondent breached the terms of the record of settlement by failing to return documents belonging to the applicant?**

[144] There is no question that the respondent retained documents belonging to the applicant. These include the various calculation file documents relating to building A, the DSA Final Report for Building A, the PS1 for Building A and the Technical Review notes for Building A. However, the question is whether the scope of the record of settlement captured those documents.

[145] The doubt is created by the wording used by clause 6 of the record of settlement. This imposed upon the respondent the obligation to return all property and documents. He also agreed to return the property by delivering it to a physical address.

[146] Ordinarily, if A returns a document to B, A is no longer in possession of that document, by virtue of the simple act of handing over possession of that document. However, how can one return an electronic document, and does it imply an action which results in relinquishing possession?

[147] There appears to be no New Zealand case law of the higher courts which has addressed this question directly. In *Edminstin v Sanford Limited*<sup>12</sup> the former employee had the right pursuant to a settlement agreement to “collect” his “marks” (navigational records, both paper and electronic showing the location of dredge-oyster beds). The Employment Court found that the marks were the exclusive property of the plaintiff and that it was implicit in the terms of the settlement agreement that the collection of his marks included not only a copy of the electronically recorded marks, but all copies and the originals of those marks<sup>13</sup>.

[148] Consequently, the respondent was not entitled to retention or use of the marks. The rights and obligations created by the settlement agreement implied a requirement that the respondent would delete any originals or copies after one of those versions had been collected by the applicant.

[149] Whilst dredge-oyster marks are unique, and the facts of the *Edminstin* case were very unusual, so that one should be cautious of drawing too broad a conclusion from it, one can draw an analogy with the confidential nature of the documents retained by the respondent

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<sup>12</sup> [2017] NZEmpC 70

<sup>13</sup> At [97].

relating to project A, and the interest of the applicant in keeping them confidential, for commercial and privacy reasons.

[150] In addition, at least two Employment Relations Authority determinations<sup>14</sup> have ordered the deletion of electronic copies of documents pursuant to a clause in, respectively, a settlement agreement and an employment agreement which required the return of documents, but imposed no express obligation to delete electronic copies of such documents. A third<sup>15</sup> ordered the deletion of electronic copies in a case where an employee had been bound to prevent the disclosure of confidential information to third parties, but had emailed such information to a private email address during her notice period.

[151] In considering the terms of clause 6 of the record of settlement in this matter, although the requirement is drafted with physical property in mind, the purpose of the clause would have been vitiated if the respondent could have legitimately retained documents in electronic form. In this day and age virtually all commercial information is stored in electronic form, and such a medium requires deletion for the purpose behind the requirement of returning documents to be implemented.

[152] Therefore, I am satisfied that the record of settlement obliged the respondent to both return physical copies of documents, and to delete all electronically held documents belonging to the applicant. Accordingly, the respondent is in breach of the record of settlement by having retained the documents listed in paragraph [144] above.

**Has the respondent breached the terms of the record of settlement by not treating the matters arising from his employment relationship with the applicant as fully and finally settled?**

[153] The respondent emailed the applicant on 9 February and 2 March 2017 raising issues with the calculations review for building A, and the subsequent review of the respondent's performance. This was clearly an attempt to revive an employment relationship issue which had been discussed between the parties prior to the record of settlement being entered into, and which was encompassed by the wording of clause 8. I do not believe that the agreement

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<sup>14</sup> *Simon Beirne Ltd v Selinger* [2017] NZERA Christchurch 116 and *Product Placement 2011 Ltd v Cockburn* [2014] NZERA Auckland 169.

<sup>15</sup> *OCS Ltd v Haynes* ERA Auckland AA165/10, 12 April 2010

that the record of settlement fully and finally settled all matters between the parties is limited in scope only to the raising of a personal grievance and the pursuing of legal proceedings.

[154] The intention behind a mediated record of settlement is to draw a line irrevocably under the employment relationship problems between the parties so that each party may move forward, without any fear that they will have to be addressed again, in any forum. This is in accordance with the statutory scheme at s3(a)(v) of the Act which acknowledges the promotion of mediation as the primary problem solving mechanism.

[155] I must find, therefore, that the respondent has acted in breach of clause 8 by attempting to engage the applicant in correspondence about his former employment, and also by attempting to engage IPENZ in an investigation of these matters.

### **Should penalties be imposed upon the respondent?**

[156] I have found that the respondent has breached three clauses of the record of settlement. Section 149(4) of the Act provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority. I have already found that this is an enforceable record of settlement, and it is open to the Authority impose penalties.

[157] The following questions need to be addressed:

- (a) Should penalties be imposed in respect of any of the breaches?
- (b) If so, in what amount(s)? and
- (c) Should any penalty be made payable to the applicant?

[158] In addressing these questions, I am cognisant of the requirements of s 133A of the Act, which provides as follows:

#### **133A Matters Authority and court to have regard to in determining amount of penalty**

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and

- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[159] Two of the key factors in assessing the first question are the degree of culpability of the respondent and the seriousness of the breaches. With respect to the breach of clause 8, I find that that breach was relatively minor in terms of its seriousness. The applicant chose to ignore the first email from the respondent about his disciplinary process but engaged Kensington Swan to write to the respondent's representative after the second email from the respondent. This letter was, however, not received.

[160] The respondent then wrote to IPENZ about his disciplinary process, but IPENZ rejected the complaint as outside of its jurisdiction. The respondent's later communications with IPENZ, although also in breach of clause 8, were also a breach of clause 4, which I regard as more serious.

[161] Apart from the cost of engaging Kensington Swan, no significant prejudice to the applicant is evident as a result of the breach of clause 8. I therefore decline to impose a penalty in respect of that breach.

[162] With respect to the breach of clause 6, being the retention of documents held electronically, I find that the clause was sufficiently unclear for the respondent to arguably have not understood his obligations under it with regard to the deletion of documents held electronically. With some analysis, one can come to the conclusion that deletion was required, but in terms of culpability, I am not convinced on balance that it would be fair to impose a penalty on the respondent for not having realised that.

[163] However, it is clear that the breach of clause 4, the non-disparagement clause, represented by the communications to IPENZ, was both serious and carried significant culpability. The respondent's statements to IPENZ were deeply disparaging of Messrs X and Y professionally. Indeed, it is hard to think of more serious allegations to make of a

professional engineer, than to accuse them of such incompetence, negligence, malpractice and a lack of professionalism as to cause a building to present a serious safety risk to the public.

[164] Furthermore, the respondent has stated in his written submissions an intention to make further serious allegations about the professionalism and competence of Messrs X and Y.

[165] I have found that the statements made by the respondent were not made in good faith. Furthermore, I can see no mitigating factors to mediate the seriousness of the breach. I therefore am satisfied that it is appropriate to impose a penalty upon the respondent for this breach.

[166] The maximum penalty I can impose upon the respondent, as an individual, for his breach of clause 4 is \$10,000. I do not believe it is appropriate to treat each communication to IPENZ as a separate breach. Recognising the seriousness of the breach represented by the communications to IPENZ, I believe that the starting point should be \$8,000.

[167] The respondent has given no information at all of his ability or otherwise to pay a penalty. I note that he was charged for three hours of consulting work by the research assistant, and presumably he has paid for the analysis carried out by the IT specialist. He therefore does have available resources.

[168] The imposition of a penalty has deterrence as one of its objects, and I believe that there is a strong need to deter the respondent from further breaches of the record of settlement. Standing back, I agree with Ms Parkhill that \$8,000 is an appropriate penalty to impose upon the respondent. I do not regard that as disproportionate to the circumstances of the breach.

[169] Section 136(2) of the Act provides that the Authority may order that the whole or any part of any penalty recovered must be paid to any person. Should the penalty be payable to any person in particular, or to the Crown? I am conscious that the remarks made by the respondent about Mr X and Mr Y are very likely to have caused them distress and anxiety. They have had to endure many months of worry in regard to the allegations made by the respondent to IPENZ. I believe that the Authority should recognise the distress that they are likely to have suffered by ordering that the respondent pay the whole of the penalty to the applicant company, with the expectation that it will then make a payment of \$4,000 to Mr X

and \$4,000 to Mr Y after receipt. I do not order the respondent to make the payments directly to Messrs X and Y because they may wish to keep their account details confidential.

### **Compliance orders**

[170] I agree with the applicant that compliance orders pursuant to s 137(1)(iii) and s 137(2) of the Act are appropriate to ensure that the respondent does not repeat his breaches of the record of settlement. The orders need to recognise that the respondent agreed not to make disparaging remarks about the applicant and its officers and employees; to return all property and documents belonging to the applicant and to accept that the agreement was the full and final settlement of all matters arising out of the respondent's employment relationship with the applicant.

[171] However, the Authority must also recognise that the respondent cannot be gagged in relation to matters which concern the applicant and its employees but which do not relate to or arise out of his employment. I make the following compliance orders with that context in mind.

[172] The respondent should not take this limitation on the scope of the compliance orders as a carte blanche to make scurrilous and unsubstantiated allegations about the applicant and its employees. Whilst the Authority does not have the jurisdiction to intervene in the actions of the respondent in matters which do not relate to the record of settlement, the respondent is counselled to be mindful of the law of defamation, injurious falsehood, and other legal actions available to the applicant. He should also be mindful of the requirements of the Protected Disclosures Act when making disclosures which he wants to be protected, and of his own obligations as a chartered engineer to act professionally towards fellow engineers.

[173] In addition, it is not possible for the Authority to precisely define which specific matters fall within and outwith the scope of the compliance orders at paragraph [174] (a) below. However, the respondent should very carefully consider which matters are likely to fall within its scope and should not take an unreasonably narrow view as to its scope. He is counselled to take professional legal advice before taking any actions that could potentially put him in breach of the compliance order. I will say that any project or other work in which the respondent was directly or indirectly involved while employed by the applicant is likely to fall within the scope of the order.

## Orders

[174] I order the respondent to comply with the terms of the record of settlement in all its terms, but in particular:

- (a) with immediate effect to refrain from making disparaging remarks about the applicant, its employees and officers on any matter which relates to or arises out of his employment relationship with the applicant. This order does not prevent the respondent from dealing directly with ENZ and CODC in respect only of the complaints he has already made in relation to project A and building A;
- (b) within seven days of the date of this determination to return to the applicant all physical copies of all documents which belong to the applicant (the applicant's documents) and not to retain any copies of such documents in any format;
- (c) within seven days of the date of this determination, to delete irretrievably from all electronic media in his possession or under his control all copies of the applicant's documents and to confirm to the applicant in writing that he has done so;
- (d) within ten days of the date of this determination to retrieve from all third parties to whom he has passed the applicant's documents in either physical format or electronic formats, all physical copies of such documents and return them to the applicant and not to retain copies of such documents. I exclude from this order ENZ and CODC;
- (e) within ten days of the date of this determination to take all reasonably practicable steps to procure that all third parties to whom he has passed the applicant's documents, in either physical format or electronic formats, will delete irretrievably from all electronic media in their possession or under their control all copies of the applicant's documents and to confirm to the respondent in writing that they have done so, which the respondent will immediately thereafter confirm to the applicant in writing. I exclude from this order the ENZ and CODC.
- (f) with immediate effect to refrain from raising in writing or orally with the applicant, or with any employee or officer of the applicant any matter which relates to or arises out of his former employment with the applicant;

(g) with immediate effect to refrain from raising in writing or orally with any third party any matter which relates to or arises out of his former employment with the applicant, save in respect of communications:

- i) with the Employment Court for the purposes of a challenge of this determination,
- ii) with ENZ and CODC in relation to the complaints he has already made to those bodies about project A and building A,
- iii) with any third party for the purposes only of stating that he worked for the applicant, the dates he worked for the applicant and his role with the applicant, and
- iv) he is otherwise required or entitled to make by law.

[175] Insofar as the respondent has any future dealings with ENZ and CODC in relation to his complaints about building A, he is to ensure that these orders are brought to the attention of those bodies.

[176] Insofar as the respondent needs access to documents belonging to the applicant for the purposes of any future dealings with ENZ and CODC in relation to his complaints about building A, he is to request copies of such documents from the applicant. The applicant is not to unreasonably withhold the documents from the respondent but may impose such conditions relating to the use of such documents upon the respondent as are reasonable to safeguard them. The respondent is to not use any such documents for any purposes other than his legitimate dealings with ENZ and CODC in relation to building A, and must not disclose them to any third party without the express prior written consent of the applicant. The respondent must also return them to the applicant within 7 days of receiving a request in writing to do so.

[177] I further order the respondent to pay to the applicant within 7 days of receiving details of its bank account, the sum of \$8,000 by way of penalty.

### **Costs**

[178] I reserve costs. The parties are to seek to agree how costs are to be dealt with, but if they have been unable to agree by 31 January 2019, any party wishing to seek an order for costs from the other party is to serve and lodge by no later than 8 February 2019 a

memorandum setting out the contribution it seeks and the basis of that contribution, and the other party shall have until 22 February to serve and lodge a memorandum in reply.

David Appleton  
Member of the Employment Relations Authority