Employment Court of New Zealand

H v RPW [2020] NZEmpC 141 (4 September 2020)

Last Updated: 9 September 2020

ATTENTION IS DRAWN TO THE CURRENT ORDERS FOR NON-PUBLICATION OF PARTIES' NAMES

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2020] NZEmpC 141 EMPC 84/2019 EMPC 24/2020 EMPC 25/2020 EMPC 26/2020
EMPC 27/2020 EMPC 28/2020

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	applications for leave to extend time to file challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	application for orders preventing solicitors continuing to represent the defendant in these proceedings
BETWEEN	H First Plaintiff
AND	C Second Plaintiff
AND	RPW Defendant

Hearing:	20 November 2019 (EMPC 84/2019) (Heard at Auckland) On the papers (EMPC 24-28/2020) On the papers (EMPC 24-28/2020)
Appearances:	C Sawyer, counsel for plaintiffs S Hood and C Fraser, counsel for defendant
Judgment:	4 September 2020

H v RPW [2020] NZEmpC 141 [4 September 2020]

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve challenges to two determinations of the Employment Relations Authority (the Authority), applications for leave to extend the time to file challenges to five determinations of the Authority and an application for

orders preventing counsel and solicitors for the defendant from acting further in the proceedings.

[2] The defendant (RPW) is a registered charity running a rest home in a provincial town in the Waikato. The rest home was first opened in 1981 with a 30-bed facility. Over the years, it has expanded so that it now has 77 residents on-site as well as a village of 85 villas. RPW employs 107 people across all of its facilities. It is an important and significant employer in the provincial town in which it operates.

[3] The plaintiffs are a company, C, and its sole director and shareholder, H. C is an advocacy company primarily representing employees in employment disputes. In cases coming before the employment institutions where C is representing a party, H appears as advocate. H, using the vehicle of his company, espouses a cause to agitate on behalf of, and lobby for, employees who claim to have been bullied in their workplace.

[4] H and C represented an employee of RPW in an employment dispute. The dispute was resolved at mediation with the assistance of mediation services provided pursuant to s 144 of the Employment Relations Act 2000 (the Act). A document containing agreed terms of settlement was signed by the Mediator pursuant to s 149 of the Act. In addition to being signed on behalf of RPW as employer and the employee represented by H, H also signed the agreed terms of settlement. Clause 8 of the agreed terms of settlement reads:

Neither party, nor their representatives, shall make disparaging or negative remarks about the other. [H] has agreed to sign the Record of Settlement to indicate his agreement at being bound to this term in the Record of Settlement.

[5] The parties also acknowledged in the document as follows:

That s 149(4) of the Employment Relations Act 2000 provides that a person who breaches an agreed term of settlement to which subs (3) applies is liable to a penalty imposed by the Employment Relations Authority.

[6] H now suggests that he is not bound by this acknowledgement in view of the fact that his signature on the document appears before, rather than after, the acknowledgement. He endeavours to make a distinction between himself and his client, the employee, and RPW in this respect. Nevertheless, his signature appears immediately above the acknowledgement, and I do not consider that the distinction he makes in this respect is valid. In any event, whether or not he made the acknowledgement, the fact is that the Act entitles the Authority to impose a penalty on a person who breaches an agreed term of settlement. H had clear notice of this.

[7] Clauses containing non-disparagement and confidentiality obligations are a common feature in settlements of employment disputes such as occurred in this case. These are often necessary to maintain requirements as to privacy and preserve future employment prospects and business normalcy as the parties move on from the dispute. In addition, where the employment relationship is to continue, despite the dispute arising, non-disparagement is obviously a feature of maintaining good faith, amicable relationships and trust and confidence between employer and employee. Mutual obligations and benefits arising from such clauses are required to be recognised.

[8] RPW had knowledge of H disparaging other employers through social media following settlements he had procured on behalf of employee clients where the terms of settlement incorporated non-disparagement and confidentiality clauses. It is for this reason that, in the present case, RPW insisted upon the clause being incorporated and H signing so that he and C became parties to the agreed terms of settlement then certified by the Mediator pursuant to s 149 of the Act. It was based on the representation by H agreeing to be bound that H and C were able to procure a settlement for their employee client. The agreed terms of settlement required RPW to contribute to the employee's costs of representation by H and C in the sum of $4,000 plus GST. The payment was clearly to be made directly to H and C because the payment was to be made within five days of RPW's receipt of a GST invoice sent by H and C. In reliance upon the representation by H, RPW acted to its detriment in

settling the employment dispute with the employee, with RPW paying a reasonably substantial sum to the employee in addition to the costs.

[9] Within a short period after procuring the settlement in this way, H posted disparaging comments about RPW on C's social media pages. Over the lengthy period since 5 March 2018 when the agreed terms of settlement were executed, the disparagement has continued in an unrelenting way. As a result, RPW took steps to enforce the mediated settlement by way of compliance and other orders pursuant to the Act.

[10] As various matters have come before the Authority and the Court, anarchy has continued to reign. Breaches by H and C have consisted of complete disregard for Authority and Court orders imposing prohibition on publication of information identifying RPW, making threatening comments to RPW and its counsel and revealing confidential information obtained by H and C from their dealings with RPW during the ongoing disputes. H has posted on C's social media pages further disgraceful disparaging comments against RPW and its officers, the Authority Member dealing with the matters, and the

solicitors and counsel representing RPW. In addition, H has approached funders of the rest home to persuade them to stop funding as he believes it covers the costs of litigation against him and his company. The plaintiffs seem unconcerned at the consequences such withdrawal of funding might have on the continued employment of employees he claims to represent in addition to those employees not involved in any dispute with their employer, RPW. The effect of the plaintiffs' actions has been to undermine RPW's relationship with its employees, residents and their families and members of the public in the small community in which it operates.

[11] The full nature and impact of the breaches and resulting comments to posts made by H and C on C's social media page are contained in the evidence and contemporary documents produced to both the Authority and Court during their investigations and hearings.

[12] There have been seven determinations of the Authority which will be discussed later in this judgment. H and C challenged only the final two of those determinations.

Those final two determinations dealt only with quantification of penalties for the breaches, for which they had already been held liable, and costs. In addition to dealing with those two challenges, this judgment will also deal with a belated attempt by H and C to seek leave to extend the time to file challenges to the five earlier determinations, which have not been challenged, and the application to have RPW's solicitor and counsel prevented from acting further for RPW in this matter. That latter application only needs to be considered if leave is granted to H and C to extend the time to challenge the earlier determinations. The challenges against the last two determinations have already been heard with judgment reserved. The subsequent applications were made after submissions were filed in accordance with timetabling directions given to counsel at the close of evidence at the hearing. The need to receive and consider the submissions and then deal with these further applications has caused the delay in issuing this judgment since the date of hearing.

[13] The applications for leave to extend the time to file challenges to determinations will be dealt with first. Because of the outcome of those applications, the Court will not need to deal with the application to prevent the solicitors and counsel from acting. This judgment will then deal with the challenges presently before the Court relating to quantification of penalties and the costs.

Summary of Authority determinations

[14] The first determination dated 27 July 2018,1 granted an application by RPW that the names of the parties, and any information likely to identify them, be subject to a non-publication order until the substantive determination dealing with an application for a compliance order was issued. The determination also indicates that, in order that H and C comply with the non-publication order, they may need to remove or redact information already posted. H and C indicated that they did not wish to do that.

[15] The second determination is dated 13 August 2018.2 In this determination, the Authority reviewed the earlier non-publication order. The Authority decided that the

1 *R v A* [2018] NZERA Auckland 237 (Member Larmer).

2 *R v A* [2018] NZERA Auckland 250.

prohibition of publication in respect of RPW be continued but that the prohibition in respect of H and C be removed. The prohibition in respect of H and C was later reinstated by the Court.

[16] The third determination is dated 16 August 2018.3 This determination dealt with issues of jurisdiction and granted RPW's application for compliance orders against H and C. They were ordered to comply with the terms of settlement dated 5 March 2018. They were also directed to remove the published or publicly available disparaging comments they had made on social media platforms and/or websites under their control.

[17] The fourth determination is dated 27 August 2018.4 Under this determination, a further compliance order was granted against H and C for continued breaches of the non-publication orders and the compliance orders. The determination also dealt with the Authority's jurisdiction despite having received no or inadequate submissions on the point from H and C.

[18] The fifth determination is dated 1 November 2018.5 In this determination, the Authority, amongst other matters, decided that penalties should be imposed for breaches of the settlement agreement and obstruction or delay of the Authority's investigations. Leave was reserved to H and C to file any further evidence or submissions in respect of the assessment and quantification of the penalties. Further permanent orders prohibiting publication were made.

[19] The sixth and seventh determinations of the Authority were those dated 5 March 20196 and 21 June 20197 quantifying penalties and costs. Those are the determinations which are the subject of the challenges now dealt with in this judgment and heard by the Court on 20 November 2019. Even though the costs determination has been challenged, H and C had not participated in the Authority's investigation into

3 *R v H* [2018] NZERA Auckland 253.

4 *R v H* [2018] NZERA Auckland 275.

5 *RPW v H (No 5)* [2018] NZERA Auckland 338.

6 *RPW v H (No 6)* [2019] NZERA 121.

7 *RPW v H* [2019] NZERA 367.

costs despite being given the opportunity to do so. No challenges were filed against the five earlier determinations.

The applications for leave to extend the time to file challenges

Principles applying

[20] Principles applying to applications for leave to extend the time for commencing a challenge are well established in this Court.

[21] Section 219 of the Act gives the Court jurisdiction to make such an extension. The relevant criteria have been established in a number of decisions of the Court. For example, in *An Employee v An Employer*, the following criteria were adopted:8

(a) the reasons for the omission to bring the case within time;
(b) the length of the delay;
(c) any prejudice or hardship to any other person;
(d) the effect on the rights and liabilities of the parties;
(e) subsequent events; and
(f) the merits of the proposed challenge.

[22] These criteria should also now be read in the light of the New Zealand Supreme Court's judgment in *Almond v Read*.9 The Supreme Court in that decision emphasised that the ultimate question in such a case is what the interests of justice require. It rephrased the issue of prejudice as meaning prejudice or hardship to the respondent or to others with a legitimate interest in the outcome. The Supreme Court went on to say that: "[w]here there is significant delay coupled with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable."10

8 *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9].

9 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

10 At [38](d).

[23] In *Freeborn v Sfizio Ltd*,11 when analysing the *Almond v Read* statements regarding the merits, Judge Corkill stated as follows:

> [22] The Supreme Court also examined the extent to which the issue of merits may be relevant when leave is sought. It referred to three particular problems. First, issues as to the merits may be overwhelmed by other factors, such as the length of the delay or the extent of prejudice to a respondent. Second, the merits would not generally be relevant in a case where there had been insignificant delay as a result of a legal advisor's error and the proposed respondent had suffered no prejudice; in such a case, a respondent who does not consent would run the risk of an adverse costs award. Third, consideration of the merits on an interlocutory application is necessarily superficial. That meant there would be cases where the court should discourage argument on the merits and reach a view about them only where they are obviously very strong or very weak.
> [23] Although these observations were made with regard to applications for leave to appeal to the Court of Appeal, in my view there are cases under s 219 of the Act where such factors are potentially relevant, particularly if the delay is minor.

Analysis of the criteria in this case

[24] There is nothing in the evidence of H in support of the applications, or submissions of H and C's counsel, to explain the delay apart from a claim by H that he was overwhelmed and, to use the word used in his and C's counsel Ms Sawyer's submissions, "tricked" into signing the agreed terms of settlement. He claims that he only became aware of this when hearing the evidence of the Board Chairman of RPW at the hearing of the challenges on 20 November 2019. His attempts to explain away the delay based on his naivety and the wiles of opposing counsel are somewhat disingenuous for several reasons. First, H, in his own pleadings, evidence and in submissions from his counsel, mentioned his experience as an employment advocate. Secondly, H had been involved in previous settlements with other employers prior to the settlement in this case with RPW. RPW, knowing of H's tactics in previous dealings, insisted that settlement in the present case depended upon H and C's agreement to the terms of settlement and their being confirmed by the mediator.

[25] H's assertion that it was not until the hearing in November 2019 that he realised he had been tricked is equally disingenuous. These proceedings had been continuing

11 *Freeborn v Sfizio Ltd* [2020] NZEmpC 87 (footnote omitted).

before the Authority since 2018. H and C also became the subject of applications for the Court to exercise its powers under s 138(6) and s 140(6) of the Act. H and C took no steps to oppose those applications, and H did not attend at the first Court hearing on 6 September 2018. H attended Court on the two subsequent occasions when those applications were dealt with. He would have read the substantial evidence contained in the affidavits of the Chairman of RPW who gave evidence at the hearing on 24 September 2018 and who also gave similar evidence at the hearing in November 2019. H also attended court on 6 November 2018 when fines were imposed. When the applications to exercise powers under s 138(6) and s 140(6) against H and C for breach of compliance orders were heard, three separate judgments were issued by the Court on 6 September 2018,12 11 October 201813 and 6 November 2018.14 The judgment dated 11 October 2018 specifically alerted H and C to the fact that the time had expired for challenges to be filed to the determinations of the Authority issued by that date.15 For his breach, H was fined the sum of $2,000 and ordered to pay Court costs of $3,500 to RPW. He would have been well aware by then of the consequences of his and C's failure to comply with the terms of settlement and RPW's motives for requiring their agreement to them.

[26] No applications for leave to appeal were lodged to those judgments. The Authority's fifth determination had only just been issued when the fines were imposed. H and C took no steps then to file a challenge and would have been within time to do so.

[27] Unlike *Almond v Read*16 and *Freeborn v Sfizio Ltd*,17 this is not a case where the delay is short or arises from a minor slipup or oversight. With the first determination dated 27 July 2018, the period of 28 days for filing a challenge would have expired on 24 August 2018. With the second determination dated 13 August 2018, the expiry date would have been 10 September 2018. With the third determination dated 16 August 2018, time would have expired on 13 September 2018.

12 *RPW v H* [2018] NZEmpC 103.

13 *RPW v H* [2018] NZEmpC 120.

14 *RPW v H* [2018] NZEmpC 131.

15 At [10].

16 *Almond v Read*, above n 9.

17 *Freeborn v Sfizio Ltd*, above n 11.

With the fourth determination dated 27 August 2018, the expiry date would have been 24 September 2018. With the fifth determination dated 1 November 2018, the time would have expired on 29 November 2018.

[28] In each case, the delay in seeking leave to file challenges out of time was well over 12 months. The delay was compounded by the fact that, even though the applications for leave were filed by email with the Court on 20 January 2020, they were not served on the defendant. Amended applications which were subsequently filed on 20 March 2020 were served. These are substantial periods of delay, having inevitable consequences considering the overall interests of justice. It is noteworthy that the delay between November 2019 and March 2020 would have been significant even if it is accepted that H only became aware of the issue he claimed, on 20 November 2019.

[29] The prejudice and hardship to RPW if leave is granted after this period of delay would be substantial. RPW has already been involved in numerous hearings as a result of H's and C's actions. Substantial legal costs have been incurred. The Chairman of RPW in evidence mentioned the financial consequences of H and C's actions. The rest home business has been nearly brought to its knees as a result of the costs incurred and the effect that the actions of H and C have had on the community in which the rest home business operates. This has also been compounded by having to deal with funders who H has attempted to persuade to withdraw funding.

[30] Granting leave would also have an effect on the rights and liabilities of the parties and prejudice and hardship to third parties. In obtaining some vindication from the compliance orders against H and C, RPW has been able to get on with operating the rest home, even though the disparagement has continued. It has relied upon the orders of the Authority and Court to try and bring back some normalcy to its operations. There are residents and families of residents who would have been disturbed by the behaviour and allegations. The liability of H and C's own clients has been jeopardised as pointed out by the Authority Member in her determinations. Other employees of RPW not involved in the dispute have had their employment jeopardised. These consequences will be aggravated if RPW faces further substantial financial liabilities because of having to re-litigate the matters.

[31] Subsequent events also militate against the discretion being exercised in favour of granting leave to H and C. H has not paid the fine or the costs ordered against him on 6 November 2018. H has been relentless in ignoring the orders of the Authority and the Court.

[32] Insofar as the merits of the proposed challenges are concerned, as stated in *Almond v Read*, the assessment of the merits must necessarily be relatively superficial. While applications such as the present are not appropriate for much discussion on the merits for the reasons expressed by the Supreme Court, perusal of the arguments as to the merits put forward in both the challenges and the applications for leave demonstrate reliance upon a somewhat tenuous argument which ignores the statutory overlay of the Act. Acceptance of the interpretation of the Act argued on behalf of H and C would leave the Court powerless to intervene when there is behaviour of the kind that H and C have indulged in in this case. There is good reason why the Court must have power to intervene, as is expressed by Chief Judge Colgan in *Musa v Whanganui District Health Board*.18 In that case, Chief Judge Colgan, in rejecting a similar submission to that made in the present case, stated as follows:19

> [54] Mr Leggat submits first that no one other than a party to a settlement can breach s 149(4) of the Act and, as Mr Solomon was not a party to the settlement of Mr Musa's personal grievance with the Board, the second defendant cannot be liable.
> [55] To succeed with this argument, however, counsel must persuade the Court that the word "person" in subs (4) means a party to a settlement. I do not agree. To accede to the argument would be to read down the word used expressly and deliberately by Parliament. There is no support for interpreting very restrictively the word "person" as Mr Leggat contends. To do so would be to defeat the object of s 149 which is to preserve the confidentiality of settlements. To constrain only parties would, for example, mean, on Mr Leggat's interpretation, that a journalist could broadcast or publish with impunity the confidential terms of a settlement reached under s 149 so defeating, without sanction, the statutory confidentiality of that settlement. That interpretation of the word "person" cannot have been intended by Parliament.
> [56] Mr Leggat submits that Judge Shaw's decision in this case, declining to strike out Mr Musa's claim against Mr Solomon for breach of s 149(4), was wrong in law. I agree, however, with the Judge that it is possible for someone such as Mr Solomon to breach s 149(4) although he was not a party to the

18 *Musa v Whanganui District Health Board* [2010] NZEmpC 120, [2010] ERNZ 236.

19 Footnote omitted.

settlement as was the Board. Whether Mr Solomon has done so in fact is, of course, another question that will be dealt with subsequently in this judgment.

[33] H and C were of course parties to the terms of settlement in the present case, which makes the position against them even stronger than the situation in *Musa*. The comments of Chief Judge Colgan in *Musa*, which, by analogy, can apply in the present case, were also reinforced in *The Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc*20 by the Court of Appeal observing that:

An "employment relationship problem" is not confined to disputes between parties to an "employment relationship". It has a more expansive application...

[34] H and C have also pleaded reliance on the Bill of Rights Act 1990 in bolstering the merits of the challenge. That Act does not appear to be relevant in the context of this application.

[35] In any event, applying the statements in *Almond v Read*21 and *Freeborn v Sfizio Ltd*22 in this particular case, any issue as to the merits is completely overwhelmed by the other factors of the length of the delay and the extent of prejudice and hardship which will be suffered by RPW, members of the public in which the rest home operates, and other employees of RPW who rely upon RPW's viability for their livelihood.

[36] For all of these reasons, the applications for leave to extend time to file challenges are dismissed.

The application to prevent solicitor and counsel from acting

[37] In view of this decision, it is not necessary to go on and consider the application to prevent counsel for RPW from continuing to act. In the context of such an application as this, however, I note the previous comments of this Court on this issue.23

20 *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc* [2013] NZCA 272, [2013] ERNZ 664. See also *J P Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] ERNZ 37 at [95].

21 *Almond v Read*, above n 9.

22 *Freeborn v Sfizio Ltd*, above n 11.

23. See *Walker v Procare Health Ltd* [2011] NZEmpC 95, [2011] ERNZ 173 and *George v Auckland Council* [2012] NZEmpC 83, (2012) 9 NZELR 577.

Quite apart from the merits or otherwise of the application, I express some concern at, and disagreement with, the immoderate comments directed at opposing counsel contained in submissions in support and reply by Ms Sawyer, counsel for the plaintiffs.

The challenges against quantum of penalties and costs

[38] Finally, I return to the challenges. No evidence or argument was presented on the matter of quantum of penalties or costs at the hearing. Counsel for H and C concentrated on the issue of jurisdiction. The arguments as to jurisdiction were founded on three repetitive sentences in H and C's amended statement of claim alleging that there was no jurisdiction for the Authority to make the orders in the determinations against the plaintiffs. Read in its entirety, however, the wording in the amended statement of claim is clear that the determinations referred to deal solely with quantification of penalties to be imposed and the determination on costs. The sixth determination briefly mentions jurisdiction but only as an iteration of the findings in the previous determinations, which were never challenged. Liability for penalties and jurisdiction to impose them had already been the subject of the third, fourth and fifth determinations. The presentation of the argument on jurisdiction, therefore, amounts to an attempt to relitigate issues and is simply a collateral attack on final determinations earlier issued by the Authority; not challenged, and not disputed. Recognition of this by H and C and their counsel is confirmed by the attempts now made to obtain leave to extend time to challenge the earlier determinations already dealt with in this judgment.

[39] H was not tricked into signing the terms of settlement and deliberately chose not to challenge the five determinations. This was a positive decision he made and is confirmed by his attitude at the hearings when remedies were sought against him pursuant to s 140(6) of the Act and he was fined. He took no steps to defend those proceedings. He chose not to attend the first hearing. Because I felt that I needed to at least hear from him on the quantification of any fine and any mitigating circumstances, he was given leave at the final hearing to address the Court on the orders which could be imposed for his breaches.

[40] The arguments now presented in an effort to reopen the matters covered by the determinations where no challenges were filed are rejected. The present challenges relate solely to the sixth and seventh determinations. The absence of evidence from H, or submissions of H and C's counsel, as to quantification of the penalties or costs leaves me with having to consider the determinations themselves and the submissions of counsel for RPW, who did deal with these issues.

[41] In her determination, the Authority Member dealt with the behaviour in considering the imposition of penalties. The nature of the breaches had been considered at length in the previous determinations. The disparaging and negative remarks and the naming of RPW and its officers and other employees were identified in 26 postings H and C made using C's social media page. As discussed earlier, such postings were then commented on by members of the public which, in some cases, involved direct or inferred threats of violence against RPW, its officers and other employees, the Authority Member and RPW's counsel.

[42] The second head considered was the breaches by H and C covered by s 134A of the Act. This section provides as follows:

134A Penalty for obstructing or delaying Authority investigation

(1) Every person is liable to a penalty under this Act who, without sufficient cause, obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation (if required).
(2) The power to award a penalty under subsection (1) may be exercised by the Authority—

(a) of its own motion; or
(b) on the application of any party to the investigation.

[43] H's behaviour on behalf of himself and C, considered by the Authority in its investigation under this head, was at times insidious. Mostly, however, it was more blatantly of an obstructing and intimidating nature. The Authority Member narrowed this behaviour overall into 11 categories. The behaviour can be categorised as follows. First, in the face of orders prohibiting publication and compliance orders to enforce the non-disparagement clause in the terms of settlement, H and C breached the orders by continuing a campaign using social media posts. This had the effect of undermining

the proceedings before the Authority by overwhelming and rendering nugatory any benefit that RPW might then be able to obtain from its applications.

[44] Secondly, H entered into a campaign of endeavouring to intimidate RPW and its legal counsel by seeking political intervention in the proceedings, making accusations to the District Health Board (DHB) funder about RPW and threatening adverse publicity against the DHB and RPW. H endeavoured to coerce the Authority into abandoning the investigation and made contemptuous comments about the Authority Member. He made a concerted effort to intimidate and discredit RPW's legal counsel using accusations that they were wasting taxpayers' money by acting for RPW. He claimed that a Calderbank offer that was sent by counsel for RPW in an attempt to settle the matter was blackmail and bullying. He made unfounded complaints to the Law Society. He used social media to inflame hostility from members of the public towards those involved in the proceedings. He attempted to further intimidate by posting confidential and sensitive information about an RPW employee.

[45] Thirdly, H made it plain that he had no intention of participating in the Authority's investigation in good faith and would ignore its directions and disobey its orders.

[46] H's behaviour on behalf of himself and C is not disputed by him. It is confirmed in evidence and by contemporary documents. As I commented in the earlier Court proceedings against H, pursuant to s 140(6) of the Act, H appears to wear criticism of his behaviour as a badge of honour. His modus seems to be to malign anyone he perceives to be in disagreement with his actions and views. I did indicate to him in an earlier judgment issued at that time that, as an advocate, he held a privileged position before the Court under s 236 of the Act. I suggested that he might do better to comply with the same requirements of behaviour as are imposed on legal counsel when conducting court proceedings.24

[47] I have considered the comprehensive determinations of the Authority which are the subject of these challenges. I have also carefully considered the submissions

24 *RPW v H*, above n 12 at [22].

of counsel for RPW. I have received no assistance from H and C or their counsel, as no evidence or submissions were directed at the assessment and calculation of penalties or costs. The Authority Member has properly analysed the number of decisions of this Court dealing with quantification of penalties. I concur with her assessment that penalties are warranted for the breaches of the terms of settlement. I also concur with her assessment that H and C indulged in behaviour designed to obstruct and undermine the Authority's investigation process. Penalties are, therefore, appropriate pursuant to s 134A of the Act.

[48] In quantifying penalties, the Authority relied in particular upon this Court's decision in *Labour Inspector v Preet PVT Ltd*.25 That decision of the full Court was designed to provide future assistance to Members of the Authority and Judges of the Court when considering the imposition and quantification of penalties. It recognised the need to ensure a consistent approach and fairness towards litigants coming before the Authority or Court on such matters. The *Preet* decision has been applied in several subsequent cases coming before the Authority and the Court, and useful precedents are available. The Authority Member in this case applied the established principles and methodology appropriately. Along with the applicable factors arising from *Preet* and subsequent decisions, she had proper regard to the mandatory factors required to be taken into account pursuant to s 133A of the Act. By following the methodology established in *Preet*, the Authority quantified total penalties against H and C at $26,400 each. I consider that those figures should not be disturbed having regard to the nature of the breaches to be penalised, the need in this case for deterrence but, at the same time, maintaining overall consistency and fairness.

[49] There was nothing presented to the Authority by H and C by way of mitigation. Before the Authority, H and C were given the opportunity to present such evidence which may have given some indication of their financial ability to pay. No such evidence was provided. The Authority Member noted in the determination that H's repeated response was that he and C "will not pay a cent". Even so, in her calculations, she did make an allowance for such mitigating circumstances as she perceived might exist.

25 *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

[50] In the challenges to the Court, no such evidence was given either. Ms Sawyer indicated in her submissions that "[c]ounsel will not enter into the long lists of supposed "breaches" or their arithmetic. Jurisdiction not quantum is in issue". The evidence of H did not depart from this approach.

[51] As I have indicated earlier, H and C and their counsel have failed to engage with the Court on the real purpose of the determinations subject to the challenges. This has left me in the position of needing to retrace the steps taken by the Authority from its determinations to be able to judge the quantification of penalties and costs. I make this quantification based on the evidence as to the breaches and the acts of obstruction and intimidation presented on behalf of RPW. Having followed that process, I consider that the penalties awarded are appropriate and confirm them as payable by H and C.

[52] One area where I disagree with the Authority is in the apportionment of part of the penalties to counsel. At the hearing of the challenges, it was plain to me that counsel for RPW had not sought such an order from the Authority. He agreed it was not appropriate. Accordingly, the apportionment of part of the penalties to counsel is set aside. I direct those sums to be payable to the Crown. Apportionment in favour of RPW should stand.

[53] While on this subject, I comment upon Ms Sawyer's assertion in several places throughout her submissions that counsel for RPW received "kickbacks". It is a word not used by H anywhere in his evidence. I presume it is a word inserted by Ms Sawyer in her submissions as part of the ongoing antagonism towards counsel and solicitors for RPW. I regard it as insulting and unacceptable.

[54] H is ordered to pay penalties of:

(a) $15,000 to RPW; and
(b) $11,400 to the Crown.

[55] C is ordered to pay penalties of:

(a) $15,000 to RPW; and
(b) $11,400 to the Crown.

Costs

[56] As far as the challenge to the costs determination is concerned, this was not advanced at the hearing. As indicated, no evidence or submissions were directed towards it. I can only presume that the parts of the plaintiffs' pleadings relating to the costs determination were abandoned. Nevertheless, the determination on costs contains a comprehensive analysis of the approach towards costs in the Authority. The grounds adopted for the uplift appear appropriate, and I see no reason to depart from the final award. H and C are, accordingly, each ordered to pay RPW a contribution towards costs in the Authority of $15,035.78 (a total of $30,071.56).

[57] In respect of these challenges, costs should follow the event. RPW is entitled to costs. In view of what has transpired in this case, any agreement on costs is unlikely. Counsel for RPW are to file a memorandum of submissions on costs by 4 pm on 18 September 2020. Counsel for H and C is to file a memorandum on costs within 14 days of receipt of these submissions from RPW. The Court will then issue a further judgment on costs.

M E Perkins Judge

Judgment signed at 4 pm on 4 September 2020