

[3] Due to his role Mr Sinclair also gained detailed knowledge of Evolution's employees' qualifications, skills, experience, pay rates, overall capabilities, and personalities.

[4] Evolution said Mr Sinclair used this information that he had gained during his employment to breach a non-solicitation clause that prevented him (among other things) from soliciting its employees for three months after his employment had ended.

Mr Sinclair's resignation

[5] In October 2022 Evolution commenced a disciplinary process relating to allegations of misconduct by Mr Sinclair. Prior to the completion of that process, Mr Sinclair resigned. His last day of employment was 28 October 2022.

[6] Evolution specifically reminded Mr Sinclair verbally and in writing that his confidentiality and restraint of trade obligations continued after his employment had ended.

Employment by CCL (In Liquidation)

[7] Shortly after Mr Sinclair's employment ended with Evolution, he commenced employment with Construct Civil Limited (CCL) which went into liquidation from 5 May 2023.

[8] Mr Sinclair approached a number of current and former Evolution employees and made it known that part of his role at CCL was to start up a division that required staff with traffic management skills and experience.

Mr Sinclair's employment agreement with Evolution

[9] Mr Sinclair had an individual employment agreement dated 15 July 2022.

[10] The non-solicitation obligations in clauses 17.2 (d) and 17.2 (e) of Mr Sinclair's employment agreement with Evolution expired on 28 January 2023.

[11] Between 28 October 2022 and 28 January 2023, Mr Sinclair approached a number of Evolution's employees and attempted to solicit them to work for him at CCL.

Untrue information distributed by Mr Sinclair

[12] Evolution said that on 6 January 2023 Mr Sinclair distributed incorrect information about it to employees, namely that its business had been placed in administration. A text was produced to the Authority that proved Mr Sinclair had done that.

[13] Evolution believed he did so in order to unsettle its workforce, so he could more easily solicit them into leaving their employment with Evolution, to become CCL employees.

[14] However, the notice of administration Mr Sinclair showed others, related to an Australian entity and not to the New Zealand Evolution company, which is the entity involved in these proceedings.

Request for undertakings

[15] On 16 December 2022 Evolution informed Mr Sinclair in writing of its concerns regarding his attempted solicitation of its employees. Evolution requested that he provide a written undertaking that he would not misuse any of its confidential information and that he would not solicit or attempt to solicit (directly or indirectly) any of Evolution's employees, contractors or customers for the three months duration of his post-employment restraint.

[16] Mr Sinclair did not provide the requested undertaking. Instead he responded to Evolution via email, saying its concerns were ill-informed and suggesting he had not breached his post-employment restraints. The evidence produced to the Authority proved that response was untrue.

[17] On 21 December 2022 Evolution responded to Mr Sinclair's email, renewing its request for an undertaking that he would abide by his post-employment confidentiality and non-solicitation obligations. Mr Sinclair did not provide the requested undertaking and he did not respond to Evolution's letter.

Evolution's claims

[18] Evolution subsequently found out that between 28 October 2022 and 28 January 2023, at least four of its employees who had permanently or temporarily ceased working for Evolution, had commenced employment with CCL working for, or with,

Mr Sinclair. Mr Sinclair knew all of these individuals personally as a result of him working for Evolution as the Onehunga Depot Manager.

[19] Evolution sought a declaration that the post-employment non-solicitation restraint was enforceable, that Mr Sinclair breached it on at least four occasions, and that penalties should be imposed on him for those breaches.

[20] Evolution also claimed that Mr Sinclair had incited, instigated, aided or abetted breaches by Mr Taputoa Kiikoro of his employment agreement with Evolution. It sought a penalty be imposed on Mr Sinclair for that.

[21] Evolution asked that any penalties imposed on Mr Sinclair be paid to it, instead of the Crown.

[22] Evolution withdrew two breach of employment agreement claims that related to solicitation of two individuals it still employed, because it respected their choice not to voluntarily give evidence to the Authority due to their fears of retribution.

[23] Accordingly, the breach of employment agreement and associated penalty claims for those two current Evolution employees were withdrawn from the Authority on 22 January 2024. Evolution also withdrew claims for lost revenue, general damages, and special damages it said it had incurred investigating Mr Sinclair's breach of his employment obligations.

[24] Mr Sinclair did not respond to Evolution's claims.

The Authority's investigation

No mediation

[25] The parties did not attend mediation because Mr Sinclair failed to engage with Mediation Services.

Non-engagement by Mr Sinclair

[26] Mr Sinclair also failed to engage with the Authority regarding these proceedings, despite numerous attempts being made to communicate with him by email, phone and letters.

[27] Mr Sinclair was served with a copy of the Statement of Problem, copies of the Authority's Directions and Minutes, a copy of all of Evolution's evidence and of its submissions. Mr Sinclair did not respond to any of that information.

[28] Mr Sinclair also received copies of the Notice of Investigation Meeting for the investigation meeting held in November 2023, to which Mr Brady from CCL was witness summonsed, and for the substantive investigation meeting held in January 2024.

[29] Mr Sinclair has had every opportunity to engage in the Authority's process but has elected not to.

[30] To ensure that Mr Sinclair has received copies of everything, Evolution arranged for a process server to serve him with further copies of the documentation in this matter. The documents were served by a process server from the Investigators New Zealand Limited (The Investigators) who personally handed the service documents to Mr Sinclair at his home address after he had identified himself to the process server.

[31] The Authority encouraged Mr Sinclair to participate in its investigation, but he elected not to engage. Mr Sinclair was also put on notice that failure to do so would not prevent the Authority from continuing with its investigation or from issuing a substantive determination, based on the evidence that was available to it.

[32] Mr Sinclair was also informed that his failure to engage in the Authority's investigation process could potentially adversely affect any challenge rights he may wish to exercise.

CCL related documents

[33] CCL went into liquidation in May 2023. Evolution applied to the Authority to witness summons relevant information from CCL's liquidator, Mr Stephen Lawrence of PKF Corporate Recovery & Insolvency (Auckland) Limited Liquidator of CCL (the Liquidator) in advance of the investigation meeting that was scheduled to be held in January 2024.

[34] Evolution did that because it was concerned that CCL's liquidation could be concluded prior to then, so it feared that the Liquidator may not have access to, or be

able to provide relevant information, which Evolution wanted to produce to the Authority.

[35] The Liquidator, in response to a witness summons to provide relevant information to the Authority, provided some relevant information on 5 September 2023. Evolution was concerned that this did not represent all of the relevant information it had identified, so it asked the Authority to witness summons Mr Brady of CCL to an investigation meeting to discuss the missing CCL employment documentation.

November 2023 investigation meeting

[36] Mr Brady, as CCL's sole director, was therefore witness summonsed to an in-person investigation meeting that was held on 21 November 2023, to discuss what relevant information CCL held and where it could be located.

[37] Mr Brady was helpful in terms of the evidence he gave during this investigation meeting, during which he was questioned by Evolution and the Authority. Mr Sinclair was notified of this investigation meeting but did not attend.

Monitored inspection at the Liquidator's premises

[38] Mr Brady identified to the Authority where he believed further relevant information could be found. Evolution's counsel and Mr Brady attended a monitored inspection with the Liquidator, at the Liquidator's business premises, during which time Mr Brady identified further relevant documents. The Liquidator was then directed by the Authority to provide those to Evolution, and that occurred.

Summonsed witnesses

[39] Evolution applied for and was granted witness summons for four former employees it alleged Mr Sinclair had solicited to work for CCL.

January 2024 investigation meeting

[40] An in-person investigation meeting was held in Auckland on 23 and 24 January 2024. The Authority heard from four witnesses who had been summoned by Evolution: Cory Hita; Taputoa Kiikoro; Kaleena Kiikoro and Johnathan Armitage.

[41] The Authority also heard from Cathy Leader, who is employed by Evolution as the Human Resources Manager, a role she has held since March 2020. Mr Rhys

Attwood, Evolution's General Manager, also gave evidence. Mr Attwood has held that role since February 2021.

Attempted solicitation of Evolution's current employees

[42] Although two of Evolution's current employees initially lodged witness statements, they subsequently declined to voluntarily participate in the investigation meeting. They made that decision in light of the Authority's indication that they would be unlikely to get a permanent non-publication of their names and positions.

[43] These two current employees said they were worried about being identified as 'narcs' in the industry and feared retribution for supporting Evolution with these proceedings. Evolution decided to respect their views, so did not witness summons them.

[44] However, both of these current employees had provided Evolution with a note recording Mr Sinclair's approach to them shortly after it had occurred. These notes were handwritten in their own words and occurred without Evolution's input (other than a simple request to record what had occurred).

[45] Although their witness statements were not considered by the Authority, because the two current employees did not make themselves available to be questioned about their statements, their handwritten notes (which the statements had been based off) formed part of the bundle of documents Evolution used during the Authority's investigation. These had been disclosed to Mr Sinclair, so were treated as admissible evidence.

[46] While giving evidence during the Authority's investigation meeting, some of the summonsed witnesses also identified by name and position other current Evolution employees who they personally knew Mr Sinclair had solicited to work for CCL. Evolution was not aware these other employees had been approached, so they (along with the other two current employees who had provided handwritten notes) did not form part of the claims it made to the Authority.

Submissions

[47] At Evolution's request, the parties were given time to lodge submissions after the investigation meeting. Evolution did so, but Mr Sinclair did not.

Issues

[48] The following issues are to be determined:

- (a) Is the non-solicitation post-employment restraint clause in Mr Sinclair's employment agreement with Evolution enforceable?
- (b) If so, did Mr Sinclair breach it by soliciting some of Evolution's employees/former employees to work for his new employer, CCL?
- (c) Did Mr Sinclair breach his implied duty of fidelity by soliciting Mr Armitage to work from CCL while Mr Sinclair was still employed by Evolution?
- (d) Did Mr Sinclair instigate, initiate, aid or abet any breaches by Mr Kiikoro of his employment agreement with Evolution?
- (e) Should penalties be imposed on Mr Sinclair for any breaches of his employment obligations that have occurred?
- (f) Should some or all of any penalties that may be imposed on Mr Sinclair be paid to Evolution instead of, or as well as, the Crown?
- (g) What costs should the successful party be awarded?
- (h) What disbursements should be awarded?

[49] Evolution withdrew its damages claims prior to the investigations meeting, so these did not need to be determined.

Is the non-solicitation post-employment restraint in Mr Sinclair's employment agreement with Evolution enforceable?

Relevant contractual provisions

[50] Clause 17.2 (d) and (e) of Mr Sinclair's employment agreement with Evolution states:

You agree that for a period of three (3) months, following termination of your employment with Evolution, you will not: [...]

- (d) Attempt to or actually encourage or persuade any of Evolution's employees [...] to terminate their employment contract [...]; or
- (e) Employ any of Evolution's employees who have been employed by Evolution in the three (3) months prior to your termination.

[51] Mr Sinclair was clearly put on notice that he was not to interfere with the stability of Evolution's workforce – for example, by poaching and employing, either directly or indirectly, Evolution's employees.

Reasonableness of the post-employment restraint

[52] Evolution's post-employment restraint for a period of three months after the ending of Mr Sinclair's employment was reasonable. He held a key management role. He had a close relationship with the employees he managed and was in a position to be able to influence them, and did in fact influence them.

[53] Evolution had a legitimate proprietary interest in protecting its workforce for a limited period of time following Mr Sinclair's departure from its employment. The restraint was reasonable in terms of its nature and duration, and regarding the conduct (non-solicitation of employees) it sought to restrain.

[54] Traffic management is a highly competitive industry, and a lack of staff could (and in this case did) result in Evolution being unable to meet its contractual obligations. The evidence demonstrated that Mr Sinclair had built a good rapport and exercised influence over the Field Crew employees he managed.

[55] The period of restraint from 29 October 2022 to 29 January 2023 (the restraint period), was of a limited and reasonable duration, taking into account the nature of Mr Sinclair's role and the time it would likely have taken Evolution to secure a replacement Onehunga Depot Manager, who would then need time to establish relationships with Evolution's Field Crew.

Consideration

[56] Clause 17.2 of Mr Sinclair's employment agreement specified that the value of his remuneration was reasonable consideration for the restrictive covenants he had entered into. The Authority was satisfied that was the case, and Mr Sinclair's remuneration was set at an appropriate level in order to constitute sufficient consideration for him entering into the restraint.

[57] The restraint was also a term and condition of his original employment, so the offer of employment to him was also appropriate consideration for the restraint. No extra consideration or premium was required.

[58] Mr Sinclair's non-solicitation restraint that applied for three months after his employment had ended was reasonable and enforceable.

Did Mr Sinclair breach his post-employment restraint by soliciting Evolution's employees/former employees to work for his new employer, CCL?

[59] There was clear evidence that Mr Sinclair solicited Evolution's employees to work for CCL. Mr Sinclair was the manager (while employed by Evolution) for all of the Evolution employees he solicited or attempted to solicit for CCL.

[60] Mr Sinclair solicited Mr Armitage while he (Mr Sinclair) was still employed by Evolution. Mr Sinclair solicited the other three employees (Mr Hita, Ms Kiikoro and Mr Kiikoro) during the restraint period while he was working for CCL. There was also credible evidence that Mr Sinclair attempted to solicit other Evolution employees who are still working for Evolution.

Cory Hita

[61] The evidence established Mr Sinclair solicited Mr Hita during the restraint period, in breach of his post-employment non-solicitation restraint, by encouraging Mr Hita to resign from his employment with Evolution and become employed by CCL.

[62] Mr Sinclair was Mr Hita's direct manager. Mr Hita told the Authority when giving his evidence that Mr Sinclair had offered him employment with CCL while he (Mr Hita) was still employed by Evolution. That had occurred during Mr Sinclair's restraint period.

[63] Mr Hita confirmed that he was employed by CCL after leaving his employment with Evolution. CCL employed him in the same position he had held with Evolution, he was paid the same remuneration, and he reported directly to Mr Sinclair, who at that time was employed by CCL.

[64] According to payroll information that was produced to the Authority, Mr Hita must have started his employment with CCL by no later than the week beginning 19 December 2022. Mr Hita confirmed that in his evidence.

[65] Mr Brady, when he gave his evidence to the Authority during the investigation meeting held in November 2023, said Mr Sinclair must have facilitated Mr Hita's employment. Mr Brady did not know Mr Hita and his employment with CCL had not

come about in response to a job advertisement, because CCL was not advertising for any of the positions that Mr Hita was able to do.

[66] A record was provided to the Authority of Mr Sinclair advising Mr Brady on 7 November 2022 that he was going to meet Mr Hita that afternoon to get him “signed up”. This was evidence that he had facilitated Mr Hita’s employment with CCL. At that time, Mr Hita was still employed by Evolution and had not yet resigned.

[67] Mr Hita resigned his employment with Evolution on 10 November 2022, with his last day of work for Evolution being 8 December 2022. Mr Hita confirmed to the Authority that he was presented with an employment agreement from CCL by Mr Sinclair on 7 November 2022, which he signed when they met that same day.

Taputoa Kiikoro

[68] The evidence established that, during his restraint period, Mr Sinclair solicited and arranged for Mr Taputoa Kiikoro to work for CCL, while Mr Kiikoro was still working for Evolution.

[69] Mr Kiikoro was a key member of Evolution’s staff, in that he held the crucial operational role of being in charge of the ASM Motorway Work Team. This team could not operate without him. Mr Kiikoro was employed by Evolution as a Site Traffic Management Supervisor (STMS), meaning he had the highest qualification and experience level of all of its employees.

[70] Mr Kiikoro was a permanent fulltime employee of Evolution’s and had worked for it since April 2022. He was guaranteed a minimum of 40 hours work per week and he remained an employee of Evolution’s until late January 2023, at which time he left without providing any notice of his departure. He simply informed Evolution he would not be returning to work.

[71] While employed by Evolution, Mr Kiikoro reported directly to Mr Sinclair. Mr Kiikoro told the Authority when giving evidence, that he had a good relationship with Mr Sinclair, and that influenced him to accept his offer of work with CCL.

[72] On 4 November 2022, Mr Kiikoro signed an individual employment agreement with CCL as a STMS, which was the same position he held with Evolution. Mr Kiikoro

also reported to Mr Sinclair while employed by CCL, in the same way he had done so when employed by Evolution.

[73] Although Mr Kiikoro's employment agreement with CCL recorded a start date of 1 December 2022, CCL's payroll records established that he actually commenced his employment with CCL earlier, in the week beginning 21 November 2022.

[74] Mr Kiikoro told the Authority that his employment with CCL came about solely as a result of Mr Sinclair having solicited him. Mr Kiikoro said that while he was working for Evolution in Tauranga, Mr Sinclair called him telling him that he had left his employment with Evolution and that he "would like to take me with him" to his new company, meaning CCL. Mr Kiikoro confirmed that it was Mr Sinclair who provided him with his employment agreement for his employment with CCL.

[75] Mr Kiikoro said Mr Sinclair had been "sweet-talking" him into joining CCL, by telling him that he would be the "lead STMS at CCL". Mr Kiikoro gave evidence that Mr Sinclair had called him a number of times, attempting to convince him to leave his employment with Evolution to work for CCL. Mr Kiikoro told the Authority Mr Sinclair had viewed him as "easy bait to be poached."

[76] The evidence also established that Mr Kiikoro told Mr Sinclair he was still employed (and working for Evolution) on the days Mr Sinclair had arranged for Mr Kiikoro to do work for CCL. Evolution was not aware that Mr Kiikoro was working for it and CCL at the same time, and would not have approved that, had it known about it at the time.

[77] Mr Brady also confirmed that Mr Kiikoro's employment with CCL had come about as a result of Mr Sinclair's actions. Mr Brady did not know who Mr Kiikoro was and confirmed he had not been employed in response to a job advertisement or other recruitment processes.

[78] Mr Kiikoro's daughter, Kaleena Kiikoro, also told the Authority that Mr Sinclair had called her father to come and work for him at CCL while Mr Sinclair was still subject to the restraint period, i.e. before 28 January 2023.

Kaleena Kiikoro

[79] The evidence established that Mr Sinclair solicited Kaleena Kiikoro in breach of his post-employment restraint. Mr Sinclair directly encouraged Ms Kiikoro to resign from her employment with Evolution and he arranged for her to become employed by CCL, during the period of his post-employment restraint.

[80] Ms Kiikoro told the Authority that it was Mr Sinclair who had got her the Traffic Controller job with Evolution in Tauranga, and that he was her boss during her employment. Ms Kiikoro was employed by Evolution from 27 October until 22 November 2022, which Mr Sinclair was aware of.

[81] Ms Kiikoro was still employed by Evolution as its employee at the date that Mr Sinclair offered, and she accepted, employment with CCL. Ms Kiikoro signed an employment agreement with CCL on 6 November 2022. Her employment with CCL as a TTMW (which was the same position she held with Evolution) commenced on 24 November 2022, two days after her employment with Evolution had ended.

[82] Mr Sinclair solicited Ms Kiikoro to become employed by CCL and he was the person responsible for directly employing her. Mr Sinclair signed Ms Kiikoro's employment agreement with CCL.

[83] Mr Brady told the Authority he did not know Ms Kiikoro, that she did not become employed by CCL in response to a job advertisement, as CCL had not advertised for any TTMW roles at that time. Mr Brady said Mr Sinclair must have facilitated Ms Kiikoro's employment with CCL.

[84] That was corroborated by Ms Kiikoro. She had also provided a written statement to Ms Leader dated 16 January 2023, in which she confirmed Mr Sinclair had recruited her to work for CCL through her father, Mr Taputoa Kiikoro.

Did Mr Sinclair breach his implied duty of fidelity by soliciting Mr Armitage to work for CCL while Mr Sinclair was still employed by Evolution?

Johnathon Armitage

[85] The evidence established that Mr Sinclair had solicited Mr Johnathon Armitage to resign from his employment with Evolution and to become employed by CCL. Mr Armitage was employed by Evolution as Traffic Management Operative Non-

Practising. Mr Armitage held the role with CCL and was also managed by Mr Sinclair when he worked for CCL.

[86] Mr Sinclair was Mr Armitage's direct manager when they both worked for Evolution. They also had a social relationship and were personal friends, which included socialising outside of work for dinners and the like.

[87] Mr Armitage resigned from his employment with Evolution on 27 October 2022, and his last day of employment with Evolution was 25 November 2022. Mr Armitage's resignation email on 27 October 2022 stated that (among other things) "Now is the time to move on to a fantastic new training opportunity that has been offered to me."

[88] Mr Armitage commenced employment for CCL on 28 November 2022, immediately after his notice period with Evolution had ended on 25 November 2022.

[89] Mr Armitage confirmed to the Authority that Mr Sinclair had facilitated his employment with CCL. This evidence was supported by Mr Brady's verbal evidence at the investigation meeting held in November 2023.

[90] When he gave his evidence, Mr Brady confirmed to the Authority that he did not know Mr Armitage, and that his employment with CCL had not come about in response to a job advertisement, because CCL had not advertised for any TTMW drivers at the time. Mr Brady confirmed to the Authority that Mr Sinclair must have facilitated Mr Armitage's employment for CCL.

[91] Although Mr Armitage's resignation from Evolution occurred before Mr Sinclair himself had resigned from his employment with Evolution, there was sufficient evidence to establish that Mr Sinclair more likely than not solicited Mr Armitage's departure and resignation from Evolution. That action constituted a breach of Mr Sinclair's duty of fidelity to Evolution as his then employer.

[92] Mr Sinclair became the subject of a disciplinary process in October by Evolution. It is therefore likely that this was the catalyst for him obtaining employment with CCL. Mr Sinclair entered into his own employment agreement with CCL on 23 November 2022.

[93] Given that Mr Armitage and Mr Sinclair were friends and socialised together, it was highly likely that Mr Armitage was aware that Mr Sinclair was the subject of a disciplinary process, that he had been looking for new employment and had secured a role at CCL.

[94] Mr Armitage also confirmed to the Authority that Mr Sinclair had facilitated his employment at CCL and that he had been mentioning the probability of a role at CCL for Mr Armitage, prior to Mr Armitage accepting the offer of employment by CCL.

[95] The Authority considered it more likely than not that the reference that Mr Armitage made in his resignation letter to a “fantastic new training opportunity” that had been offered to him, was his new job at CCL, working as a direct report for Mr Sinclair.

[96] Mr Armitage told the Authority that Mr Sinclair had advised him not to tell anyone at Evolution about his (Mr Armitage’s) new job at CCL. Based on Mr Sinclair’s advice about that, Mr Armitage admitted to the Authority that he had deliberately tried to conceal that he had arranged employment with CCL and would be doing the same work for CCL that he had been doing for Evolution.

[97] Mr Sinclair either solicited Mr Armitage to work for CCL while Mr Sinclair was still employed by Evolution, a breach of his duty of fidelity, or he solicited him during the period of his (Mr Sinclair’s) non-solicitation restraint. Either way, Mr Sinclair’s actions were a breach of his employment obligations to Evolution.

Did Mr Sinclair incite, instigate, aid, or abet any breaches by Taputoa Kiikoro of his employment agreement with Evolution?

[98] The evidence established that Mr Sinclair incited, instigated, aided and abetted Mr Kiikoro’s breach of his own employment agreement.

[99] Mr Kiikoro owed a duty of fidelity to Evolution for the period during which he was Evolution’s fulltime employee (namely since April 2022). Mr Kiikoro was not entitled to work for another employer without Evolution’s prior consent during, or even outside, of his normal hours of work.

[100] Mr Kiikoro admitted in his evidence to the Authority that he understood he was not permitted to work for another company while still employed by Evolution, without

Evolution's approval. Mr Kiikoro did not seek Evolution's approval because he knew it would not be forthcoming. Mr Sinclair would also have known that, as Mr Kiikoro's former manager.

[101] Mr Kiikoro remained employed by Evolution and accepted work for CCL while he was rostered to work night shifts on the motorway team for Evolution on 19, 20, 21 December 2022. Mr Kiikoro's failure to attend work with Evolution as expected and required of him under the terms of his employment agreement, had a seriously adverse impact on Evolution and its operations and other employees.

[102] Mr Kiikoro told the Authority that Mr Sinclair knew that he (Mr Kiikoro) was on unapproved leave, annual holidays and sick leave from his employment with Evolution while he was undertaking work for CCL during December 2022. Mr Kiikoro recalled specific conversations he had with Mr Sinclair regarding him working for CCL while he was on leave from his job at Evolution.

[103] Mr Sinclair, as the manager of Evolution's Onehunga Depot, knew that permanent fulltime employees were not allowed secondary employment unless it had been approved by Evolution. He would also have known that Mr Kiikoro would not have been given permission to work for CCL, because he was a such key member of the motorway nightshift crew that it could not operate without him.

[104] By offering Mr Kiikoro employment, and by employing him to work for CCL, while Mr Sinclair knew that Mr Kiikoro was still working for Evolution and had not sought or obtained authorisation from Evolution to work elsewhere, Mr Sinclair must have intended for Mr Kiikoro to breach his employment agreement with Evolution.

Should penalties be imposed on Mr Sinclair for the breaches of his employment obligations that have occurred?

Relevant law

[105] Section 134 of the Employment Relations Act 2000 (the Act) provides that every party who breaches an employment agreement is liable to a penalty under the Act. Section 134(2) of the Act also provides that a penalty may be imposed on any person who incites, instigates, aids or abets any breach of an employment agreement.

[106] Section 135(2)(a) of the Act provides that the maximum potential penalty per breach for an individual is \$10,000.

[107] Section 133(A) of the Act sets out various matters the Authority must have regard to when assessing penalties. The Employment Court in *Borsboom v Preet PVT Limited* recommended a four-step process for assessing penalties.¹

[108] The Employment Court then in *Nicholson v Ford* drew together the mandatory statutory considerations and identified four sub-steps that should be addressed under the Preet – step 1 criteria.² It also set out a 12-step penalty assessment process for assessing penalties, which has been applied by the Authority in this determination.

Penalty assessment process

[109] The Authority has assessed the level of penalties to be imposed on Mr Sinclair under s 134(1) of the Act for breaches of his employment agreement and under s 134(2) of the Act for inciting, instigating, aiding and abetting Mr Kiikoro’s breaches of his employment agreement as follows.

Preet – Step 1

(i) Number and nature of breaches

[110] There were at least five clear breaches by Mr Sinclair of his employment obligations that should attract penalties.

[111] Mr Sinclair breached his duty of fidelity to Evolution, while employed by it, when he encouraged/enticed Mr Armitage to resign from his employment with Evolution, so he could take up employment at CCL, shortly before Mr Sinclair was due to start work himself with CCL.

[112] Mr Sinclair improperly used his position as an Evolution employee, and his role as Mr Armitage’s manager, to encourage Mr Armitage to resign and work for the same competitor employer (CCL) that Mr Sinclair had accepted employment with.

[113] Based on the evidence the Authority heard, it was likely that Mr Sinclair had a number of conversations with Mr Armitage that breached his (Mr Sinclair’s) duty of

¹ [2016] NZEmpC 142.

² [2018] NZEmpC 132.

fidelity to Evolution. However, this will be treated as one ‘course of conduct’ involving Mr Armitage, so therefore one breach of the duty of fidelity.

[114] Mr Sinclair breached his post-employment non-solicitation restraint by soliciting Mr Hita, Mr Kiikoro and Ms Kiikoro to work for CCL during his (Mr Sinclair’s) restraint period.

[115] The evidence established that during his restraint period Mr Sinclair approached each of these employees multiple times to encourage them to work for CCL. Each time Mr Sinclair did so, he breached his restraint. The solicitation of each of these three employees will be treated as a ‘course of conduct’ involving that particular employee, meaning a separate penalty will be imposed for each former employee he solicited.

[116] There is also one further breach that related to Mr Sinclair’s inciting/instigating/aiding/abetting Mr Kiikoro’s multiple breaches of his own employment agreement. That attracted a penalty under s 134(2) of the Act.

[117] It will be treated as representative breach, because every time Mr Kiikoro attended work for CCL and not Evolution that resulted in a new (separate) breach of Mr Kiikoro’s employment agreement.

[118] Mr Sinclair knew Mr Kiikoro was still employed by Evolution and was meant to be working nightshifts for Evolution on 19, 20, and 21 December. Mr Kiikoro had also told Mr Sinclair that Evolution had declined him additional leave on those dates, so he was expected and required to work on those dates. Despite that, Mr Sinclair still scheduled Mr Kiikoro to work for CCL on those dates.

[119] It would have been obvious to Mr Sinclair that Mr Kiikoro could not be in two places at once, so if he was working for CCL then he would not be able to perform his rostered shifts, and therefore employment obligations, for Evolution.

(ii) Maximum penalties and globalisation

[120] Because Mr Sinclair is being penalised as an individual, the maximum penalty under s 135(2)(a) of the Act is \$10,000 per breach. The potential maximum total penalty for the five representative breaches the Authority has identified would be \$50,000.

Should globalisation occur?

[121] Globalisation has already effectively occurred, because all of Mr Sinclair's actions involving each former Evolution employee have been treated as only one breach and not multiple breaches.

[122] There should not be a further globalisation of the five breaches that Authority has identified are to attract penalties. To do so would artificially reduce Mr Sinclair's wrongdoing.

[123] Each breach for each former Evolution employee necessitated the separate formation of intent by Mr Sinclair to act in a way that deliberately breached his non-solicitation clause, his duty of fidelity to Evolution and that instigated/incited Mr Kiikoro's breaches of his own employment agreement.

[124] It would be unduly restrictive to globalise all of Mr Sinclair's penalties into one single penalty, in that it would artificially minimise his offending and disproportionately reduce his accountability for his actions. The circumstances of each of these five breaches were discrete, involved different individuals and occurred at different times. No additional adjustment is required for globalisation purposes.

(iii) Object of the Act

[125] Section 3 of the Act identifies that one of its objects is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and employment relationship.

[126] The implied duty of fidelity and express post-employment restraints (such as the non-solicitation restraint in this matter) are deserving of protection and enforcement as obligations that are designed to set out the parameters and expectations of those in the employment relationship.

[127] Mr Sinclair has acted in a way that demonstrates he had no regard to his legal obligations, both during and after his employment. There was also an element of deliberateness, due to his misleading of Evolution as to what he was doing after his resignation.

[128] Had Mr Sinclair disclosed that he was going to work for CCL, then Evolution would have raised that immediately at the time, on the basis it would have been viewed as a breach of the non-compete clause in his employment agreement.

[129] Mr Sinclair's deliberate and repeated breaches of his employment obligations, both in terms of breaches of his own employment and of his implied duty of fidelity, and in respect of his aiding and abetting Mr Kiikoro's breaches of his own employment agreement, were the antithesis of good faith behaviour.

[130] Consideration of the objects and purposes of the Act only reinforce the need for there to be penalties imposed on Mr Sinclair to signal strong disapproval of his conduct, to punish him for wrongdoing, and to send a message to him and others that such actions are unacceptable.

(iv) Nature and extent of the breaches or involvement in the breaches

[131] The breaches that occurred by Mr Sinclair of his employment agreement, were serious because they significantly undermined and harmed Evolution's business.

[132] The Authority heard credible evidence from Mr Attwood and Ms Leader about the consequences Mr Sinclair's actions had on the business and, in particular, the corresponding adverse commercial and financial implications that resulted from Mr Sinclair's breaches of his employment obligations.

[133] Mr Sinclair's actions directly resulted in Evolution's loss of highly qualified employees, on which Evolution bases its income. Mr Kiikoro held the highest qualification in traffic management, so his loss seriously damaged Evolution's business and adversely impacted on other members of the nightshift motorway team.

[134] Mr Kiikoro was in charge of the entire nightshift crew, which consisted of eight or more staff who were dependent on him leading and managing that work. The effect of him working for CCL and not turning up to work the Evolution nightshift that he had been rostered on to work, meant that those crews could not work at all on the days Mr Kiikoro failed to report for work.

[135] This caused serious disruption and resulted in significant business loss, in terms of equipment and wages and loss of revenue.

[136] The loss of Mr Hita was also significant to Evolution because he was a highly experienced, qualified, and valuable nightshift employee. Mr Armitage too, was also valuable to Evolution because he was a certified driver trainer, which allowed him to conduct and certify driver qualifications internally, rather than having to engage third party agencies for that.

[137] As a result of Mr Armitage being solicited to leave Evolution's employ, it had to engage those services externally at a cost of approximately \$50,000 per annum, which would not have been incurred had Mr Armitage remained employed.

[138] Mr Sinclair was reckless as to the consequences of inciting Mr Kiikoro to work for CCL on 19, 20, and 21 December 2022. Mr Kiikoro's absence from these shifts meant Evolution was unable to operate an entire nightshift motorway team. This resulted in financial loss and also in the loss of a key contract, which has been unable to be replaced. The significance of that cannot and should not be underestimated.

[139] It is also appropriate for the Authority to be mindful of the evidence it heard that established Mr Sinclair had approached at least four other Evolution employees, in addition to the four, who are identified by name in this determination.

[140] Although these other employees did not accept Mr Sinclair's attempts to solicit them to leave Evolution and work for CCL, that evidence demonstrated that Mr Sinclair's actions and breaches were wider in scope and could potentially have been significantly more adverse for Evolution than they were if these other employees had accepted Mr Sinclair's approaches.

[141] There was also evidence from Mr Kiikoro and the other summonsed witnesses, that Mr Sinclair had tried to get them to entice other Evolution employees to resign from Evolution and work for CCL instead. Although Mr Kiikoro did approach at least two other nightshift employees, who were both highly qualified STMS U Driver Level 2, so were extremely valuable to Evolution, those employees were not receptive to these approaches.

[142] Mr Hita also confirmed that Mr Sinclair had asked him to solicit other employees and that, as a result of that, Mr Hita had approached another traffic controller, nightshift employee of Evolution's. That person did not leave.

[143] It was clear that Mr Sinclair had considerable influence over Mr Kiikoro and Mr Hita, by asking them to solicit other traffic management staff for the benefit of CCL's business and to the detriment of Evolution's.

[144] As a result of the evidence that was heard during the Authority's investigation meeting held in January 2024, it became clear that Mr Sinclair's attempts to solicit employees away from Evolution's business was a bigger and more significant problem than simply involving the four former employees who have been named in this determination.

[145] That was an aggravating factor that should be taken into account when assessing the severity of Mr Sinclair's breaches and the level of penalties to be imposed on him.

(v) Were the breaches intentional, inadvertent, or negligent?

[146] Mr Sinclair's actions were deliberate and done in the full knowledge that he was actively breaching his employment obligations to Evolution.

[147] Mr Sinclair was made aware of, and therefore understood, his post-employment obligations because they were clearly recorded in his employment agreement. Mr Sinclair was also put on notice of his post-employment obligations at the time of his resignation. He therefore has deliberately chosen to disregard those obligations.

[148] The deliberateness of Mr Sinclair's actions is evident from the untruths he told to Mr Attwood and Ms Leader about how he was moving to a non-traffic management role at Fletchers. That was likely done in order to conceal that he was going to work for CCL, which he knew was Evolution's competitor. Mr Sinclair would have known that Evolution would have taken immediate steps to address that, had it known about it.

[149] Mr Sinclair also mentioned to the employees he solicited from Evolution, not to mention that he had approached them. Mr Sinclair specifically told Mr Kiikoro, Mr Hita, and Mr Armitage not to say that they were going to be employed by CCL.

[150] The only plausible explanation for Mr Sinclair giving an instruction to Mr Kiikoro, Mr Hita, and Mr Armitage to not mention their employment with CCL to Evolution, is that he was deliberately trying to hide his involvement in that in order to minimise any risk to him of being 'found out' to be in breach of his non-solicitation restraint.

[151] Mr Sinclair abused his power and influence over the staff who he got to mislead Evolution, by making them act in a manner that was dishonest and, in Mr Kiikoro's case, by making him act in a way that breached his own duty of fidelity and employment agreement and exposed him to serious risk of penalties being imposed on him personally.

[152] Although Evolution elected not to pursue the former employees who are named in this determination for any breaches of their own employment obligations, Mr Sinclair's breaches had put them at personal risk of adverse repercussions for their own behaviour.

[153] Mr Sinclair also misled Ms Leader when she raised concerns with him about soliciting Evolution's employees, which was another example of him trying to cover up his improper activities.

[154] It was also significant that Mr Sinclair failed to provide the requested undertakings. That suggested Mr Sinclair was aware that he was acting in breach of his post-employment restraints and/or duty of fidelity to Evolution.

[155] These actions show that Mr Sinclair has engaged in attempts to hide his actions and/or cover them up, so that his wrongdoing could not be quickly or easily discovered. He has not done anything to engage with Evolution to address his wrongdoing, effectively forcing it to take expensive litigation after the damage was done to protect its interests in future.

(vi) Nature and extent of any loss or damage suffered by Evolution, or gains made, or losses avoided by Mr Sinclair because of the breaches

[156] As a direct result of Mr Sinclair's breaches, Evolution lost four valuable employees. Evolution's employees are its biggest asset and the sole source of revenue generation, so this loss was significant.

[157] It was even more so in respect of Evolution's highly qualified and experienced employees, such as Mr Kiikoro and Mr Armitage.

[158] After Mr Sinclair solicited Mr Kiikoro to work for CCL while he was still employed by Evolution, Mr Kiikoro did 'no shows' to his shifts at Evolution. As a result of that, Evolution sustained significant loss. For example, Mr Sinclair's actions

resulted in Evolution losing a key contract that had amounted to approximately 17 percent of Evolution's entire revenue.

[159] As Evolution's Depot Manager in Onehunga, and therefore one of its most senior employees, Mr Sinclair must have fully appreciated the significance and value of key employees like Mr Kiikoro and Mr Armitage and Evolution's dependence on them to run its operations. The nightshift arrangements that Evolution had in place had to be cancelled as a result of Mr Kiikoro not showing up to work in December 2022. Then when he left the business, the entire nightshift had to be disestablished.

[160] Mr Sinclair would also have fully appreciated that Mr Kiikoro not showing up to work (because he was working for CCL when he was supposed to be undertaking shifts for Evolution) would result in a significant business disruption and loss of income to Evolution, because it could not run its motorway night shifts without Mr Kiikoro.

[161] This meant that it was not only Evolution that suffered, but also its other employees who were on the nightshift that Mr Kiikoro was responsible for managing and operating.

[162] Mr Kiikoro's absence meant Evolution had no-one to step in to run the nightshift work, so that work was cancelled, meaning that all of the nightshift crew had to be deployed elsewhere. That resulted in some staff leaving Evolution's employment, because they had arranged their life around nightshift work, which Evolution was unable to continue offering in Mr Kiikoro's absence.

[163] Other employees were also disrupted because their rostered shifts had to be changed around, and that affected all elements of the business, the employees involved, and even their families.

[164] Mr Sinclair would have appreciated the risk of adverse financial consequences Evolution faced as a result of being unable to deliver on its agreed services to one of its key contractual partners. This materialised, with the effect that Evolution lost the AMS motorway nightshift contract, directly as a result of Mr Kiikoro not reporting to rostered shifts (the no show) and then by him leaving the business without notice.

[165] Mr Sinclair's actions not only undermined Evolution's business, but they also represented a significant competitive advantage for CCL. In particular, Mr Sinclair quickly gained traffic management workers for CCL who were qualified and therefore

able to hit the ground running, without CCL having to go through a recruitment process (and the costs and delay associated with that) or the extensive training regime that is required for traffic management staff to get qualified.

[166] Mr Attwood and Ms Leader described in detail to the Authority the significant financial investment and the investment of significant time and other resources that is required by Evolution in order to assist its employees to gain their traffic management qualifications.

[167] By unlawfully poaching key employees away from Evolution for CCL's own traffic management division, Mr Sinclair was able to save his new employer significant time and cost. CCL therefore avoided having to make the significant investments that Evolution did in order to operate its business. It also made Mr Sinclair look good in his new role.

(vii) Whether Mr Sinclair has paid an amount in compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual potential adverse effects of his breaches on Evolution

[168] Mr Sinclair has done nothing to mitigate the breaches or to reverse the adverse effects of his breaches on Evolution. Even when the breaches were drawn to his attention he denied them, instead of being open and honest about what had occurred.

[169] When confronted by Evolution about its concerns, Mr Sinclair did not engage and he did not provide the undertakings Evolution had sought. His only communication was denial and the untrue response that Evolution had been "misinformed".

[170] Mr Sinclair has done nothing to mitigate the loss Evolution has suffered as a result of his breaches.

(viii) The circumstances in which the breach, or involvement in the breach, took place, including any vulnerability

[171] These breaches were deliberate and clearly pre-planned. They occurred over a number of weeks/months.

(ix) Whether Mr Sinclair had previously been found in proceedings to have engaged in similar conduct

[172] The Authority is not aware of Mr Sinclair having previously been penalised for breaches of his employment obligations.

(x) The need for deterrence

[173] Mr Sinclair deliberately ignored his post-employment restraints and deliberately mislead Evolution to conceal what he was about to do in terms of breaching his employment obligations to it, by concealing that he was going to work for CCL after resigning from Evolution.

[174] Mr Sinclair needs to be held accountable for his wrongdoing. Penalties need to be set at a level that is high enough to achieve deterrence, both of him personally and of other employees who may be tempted to breach their employment obligations.

[175] The deliberateness of Mr Sinclair's actions and the significant harm they have caused Evolution, require a firm message to be sent to him, via the level of penalties that are imposed on him, that brings home in no uncertain terms that he is not above the law and that his compliance with employment relationship obligations is not a 'nice to have' but is a 'must have'.

[176] Evolution has been required to bring these proceedings in order to hold Mr Sinclair accountable, but also to act as a deterrent to others within the traffic management industry. It is a highly competitive environment and one of its features is the continuous practice 'of employee poaching'. Evolution has positioned itself as a business that does not poach employees from others.

[177] Evolution took legal action precisely to send a message to others within the traffic management industry, current employees, former employees, and competing businesses alike, that post-employment restraints need to be taken seriously and that Evolution will enforce these where necessary. The level of penalties needs to be set to support that message.

[178] Evolution expressed concern that a low level of penalties almost encouraged breaches, on the basis the commercial benefit of poaching qualified staff, particularly financially valuable, highly qualified employees, such as Mr Kiikoro and Mr Armitage,

far outweighed the burden of what is viewed in comparison to what was gained by the breaches as low penalties.

Degree of culpability – Preet Step 2

[179] Mr Sinclair’s breaches were serious, continued over a period of time, were intentional, and deliberately harmed Evolution. His degree of culpability was therefore high, and the level of penalties needs to reflect that.

General desirability of consistency in decisions on penalties – Preet Step 3

[180] The Authority recognised the need to ensure that penalties are broadly consistent for similar types of conduct. However, each case does turn on its own individual facts.

[181] These breaches were particularly serious because Evolution lost a key client who it had been in business with for many years. It has not been able to reinstitute that business because Mr Kiikoro left its employment. Mr Sinclair’s breaches were therefore the catalyst for the loss of that key contract.

[182] In *New ERA IT Limited v Hood* a total penalty of \$15,000.00 was imposed for breaches of a record of settlement that was (mostly) based on terms in the employment agreement and included the unlawful solicitation of clients, solicitation of employees, use of employers’ confidential information, disparagement of the employer, and breaches of the post-employment restraint (non-compete) obligations.³ All of the penalty was ordered to the employer.

[183] In *Tibbitts v EWP Sales Limited* a penalty of \$10,000.00 was imposed for “deliberate and flagrant” breaches of a record of settlement that had involved breaches of the employee’s restraint of trade clause.⁴ All of the penalty imposed was paid to the employer.

[184] In *Electropar Limited v Smith* a penalty of \$14,000 for two breaches of the employment agreement was imposed.⁵ The employee had transferred large amounts of the employer’s information to five external hard drives and emailed information to a

³ [2021] NZERA 535.

⁴ [2015] NZERA 212.

⁵ [2019] NZERA 703.

personal email address. The employer had also refused to return the employer's property. The entire penalty imposed was to be paid to the employer.

[185] In *Spirax Sarco Limited v Hewitt* total penalties of \$13,500 for breaches of the employment agreement's confidentiality obligations and restrictive covenants were imposed on the employee, with the entire penalty to be paid to the employer.⁶

[186] In *Byrne v Coverstaff Recruitment Group Limited* the Authority imposed a \$25,000 penalty on an employee for seven breaches of his employment agreement.⁷ Three breaches involved breaches of the employee's non-solicitation clause, by soliciting two clients and one employee from his former employer. All of the penalty was paid to the employer, instead of the Crown.

[187] The Authority's view is that the punitive measures to be imposed need to be meaningful and impactful on Mr Sinclair. Penalties also need to be proportionate to the level of wrongdoing and need to be set at a level that are likely to be paid.

Ability to pay – Preet Step 4

[188] There is no evidence before the Authority that financial incapacity is an issue in this matter.

Proportionality – Preet Step 5

[189] The Authority recognises that there needs to be a level of penalties imposed that is proportionate to the nature, extent, and severity of the breaches for which the penalties are being imposed.

Amount of penalties to be imposed

[190] Total penalties of \$25,000 have been imposed on Mr Sinclair for his wrongdoing. This is proportionate to the gravity of the breaches, the harm caused to Evolution and others who were adversely affected and is consistent with the amounts set in other cases.

[191] The total penalties imposed on Mr Sinclair have been assessed as follows:

⁶ [2021] NZERA 246.

⁷ [2023] NZERA 549.

- (a) \$2,000 for soliciting Ms Kiikoro to work for CCL;
- (b) \$4,000 for soliciting Mr Hita to work for CCL;
- (c) \$6,500 for soliciting Mr Kiikoro to work for CCL;
- (d) \$6,500 for instigating/inciting/aiding and abetting Mr Kiikoro to breach his employment agreement with Evolution by working for CCL;
- (e) \$6,000 for breaching the duty of fidelity to Evolution by soliciting Mr Armitage to work for CCL.

Should some or all of the penalties imposed on Mr Sinclair be paid to Evolution instead of or as well as the Crown?

[192] Penalties are prima facie payable to the Crown. However, s 136(2) of the Act provides the Authority with discretion to award some or all of any penalty imposed to any person.

[193] Whilst penalties are not intended to act as compensation for a party, the fact that a party such as Evolution has suffered harm that cannot be compensated, is nevertheless relevant to the Authority's decision about how penalties should be apportioned.⁸

[194] In this case, Mr Sinclair's breaches of his obligations did not involve breaches of statutory obligations but related to his obligations arising from his employment agreement and employment relationship with Evolution.

[195] Mr Sinclair's breaches directly and adversely affected Evolution's business and its commercial and financial position, which cannot be recovered. Evolution is the injured party. It has also incurred the time, cost, stress, and business disruption associated with addressing Mr Sinclair's breaches and holding him accountable via these Authority proceedings.

[196] In such circumstances, the Authority was satisfied that it is appropriate to award all of the penalties that have been imposed to Evolution, instead of the Crown.

⁸ *Key Industries Limited v Perrin* [2022] NZERA 416, at [232].

What costs should be awarded?

Notional starting tariff

[197] Evolution, as the successful party, is entitled to a contribution towards its actual costs.

[198] The Authority has adopted its usual notional daily tariff based approach to costs. This matter involved two days of investigation meeting times, one full day on 23 January 2024, and two half days which were held on 21 November 2023 and 24 January 2024.

[199] The notional starting tariff for assessing costs is therefore \$8,000.00 (being \$4,500.00 for the first day and then \$3,500.00 for each subsequent day of investigation meeting time).

Should the notional starting tariff be reduced?

[200] There are no factors that should result in the notional daily tariff being reduced.

Should the notional starting tariff be increased?

[201] However, there are a number of factors that should result in the notional daily tariff being increased. These include that Evolution has been put to significant time, cost and expense, over and above what would normally be required, because of Mr Sinclair's non-engagement in these proceedings. It has taken responsibility for serving documents on him personally when the Authority was unable to locate him to do so.

[202] That has required time by Evolution's counsel to take steps to locate Mr Sinclair's whereabouts and to collate and instruct a process server and then report back to the Authority. Evolution and its counsel have also had to incur time to ascertain the whereabouts of relevant witnesses, apply for and then serve witness summons on Mr Brady, Mr Hita, Mr Armitage, Mr Kiikoro, and Ms Kiikoro.

[203] Evolution and its counsel have also had to engage with CCL's Liquidator in order to locate, identify, and assess documentation that was held by the Liquidator. It also participated in a monitored inspection by Mr Brady of the CCL documents that the Liquidator held, in order to identify and locate relevant documents Mr Brady said existed but which the Liquidator had failed to produce under summons.

[204] All of these steps have unreasonably increased Evolution's actual costs in respect of these proceedings. Every time that the Authority attempted to contact Mr Sinclair, those communications were copied to Evolution and therefore its counsel incurred time reviewing those, meaning Evolution incurred legal costs.

[205] It is therefore appropriate to increase the notional starting tariff by \$3,500, being the equivalent of one extra day of investigation meeting time. The effect of that is to award costs based on the notional daily tariff for a three-day investigation meeting. That includes the additional time Evolution spent on attending the monitored CCL document inspection with the Liquidator.

[206] Accordingly, Mr Sinclair is ordered to contribute \$11,500 towards the legal costs it has actually incurred.

What disbursements should be awarded?

[207] Evolution is entitled to recover total disbursements of \$3,527.20, consisting of the following individual disbursements that were actually incurred in connection with these proceedings:

- (a) \$1,455.44 For process server fees including locating the whereabouts of Mr Sinclair and serving the statement of problem and other documentation associated with these proceedings on him;
- (b) \$218.50 For process server fees in relation to the serving of the witness summons on Mr Brady;
- (c) \$322.00 For process server fees in relation to the serving of the witness summons on Mr Hita;
- (d) \$658.44 For process server fees in relation to the serving of the witness summons on Mr Armitage;
- (e) \$322.00 For process server fees in relation to the serving of the witness summons on Mr Kiikoro;
- (f) \$366.94 For process server fees in relation to the serving of the witness summons on Ms Kiikoro;
- (g) \$112.33 Courier fees in relation to serving a bundle of documents on Mr Sinclair by a track and trace courier; and
- (h) \$71.55 Reimbursement of Evolution's filing fee in respect of these proceedings.

[208] The Authority declined the request to award \$1,408.00 counsel fees as a disbursement, for attendance at the Liquidator's premises for the monitored document review by Mr Brady. That cost has already been reflected in the increase that was made to the notional starting tariff.

Orders

[209] Within 28 days of the date of this determination, Mr Sinclair is ordered to pay Evolution \$40,027.20, consisting of:

- (a) \$25,000 total penalties;
- (b) \$11,500 legal costs;
- (c) \$3,527.20 reimbursement of disbursements.

Rachel Larmer
Member of the Employment Relations Authority