

**NOTE: This determination
contains an order at
paragraph [1] prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 416
3109232

BETWEEN KEY INDUSTRIES LIMITED
Applicant

AND CAMPBELL JAMES PERRIN
Respondent

Member of Authority: Rachel Larmer

Representatives: Nic Scampion and Georgia Gamboni, counsel for the
Applicant
Simon Greening, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further 17 December 2021 from the Applicant
Information Received: 19 January 2022 from the Respondent
26 January 2022 from the Applicant
4 April 2022 from Applicant
12 April 2022 from Applicant
14 April 2022 from Respondent
27 May 2022 from Applicant

Date of Determination: 26 August 2022

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] The Authority issues a non-publication order that prevents Key Industries Limited's confidential information from being published, subject to the condition that the non-publication order does not apply to:

- (a) Key Industries Limited (Key Industries) because as the owner of the information it may do what it wants with it; or
- (b) The parties when they are communicating with, or providing information to, the employment institutions.

[2] The confidential information that is subject to this non-publication order is identified in paragraph [22] of this determination. The content of this determination is not subject to the non-publication order.

Authority's file has been sealed

[3] The confidential and commercially sensitive nature of much of the evidence filed in this matter has resulted in the Authority's file being sealed to protect that information. It may therefore not be accessed without the Authority's prior written permission.

Employment Relationship Problem

Urgency and interim application

[4] Key Industries filed a Statement of Problem on 17 June 2020 that sought urgent interim relief from the Authority to prevent further breaches by Mr Perrin of his employment obligations. The interim application was resolved by signed undertakings Mr Perrin provided on 25 June 2020.

Statement of Problem

[5] Key Industries' Statement of Problem alleged multiple breaches of Mr Perrin's employment obligations;

- (a) During his employment these included breaches of confidence, the duty of fidelity, good faith, and the obligation not to divert business opportunities away from his employer while employed;
- (b) The breaches of confidence and misuse of confidential information while employed included:
 - (i) He downloaded confidential information, that related to all divisions of his employer's business so was not just for work he had been doing;
 - (ii) He photographed and emailed Key Industries' confidential information to his personal email;

- (iii) He passed Key Industries confidential information to a competitor, and two or three weeks later the competitor started taking steps to set up a new business that Mr Perrin was employed to manage.
- (c) When Mr Perrin's employment ended he;
- (i) Failed to return all company property, material and information to Key Industries and took steps to wipe its information off his company devices;
 - (ii) Retained Key Industries' highly sensitive confidential information about all aspects of its business, including customer, pricing and sales data that went back five years;
 - (iii) Misused Key Industries' confidential information to benefit himself and a competitor;
- (d) After his employment ended Mr Perrin solicited Key Industries' clients and customers, in breach of his 90 day post-employment restraint that prevented him from doing so. He had also solicited clients while still on his notice period.

[6] Key Industries sought general and special damages, damages for loss of profits, future damages for loss of profits or alternatively an injunction, exemplary damages, penalties, interest and costs from Mr Perrin. It also asked that any penalties imposed be paid to it, instead of the Crown.

Amended Statement of Problem

[7] An Amended Statement of Problem was lodged on 10 June 20 that identified what had been resolved between the parties. The Amended Statement of Problem also added claims for a compliance order and a production order that required Mr Perrin to produce the documents and information he had failed to produce, as per his undertakings, in addition to repeating the unresolved claims made in the original Statement of Problem.

Undertakings

[8] Mr Perrin provided signed undertakings on 25 June 2020 regarding the Authority's proceedings and on 28 August 2020 regarding the High Court proceedings.¹ Mr Perrin failed to fully comply with these undertakings, in terms of providing and retaining relevant information.

(i) 25 June 2020 undertakings

[9] On 25 June 2020 Mr Perrin signed undertakings that he would not copy, disclose, publish or otherwise use Key Industries' confidential information, as defined in paragraph [22] of this determination.

[10] Mr Perrin also undertook to (among other things) use "*all reasonable endeavours*" to return all of Key Industries' correspondence, records, notes, reports and other documents and any copies he had in his possession or under his control. This included information in online file hosting services (such as Dropbox and iCloud). He agreed to provide access to any file hosting services that had contained confidential information, without alteration of the contents, for Key Industries to inspect.

[11] Mr Perrin also undertook to use "*reasonable endeavours*" to deliver the documents and information, whether electronic, physical or otherwise, that had been identified as relevant to the claims made in the Statement of Problem, to the Authority and Key Industries, along with communications and correspondence he had with clients, suppliers and other business contacts. Mr Perrin agreed to take "*all necessary steps*" to preserve those documents and information.

[12] Mr Perrin also agreed to arrangements to have his iPad, and any other device in his possession or under his control, cloned by Forensic Analyst Tina Payne of Financial Forensics Limited, so she could search for work-related material.

[13] Mr Perrin undertook to provide an affidavit that:

¹ Paragraphs [56] to [59] refer to the High Court proceedings. Mr Hess and Mr Green also provided undertakings on 26 August 2020 to Key Industries about (among other things) its confidential information in connection with the High Court proceedings.

- (a) Gave a full account and fully itemised all of the confidential information or other property of Key Industries that he had taken, including any such property held in any file hosting services;
- (b) Gave a full account of any disclosures of confidential information he had made to third parties, including the name of the third party, the date of the disclosure and the information disclosed; and
- (c) Confirmed he had returned all confidential information in a complete form, that had been in his possession or under his control.

(ii) 28 August 2020 undertakings

[14] On 28 August 2020 Mr Perrin signed undertakings in connection with the High Court proceedings, without admission of liability, that he:

- (a) Would not directly or indirectly, solicit anyone on the “*client list*” that accompanied the undertakings for six months;
- (b) Would not copy, disclose, publish or otherwise use any “*confidential information*”, as defined in the undertakings, relating to Key Industries’ business;
- (c) Had no confidential information in his possession and any he had previously received had been deleted;
- (d) Would take “*all necessary steps*” to preserve relevant documents that would be discoverable in the High Court proceedings;
- (e) Would take “*proper and appropriate steps*” to ensure that no relevant documents, including electronic documents, that were in his control were altered, lost, destroyed or disposed of.

Mr Perrins’ position in these proceedings

[15] Mr Perrin acknowledged 218 breaches of his employment agreement and did not dispute 43 alleged instances of, without sufficient cause, obstructing or delaying the

Authority's investigation as per s 134A of the Employment Relations Act 2000 (the Act).² The breaches referred to are set out in the Joint Memorandum dated 26 November 2021.

[16] Mr Perrin acknowledged he would have penalties imposed on him and that he would be liable for special damages for some legal fees, if the Authority determined the legal fees were necessary, reasonable and had been properly incurred by Key Industries.³

[17] Mr Perrin disputed the extent and amount of the special damages Key Industries had claimed. He also opposed Key Industries' claims for general damages, loss of profits, claims for future loss of profits and exemplary damages.

[18] Mr Perrin did not comment on the requests Key Industries had made for a stay of this matter so others could be joined as respondents or the partial stay of the future loss of profits damages claim.

[19] Mr Perrin did not oppose the application for a compliance order.

Overview of breaches of the employment agreement that occurred

[20] The breaches of Mr Perrin's employment agreement can be categorised as follows:

- (a) Diverting business opportunities away from Key Industries while employed;
- (b) Copying and retaining Key Industries' confidential information;
- (c) Destroying and failing to return Key Industries' property and confidential information;
- (d) Disclosing Key Industries' confidential information to a competitor, that (because of the timing involved) appeared to have used that information to decide to set up a new competing business in New Zealand that would be run by Mr Perrin;

² Mr Perrin disputed four out of the 54 claims Key Industries had made that he had passed confidential information to Mr Green. Mr Perrin further said he had decided not to defend the alleged breaches of s 134A of the Act in order to bring these proceedings to a conclusion.

³ Mr Perrin's view was that a maximum of \$8,200 of the legal fees claimed by Key Industries could potentially be awarded as special damages.

- (e) Contacting many of Key Industries' customers and clients to solicit their business for a competitor while he was still employed and during his restraint period.

Overview of breaches of s 134A of the Act (obstructing or delaying Authority's investigation)

[21] The details of Mr Perrin's conduct that breached s 134A of the Act 2000, because (without sufficient cause) it had obstructed and delayed the Authority's investigation into his breaches of his employment agreement, could be broadly categorised as:

- (a) Providing false and misleading information to the Authority;
- (b) Deleting and/or withholding relevant information during the Authority's investigation;
- (c) Failing to comply with his signed undertakings dated 25 June 2020 and 28 August 2020;
- (d) Breaching the Authority's directions and orders.

Identification of the confidential information referred to in this determination

[22] Mr Perrin agreed in the written undertakings he signed on 25 June 2020 to a list of items that he accepted were Key Industries' confidential information. That same list of confidential information has been adopted by the Authority to identify the confidential information that is addressed in this determination and which is the subject of the non-publication order in paragraph [1] of this determination, namely:

- (a) Customer lists and contact information;
- (b) Prospective customer lists and contact details;
- (c) Supplier lists and contact information;
- (d) Product databases and records;
- (e) Product costs;
- (f) Product designs, specifications and formulations;
- (g) Product pricing and information;
- (h) Key Industries' stock management and reporting system;

- (i) Information relating to Key Industries' marketing or sales activities;
- (j) Sales targets and statistics;
- (k) Key Industries' surveys, research and reports;
- (l) Customer and supplier contracts.

Key Industries

[23] Key Industries is an agrichemical and pest control company. Its three main product divisions are 'Aghort' (agricultural and horticultural products), pest control, and DIY (sales to standard, retail customers as opposed to Professional Pest Operators).

[24] Key Industries is a distributor of a broad range of agrichemicals for agricultural and horticultural customers, and a full range of pest control products to the professional pest management and conservation industries. It is the largest supplier of pest control products in New Zealand.

[25] Key Industries is a small family run business that operates in New Zealand and the Pacific Islands. It has been built up and run by the Visser family for 20 years and employs less than 20 employees, including members of the owner's family.

Campbell Perrin

[26] Mr Perrin worked at Key Industries for 13 years. He started work in June 2007 and by 2014 his position title was Key Account and Technical Manager (Pest Control). Mr Perrin remained in that position until he was made redundant, as part of a restructuring that had stemmed from the impacts of Covid-19 on Key Industries.

[27] Mr Perrin was responsible for Key Industries' pest control customers throughout New Zealand and in the Pacific Islands. He worked closely with customers and most of his work was done by mobile phone. Mr Perrin's responsibilities included growing existing business and finding new avenues of business for Key Industries.

[28] By the time Mr Perrin's employment ended he was responsible for around 400 customers in New Zealand and 20 in the Pacific Islands. He was 'the face' of Key Industries for the customers he dealt with and looked after accounts that represented approximately 45% of Key Industries' total turnover.

[29] Mr Perrin held a senior and important role, so he was trusted and entrusted with commercially sensitive information. Mr Perrin therefore had access to full details about all aspects of Key Industries' business and operations. That included, among other things, sales information across all divisions, sales and marketing activities/intentions throughout the company, suppliers' information across all divisions, as well as contracts, product formulations and testing activity across all divisions and research and surveys.

[30] Mr Perrin was given 30 days' notice of redundancy on 8 May 2020, so his employment ended on 7 June 2020. He was subject to 'non-compete and non-solicitation' restraints for 90 days following the end of his employment, so these restraints ended on 7 September 2020. His post-employment confidentiality obligations continued in perpetuity.

Relevant clauses in the employment agreement

[31] Mr Perrin's employment was subject to a written employment agreement dated 1 July 2014. He also had implied obligations that included (among other things) trust and confidence, fidelity, good faith and honesty. In addition to implied obligations, the following clauses in Mr Perrin's employment agreement were relevant to the breaches that occurred:

- (a) Clause 4.2(i) required Mr Perrin to comply with lawful and reasonable instructions;
- (b) Clause 4.2(iii) required Mr Perrin to act in his employer's best interests;
- (c) Clause 4.2(iv) required Mr Perrin to act in good faith in all aspects of the employment relationship;
- (d) Clause 12.1 was a confidentiality clause that prohibited him from using, disclosing or distributing to any person or entity any confidential information, messages, data or trade secrets he had acquired as a result of his employment. This clause applied during, and continued indefinitely after the end of, his employment;
- (e) Clause 12.3 was a conflict of interest clause that required him to avoid conflicts of interest and to report any potential conflicts that did arise;
- (f) Clause 12.4 required Mr Perrin's use of the internet and email to not be illegal or contrary to his employer's interests;

- (g) Clause 12.6 contained non-compete and non-solicitation of customers and clients post-employment restraints that applied for 90 days after his employment ended. This prohibited Mr Perrin from, either personally or as an employee, consultant, or agent for any other entity or employer, soliciting or carrying out any work of the same nature for any client he had contact or dealings with during his employment;
- (h) Clause 12.7 prohibited Mr Perrin, for 90 days following the end of his employment, from soliciting employees he had dealings with while employed;
- (i) Clause 14.5 required Mr Perrin, when his employment ended, to return all company property, material and information that was in his possession or under his control.⁴

Reminder to Mr Perrin of his employment obligations

[32] Mr Perrin was reminded about his employment obligations and put on notice that any breaches would be taken seriously in the notice of redundancy letter he was given on 8 May 2020. In particular he was:

- (a) Expressly instructed not to contact Key Industries customers, prospective customers, suppliers or other business partners for the remainder of his employment;
- (b) Reminded of his existing and ongoing contractual obligations, and the requirements of clauses 12.1 (confidential information), 12.6 (non-solicitation of clients) and clause 14.6 (obligations on termination of his employment) of his employment agreement were expressly set out again for him;
- (c) Referred to his ongoing confidentiality obligations, and the types of information and documents that Key Industries was entitled to protect was again set out for him;
- (d) Informed that breaches of his obligations (and any loss suffered) would be taken seriously and enforcement action would be taken if necessary.

⁴ Examples given in clause 14.5 included (but were not limited to) return of computer discs, printouts, manuals, reports, letters, memos, plans, diagrams, security cards, keys, and laptop computers.

Discovery of wrongdoing

[33] When Mr Perrin returned his company issued laptop and mobile phone (“*the devices*”) Key Industries discovered he had attempted to delete, or had deleted, all of its information off the devices. Key Industries found 25 photos in the ‘deleted items’ folder of internal pricing screenshots Mr Perrin had taken of its database. Some information Mr Perrin had deleted from the devices could be recovered by Key Industries, but most could not.

[34] After being notified of the proposed restructure of his position, Mr Perrin had emailed the pricing photos and a substantial amount of other confidential information to his personal email address and he had also uploaded it to his personal iCloud storage facility. This happened on multiple occasions during late April and May 2020. There was no legitimate business reason for him to have done that.

[35] Key Industries undertook further investigation and, as a result of that, identified that Mr Perrin had repeatedly breached his implied, contractual and statutory obligations to it. It was discovered that Mr Perrin had been copying and retaining its confidential information, had diverted business opportunities from it, had solicited its clients and customers, and had passed confidential information to a competitor, Agserv Pty Limited.

Agserv Pty Limited, Eris Hess and Jason Green

[36] Agserv Pty Limited (Agserv) is a large distributor of pest control products in Australia. Agserv primarily focuses on pest control and it has branches in Sydney, Newcastle, Melbourne, Brisbane, Adelaide, Perth, and the Gold Coast.

[37] Mr Michael Eris Hess (known as “*Eris*”) is Agserv’s Managing Director. Mr Jason Green is Agserv’s General Manager in Australia. Mr Green and Mr Perrin are close friends and Mr Green was best man at Mr Perrin’s wedding.

Discovery of Mr Perrin’s interactions with Agserv in May and June 2020

[38] Key Industries told the Authority it did not believe it had received the full picture regarding all of Mr Perrin’s interactions with Agserv and Mr Green, because Mr Perrin had not been forthcoming about that, despite having undertaken to do so.

[39] Mr Perrin admitted disclosing Key Industries’ confidential information to Mr Green. Mr Perrin and Mr Green exchanged emails on 14 May 2020, following an email that Mr Perrin

sent Mr Green that said “*last 5 years sales so there is no lies and the markets are the [redacted].*” That email attached a copy of five years’ of Key Industries’ customer sales.

[40] Mr Green responded to Mr Perrin by email a few hours later saying “*It has declined quite a bit over the last two years?*” Mr Perrin replied with his views on why that had occurred, and further commented “*the Islands and conservation are better? Does it stack up?*”.

[41] Mr Green’s reply email said:

If you assume you will get [redacted] back with a shop in place then yes, I think it still does. Based on the 2020 numbers I would expect to get about 30% of the business easily which is around \$[redacted]M and then with a branch in place and some promotion pick up enough to get to around \$[redacted]M reasonably quickly.

[42] Mr Perrin’s response to Mr Green was that:

The Islands would be a good earner and there are some very good sales to be made as [redacted] and I know that I can get some of [redacted] and there is (sic) many loyal Pesties throughout NZ that (sic) will come to us and screw the others.

[43] These emails between Mr Perrin and Mr Green all occurred on 14 May 2020, within hours of the confidential information being disclosed to Mr Green, and while Mr Perrin was still employed by Key Industries.

[44] A letter dated 20 July 2020, from counsel for Agserv and Mr Green, sent to Key Industries denied that the 14 May 2020 email Mr Green received “*contained anything confidential or commercially valuable*”. That denial has been proven to be untrue.⁵

[45] Mr Green’s counsel, in the 20 July letter, explained the emails between Mr Perrin and Mr Green as involving a personal exchange between friends, in which Mr Green was “*questioning how he [Mr Perrin] could have been made redundant considering the business climate and there were some emails in this context to question whether the redundancy may have been justified [...].*”

[46] Key Industries did not accept that explanation. It believed the email exchange indicated that Mr Green had used its confidential information to plan how much business Agserv could take from Key Industries if Agserv opened a competing business in New Zealand.

⁵ Mr Perrin admitted the 14 May 2020 email he sent to Mr Green disclosed confidential information.

[47] Key Industries believed that Mr Hess decided to start up an Agserv business in New Zealand based on Mr Green's calculations; namely that a New Zealand based Agserv business would "easily" take about 30 per cent of Key Industries business and then \$[redacted] of Key Industries' annual business "reasonably quickly", once Agserv had opened a New Zealand branch and had done some promotion.

[48] Key Industries said that prior to Mr Perrin's disclosure of Key Industries' confidential information to Mr Green, there was nothing that indicated Agserv had been taking any steps to enter the New Zealand market. At that time, Agserv did not have a branch or operate in New Zealand and it had not made arrangements to obtain premises, staff, stock to sell, or supply arrangements in New Zealand.⁶

Agserv NZ Limited/ Agserv GP Limited

[49] Agserv NZ Limited was incorporated in New Zealand on 9 June 2020. Agserv NZ Limited was subsequently renamed Agserv GP Limited (Agserv GP).

[50] Agserv GP remains incorporated in New Zealand but it has not yet commenced operations here due to these proceedings. Key Industries believes it is likely to do so once these claims have been resolved.

[51] Mr Hess is the sole director and shareholder of Agserv GP.

[52] Mr Perrin was employed to manage the newly created New Zealand based Agserv operation. He was offered the position as "*Manager – New Zealand at Agserv GP*" on 28 May 2020 and was due to start work in that role in September 2020.

[53] Mr Perrin did not start work for Agserv GP and subsequently resigned as a result of these proceedings. However, prior to his resignation Agserv had provided Mr Perrin with a company vehicle, two laptops, a mobile phone and had allocated him a New Zealand Agserv email address. All of that had occurred before Mr Perrin had even started work for Agserv GP.⁷ Mr Perrin also had set up a second Agserv email address, that was linked to a gmail account.

⁶ Key Industries told the Authority that Mr Hess' first contact with suppliers regarding a New Zealand based Agserv business occurred on 28 May 2020.

⁷ Mr Perrin's actual New Zealand Agserv email address was identified in the letter from Mr Perrin's counsel to the Authority dated 24 September 2021, but is not set out here for privacy reasons.

[54] Mr Perrin did not make his Agserv GP devices (his laptop, iPhone or Sony VAIO laptop) or his New Zealand Agserv email available for inspection. He claimed they had been returned to Agserv in Australia, but did not arrange for any of those devices to be returned or inspected.

[55] Agserv also failed to make Mr Perrin's Agserv devices or his New Zealand Agserv email account available for inspection. Mr Perrin also deleted emails from his Agserv gmail email account before it could be reviewed by Ms Payne.

High Court proceedings

[56] Key Industries filed High Court proceedings against Mr Perrin, Agserv and Mr Green.⁸ Key Industries entered into a Settlement Agreement regarding the High Court claims with Agserv, Mr Green and Mr Hess on 8 October 2020 ("*the Settlement*"). Mr Perrin was not a party to the Settlement.

[57] The Settlement was stated to be "*full and final settlement of all matters arising from, relating to otherwise connected to the Dispute.*" The "*Dispute*" was defined and related to the proposed commencement of Agserv's business in New Zealand, its communications with and engagement of Mr Perrin, and all communications between the parties about that.

[58] The Settlement was based on material assurances and representations that Key Industries, based on currently available information, now believed were untrue. However, the Settlement also provided that if any of Agserv's material representations were incorrect, then Key Industries could pursue its claims against Agserv, Mr Hess and Mr Green "*in any forum whatsoever arising from, relating to or otherwise connected to the Dispute.*"

[59] Key Industries claimed that, due to evidence uncovered during these Authority proceedings, material representations made by Agserv, that had induced settlement of the High Court proceedings, were untrue. As a result of that view, Key Industries now sought to pursue claims against Agserv, Mr Hess and/or Mr Green in the Authority.⁹

⁸ High Court CIV-202-404-1380.

⁹ This was raised in Key Industries' submissions so was not covered in the Amended Statement of Problem.

Allegations and potential claims against Agserv and others

[60] Key Industries said it had not claimed penalties in this matter against Agserv, Agserv GP, Mr Hess or Mr Green due to the Settlement.

[61] However, Key Industries said that if the Settlement was vitiated due to misrepresentations, then it would pursue Agserv, Agserv GP, Mr Hess and Mr Green for damages as well as for penalties under s 134(2) of the Act, for inciting, instigating, aiding, or abetting Mr Perrin's breaches of his employment agreement.

[62] Key Industries therefore sought findings by the Authority against Mr Hess (as the sole director and therefore controlling mind of Agserv GP) and Mr Green (as the person who received and reviewed Key Industries' confidential information) regarding their involvement in Mr Perrin's misuse of Key Industries' confidential information.

[63] Agserv, via its lawyers, responded to Key Industries' requests for clarification about its involvement in the misuse of Key Industries' confidential information by stating that Agserv Pty Ltd did not hold any of Key Industries' confidential information, as per its Settlement representations. It was not prepared to engage further than that.

[64] Key Industries did not accept that response. However, Agserv's response could not be tested by cross-examination. Agserv, Mr Hess and Mr Green did not accept invitations from Key Industries, or the Authority, to give evidence about the full extent of their knowledge of, and alleged participation in, Mr Perrin's disclosure of Key Industries' confidential information.

[65] Key Industries in its submissions requested:

- (a) A stay of the Authority's investigation in this matter, so it could join Agserv, Agserv GP, Mr Hess and Mr Green to these proceedings in order to pursue penalty claims against them under s 134(2) of the Act;
- (b) An award of damages for future loss be made against Agserv, so it did not unfairly benefit from having received Key Industries' confidential information;
- (c) If damages were not awarded against Agserv, then alternatively a permanent injunction be issued to prevent Mr Perrin working for Agserv, or any related entity in New Zealand, so Key Industries could protect its business from the

threat of Agserv commencing business in New Zealand with Mr Perrin at the helm, using its confidential information;

- (d) If an injunction was not issued against Mr Perrin, and damages were not awarded against Agserv, then alternatively, Key industries sought a partial stay, for up to three years, of the Authority's assessment of damages on its projected loss of profits/future losses claims "*until Agserv's next moves could be known.*"

Details about the confidential information Mr Perrin removed and retained

[66] The range of products offered by Agserv in its pest control division were comparable to those offered by Key Industries, so there was considerable overlap between the product ranges each company offered. That meant Agserv could have easily gained a competitive advantage over Key Industries by having access to its confidential information, because that would have given valuable insights into how Key Industries operated and its future plans.

[67] Collectively the information retained by Mr Perrin, that Key Industries feared had all been passed on to Agserv, was the result of 20 years of Key Industries' development and investment in its customer and supplier bases, business practices, and product lines and formulations. It captured virtually all of the trade secrets, confidential know how and internal business partner data developed and acquired over that period.

[68] The records Mr Perrin took could not be independently learned or generated. The sales volumes, sales values and retail pricing for each customer was confidential to Key Industries and that specific customer. Key Industries' internal prices and product margins were the culmination of two decades of effort, investment, analysis, trial and error to find the right pricing levels.

[69] For a sophisticated competitor like Agserv, the information Mr Perrin took (and particularly the two Excel spreadsheets he sent Mr Green on 14 May 2020) essentially provided a blueprint for establishing a local business to compete with Key Industries, because it included a 'shopping list' of pre-qualified customers and their commercial needs/spend. Key Industries pointed out that Agserv did in fact start up a new offshoot of its business (Agserv GP) in New Zealand in early June 2020, within weeks of receiving confidential information.

[70] The confidential information Mr Perrin took could be used by a competitor to:

- (a) Approach all of Key Industries' customers and clients;

- (b) Understand customers' and clients' sales histories and requirements, across all divisions;
- (c) Identify and undercut the pricing for each customer and client, including individually target pricing for specific customers/industries/regions;
- (d) Approach Key Industries' suppliers and leverage the product supply costs it had negotiated over many years;
- (e) Use the product formulation information to replicate products and/or produce generic copies from manufacturers;
- (f) Anticipate and get ahead of Key Industries regarding its future marketing plans and activities.

[71] The confidential information Mr Perrin retained would have significantly reduced the risks inherent with starting a new business in a new market. It would have allowed Agserv to have more easily assessed the viability of a potential New Zealand-based arm of its business, which would otherwise have cost it substantial and resource intensive investigation.

[72] The confidential information Mr Perrin gave Agserv therefore would have allowed it to have entered the New Zealand market in a more targeted and efficient manner than it could not otherwise have done because it could have seen:

- (a) Long term sales trends from Key Industries' customers spanning over a five-year period;
- (b) Key Industries' customers' preferred products; and
- (c) The quantities of products ordered by each of Key Industries' customers.

[73] If Key Industries was correct, and Mr Perrin's and Mr Green's email exchanges on 14 May 2020 referred to the amount of business a new Agserv branch in New Zealand could take off Key Industries (and was not simply 'questioning of Mr Perrin's redundancy' as Mr Green's counsel claimed), then the financial consequences of that could have potentially been devastating for Key Industries' business.

[74] Key Industries' analysis of Mr Green's email was that he had believed 30% of its business could be "*easily*" taken and half of its business could be taken "*reasonably quickly*",

once Agserv GP started operating in New Zealand. The loss of half its business, in a short time, would have been devastating for Key Industries.

Relevant information that was not disclosed by Mr Perrin

[75] Mr Visser's affidavit identified all of the relevant information Key Industries considered Mr Perrin had knowledge, possession, or control of but which he had failed to disclose/provide, in breach of his undertakings to do so.¹⁰ This included:

- (a) Access to his iCloud account;
- (b) Copies of communications he had with Key Industries' customers (including but not limited to text messages and Facebook messages);
- (c) A full account of communications he had with Key Industries customers (such as phone calls);
- (d) Copies of all communications with Mr Green (including but not limited to text messages);
- (e) A full account of communications with Mr Green (such as phone calls);
- (f) The full email chains formerly on his iPad, that he deleted after they had been identified by Ms Payne during her search;
- (g) Emails he sent from his personal gmail account before 19 May 2021, that he deleted before Ms Payne examined the account;
- (h) All emails in the Agserv gmail account, that he likely deleted;
- (i) The CAM-VAIO device;
- (j) A full account of the 'database' he was compiling for Mr Green;
- (k) His Agserv devices and company email.

Authority's investigation

[76] The Authority held Case Management Conferences (CMCs) with the parties on 18 June 2020, 26 June 2020, two CMCs on 19 November 2020 because Mr Perrin's representative did not appear at the first case management conference that day, 19 February 2021 and 9 July 2021.

¹⁰ See exhibit G of Mr Visser's affidavit dated 17 December 2021.

[77] The Authority issued Minutes and/or Notices of Direction on 18 June 2020, 20 November 2020, 29 September 2021, 27 October 2021 and 15 July 2021.

[78] Investigation meetings were held on 12 March 2021 and 27 October 2021. A third investigation meeting set down for 28 January 2022 did not proceed because, by agreement, the outstanding matters were instead subject to this ‘on the papers’ investigation.

Information filed by the parties

[79] Extensive written evidence and documentation was filed by the parties. This included expert information and reports from Forensic Analyst Tina Payne, of Financial Forensics Ltd. The Authority was also provided with a copy of the Settlement in the High Court proceedings.

[80] Key Industries’ Commercial Manager Mr Andre Visser filed affidavits dated 17 June 2020, 15 October 2021 and 17 December 2021. He also referred the Authority to the affidavit dated 21 August 2020 he had prepared for the High Court proceedings. Mr Frank Visser, Operations Manager, provided a written statement.¹¹

[81] Mr Perrin filed affidavits dated 16 June 2020, 3 December 2020, 1 April 2021, 5 May 2021, 21 September 2021 and 8 October 2021.

[82] Both parties filed written submissions.

[83] In September 2021 Agserv, Agserv GP, Mr Hess and Mr Green were invited to voluntarily participate in the Authority’s 27 October 2021 investigation meeting, so they could respond to the allegations Key Industries had made about them. Despite that offer, none of them did so.

The Authority’s first investigation meeting

[84] Mr Perrin’s failure to comply with his undertakings regarding his disclosure obligations led to an investigation meeting on 3 March 2021, to address outstanding document/information issues arising from his undertakings.

¹¹ Frank Visser had purchased the business and built it up.

[85] That resulted in the Authority issuing its determination *Key Industries Limited v Perrin* on 12 March 2021.¹² The Authority ordered Mr Perrin to lodge and serve a sworn affidavit in accordance with his 25 June 2020 undertakings.

[86] Mr Perrin was ordered to specifically address each of the 11 points that were set out in a list Key Industries had provided to Mr Perrin on 10 March 2020, that identified the outstanding points he needed to address in order to comply with his undertakings.

The Authority's second investigation meeting

[87] The Authority held a second investigation meeting by Zoom on 27 October 2021 to again address alleged breaches of Mr Perrin's undertakings, that arose due to outstanding document/information issues.¹³ That investigation meeting was adjourned part heard to give the parties a further opportunity to attempt to resolve the outstanding document issues and to agree on the total number of breaches that had occurred.

[88] Mr Perrin and Mr Visser also both affirmed their unsworn affidavits during this second investigation meeting.

The Authority's third investigation meeting

[89] The third investigation meeting that was scheduled for 28 January 2022 to investigate the disputed breaches did not proceed. On 19 January 2020 Mr Perrin's counsel informed the Authority that Mr Perrin would no longer be disputing the remaining alleged breaches.¹⁴

[90] The parties advised the Authority in a joint memorandum that, in order to save time and costs and given that now most of the alleged breaches were no longer disputed, the damages and penalties claims should be dealt with on the papers.

[91] Accordingly, this determination has assessed damages and penalties, associated with the breaches that were set out in Appendix A of Mr Visser's affidavit dated 17 December 2021, based on the information the parties filed with the Authority.

¹² [2021] NZERA 101.

¹³ This occurred during lockdown.

¹⁴ Above n2.

Nature of the breaches of the employment agreement

[92] The breaches of Mr Perrin's employment agreement that are addressed in this determination consisted of:

- (a) Breaches of the duty of fidelity and good faith obligations;
- (b) Breaches of confidence and misuse of confidential information;
- (c) Solicitation of Key Industries' customers during the:
 - (i) Employment relationship;
 - (ii) Notice period;
 - (iii) Restraint period; and
 - (iv) Period during which his undertakings had applied.

Nature of the breaches of s 134A of the Act (obstructing or delaying the Authority's investigation)

[93] Mr Perrin did not defend Key Industries' claim that there had been 45 instances on which he had obstructed and/or delayed the Authority's investigation. However, the Authority has proceeded on the basis there were 43 (and not 45) breaches of s 134A of the Act, because two of the breaches Key Industries sought to rely on predated the filing of these proceedings.

[94] Mr Perrin's conduct that, without sufficient cause, obstructed and delayed the Authority's investigation is set out in paragraph [21], so it is not repeated again here.

Issues

[95] The following issues are to be determined:

- (a) Did the Authority have jurisdiction over claims against Agserv, Agserv GP, Eris Hess and/or Jason Green?
- (b) If not, should the matter be stayed to enable Key Industries to file claims against them?
- (c) What, if any, special damages should Key Industries be awarded?
- (d) Should any special damages that are awarded be reduced as a result of the High Court settlement agreement?

- (e) Should Key Industries be awarded exemplary damages?
- (f) What, if any, general damages should Key Industries be awarded?
- (g) Should Key Industries be awarded future damages and/or loss of profits?
- (h) Should the Authority issue an injunction against Mr Perrin, Agserv, Mr Hess and/or Mr Green?
- (i) Should the Authority issue a partial stay of the future damages claimed in these proceedings?
- (j) Should the Authority issue a compliance order?
- (k) What penalties should be imposed on Mr Perrin for his breaches?
- (l) Should some or all of the penalties imposed on Mr Perrin be paid to Key Industries instead of the Crown?
- (m) Should Key Industries be awarded interest?
- (n) What, if any, costs and disbursements should Key Industries be awarded?

Did the Authority have jurisdiction over claims against Agserv, Agserv GP, Eris Hess and/or Jason Green?

[96] In its submissions, Key Industries asked the Authority to make findings that Mr Hess and Mr Green:

- (a) Encouraged Mr Perrin to provide Key Industries' confidential information;
- (b) Were aware he was going to do so before it was provided to them;
- (c) Appreciated Mr Perrin was acting unlawfully;
- (d) Appreciated the value of the confidential information;
- (e) May still have copies of, or access to, Key Industries' confidential information in breach of their 26 August 2020 High Court undertakings.

[97] The Authority declined to make these findings.

[98] None of these claims were before the Authority for determination. Mr Hess and Mr Green were not named as respondents in these proceedings. Nor were they witnesses and they have not provided evidence to the Authority.

[99] If Key Industries wanted to prove that Mr Hess or Mr Green have breached their High Court undertakings, or made false material representations that induced the Settlement of those proceedings, then those issues should be pursued in that forum.

[100] The Authority did not have jurisdiction over claims involving Agserv, Agserv GP, Mr Hess or Mr Green. There was no employment relationship between them and Key Industries. Nor did the Amended Statement of Problem include claims against any of them, that could be pursued against them in the absence of an employment relationship.

Should this matter be stayed to enable Key Industries to file claims against Mr Hess, Mr Green , Agserv or the Agserv GP?

[101] The Authority declined to issue a stay of these proceedings to enable Key Industries to file new claims against individuals and/or entities that are not currently named as respondents in this matter.

[102] This is a longstanding matter that has consumed a huge amount of time, resources and legal costs for all involved. It is important for the parties to be able to put these problems behind them, so everyone can finally move on. A stay would fundamentally undermine that objective.

[103] The proposed new penalty claims were problematic because they faced significant jurisdictional issues.

[104] Section 135(5) of the Act required penalty claims to be commenced within 12 months of the breach first becoming known, or from when the penalty claim should reasonably have become known, to the person pursuing the penalty.

[105] The proposed new penalty claims are out of time because they had not been lodged within the 12 months' timeframe required by s 135(5) of the Act. Although under s 221(c) of the Act the Authority had jurisdiction to extend the time for anything to be done, it was not clear that applied to penalty claims.

[106] The Settlement also barred claims against Agserv, Mr Hess and Mr Green, unless Key Industries had proved the material representations they had given to induced the Settlement had been false. That meant a judicial finding on whether or not their representations were false would be required, before penalty claims could be pursued.

[107] There are also practical problems that should be taken into account.

[108] Agserv, Mr Hess and Mr Green are all in Australia. Agserv GP is not operating. That raised concern about the extra time and costs associated with service, and in person attendances at an investigation meeting in New Zealand, related to penalty claims

[109] In terms of a potential damages claim against Agserv, because Agserv GP had not operated in New Zealand there was likely to not be any actual loss that could be addressed by damages. A future damages claim was speculative because Agserv GP may not ever enter the New Zealand market. These are the same problems Key Industries faced in obtaining an award of damages in these proceedings, which did not succeed due to a lack of evidence.

[110] The High Court undertakings provided by Mr Hess and Mr Green, the Settlement, and the non-publication order in this determination all provide a way for Key Industries to protect its confidential information. The intended benefit of filing new proceedings against new third parties was therefore questionable.

[111] The Authority was not convinced there is any good reason to stay this matter, so Key Industries' application for a stay is declined.

What, if any, special damages should Key Industries be awarded?

Law on special damages

[112] The purpose of damages is not punitive (that is the role of penalties) but is to compensate a party for the loss, damage or harm it has suffered.

[113] The Court of Appeal in *Binnie v Pacific Health Limited* held that legal expenses prior to the issue of proceedings, such as for investigations into the conduct of employees, could be treated as special damages rather than as party and party costs, provided a proper line could be drawn between the two.¹⁵

[114] Special damages also had to be sufficiently linked to the breaches, the work done reasonably necessary and the costs incurred reasonable. If that was established, then special damages were potentially available to Key Industries to compensate it for the expenses it

¹⁵ [2002] 1 ERNZ 438 (CA). The Authority awarded special damages in *Restaurant Brands Limited v Bond* [2012] NZERA 21; *Tag Oil NZ Limited v Watchorn* [2014] NZERA 58 and *Horton Media Limited v Tither* [2013] NZERA 178.

incurred for advisers or experts it engaged, for investigative purposes, and to advise it on how to address the consequences of Mr Perrin's breaches.

Details of the special damages claimed

[115] Key Industries claimed the following special damages;

- (a) \$2804.10 for LawFlow file hosting services;
- (b) \$6,713.12 for investigative services undertaken by the Forensic Analyst, Ms Payne;
- (c) \$135,260 for executive and management time spent on investigating and responding to the breaches; and
- (d) \$171,529.53 for legal fees incurred to investigate, advise on and address the breaches, that were unconnected to any legal costs associated with these Authority proceedings.

LawFlow file hosting services

[116] LawFlow organises data and provides specific inspection tools. Key Industries used LawFlow as a document inspection and analysis tool to investigate Mr Perrin's breaches before the Authority proceedings were commenced.

[117] Key Industries had over 85,000 Outlook files, comprising emails and attachments to handle, so it was prudent and appropriate for it to have used LawFlow file hosting services to keep that amount of information organised and readily assessable.

[118] The costs incurred for LawFlow were sufficiently connected to the breaches to warrant recovery, because but for the breaches these costs would not have been incurred. The costs incurred were reasonably necessary and reasonable. They are therefore recoverable as special damages.

[119] Mr Perrin is ordered to pay Key Industries special damages of \$2,804.10 for the costs of LawFlow.

Services provided by the Forensic Analyst

[120] The \$6,713.12 incurred for the Forensic Analyst's cloning and review of devices and storage, and reporting, may be recovered by Key Industries as a disbursement when the

Authority awards party to party costs in these proceedings. It is therefore not awarded as special damages.

Executive and management time

[121] Mr Visser's affidavit of 17 December 2021 set out the details of the special damages claim that sought recovery of executive and management time. It covered work done by Andre Visser, Frank Visser, Gordon Grant ("*the executive team*"), as well as work done by members of the sales team. The details of these activities, who they were undertaken by and the general timeframe within which they occurred, were set out in exhibit "I" of Mr Visser's affidavit.

[122] This can be broadly summarised as involving time spent reviewing Mr Perrin's devices and emails, engaging the forensic analyst, obtaining legal advice, investigating and addressing Agserv's involvement in the breaches and preventing its misuse of the confidential information it had received from Mr Perrin, including time associated with the High Court proceedings.¹⁶

[123] It also included actions taken to secure customer, client and supplier relationships as well as various interactions with other external companies. That involved (among other things) a trip by Frank Visser to Rarotonga in July 2021 to connect with Mr Perrin's former customers.

[124] The trip to Rarotonga occurred more than a year after the breaches were discovered, so the Authority was not satisfied the required causal link had been established by the evidence provided. The Authority considered that most, if not all, of the sales teams' members' activities involved their normal work, which would have occurred regardless of any breaches.

[125] The Authority was concerned that much of the executive and management time claimed as special damages had been conflated with activities that the executive and management team would have had to had undertaken in connection with these proceedings and/or in the normal course of business.

[126] The Authority declined to award special damages for executive or management time. The activities were undertaken by existing staff, who continued to be paid their usual wages/salaries.

¹⁶ The High Court proceedings involved Agserv, Mr Hess and Mr Green, as well as Mr Perrin.

Legal fees

[127] Key Industries claimed \$171,592.53 inclusive of GST for the legal fees it had incurred over the period May 2020 to August 2021 as special damages.¹⁷

[128] Key Industries, in principle, can potentially recover special damages for (at least some of) the actual legal fees it incurred:

- (a) From 11 May 2020 to 5 June 2020, because it was investigating the breaches over that period, and taking action to address them, which included seeking undertakings by 5 June 2020 in order to avoid these Authority proceedings. There was therefore a clear line between those costs and party to party costs associated with these proceedings because those legal fees were incurred prior to the Statement of Problem being lodged on 17 June 2020;
- (b) From 11 May 2020 to 7 October 2020, in connection with the High Court proceedings only, because there was a clear line between these legal fees and party to party costs associated with the Authority proceedings. Key Industries had not already recovered those High Court related legal fees as part of the Settlement.

[129] The Authority was satisfied that those legal costs identified in (a) and (b) above were directly related to “*investigative purposes/advising on how to address the consequences of Mr Perrin’s actions*” including being legal fees incurred for other litigation that was entirely separate to these Authority proceedings. That separation meant a ‘bright line’ could be drawn between the different legal fees incurred, *visa a visa* special damages versus party to party costs.

[130] However, the amount of legal fees, incurred during the two periods in paragraph [128] (a) and (b), that will be recoverable as special damages remains to be determined. The Authority will need to be satisfied that the work associated with the legal fees incurred over these two periods was reasonably necessary and that the actual legal fees for the work done were also reasonable.

¹⁷ Exhibit “M” of Mr Visser’s affidavit dated 17 December 2021 set out the details of the legal fees claims as special damages.

[131] Key Industries cannot recover special damages for legal fees incurred after 6 June 2020, because, once Mr Perrin failed to provide the undertakings he had been requested to provide by 5 June 2020, then these Authority proceedings were contemplated from that point onwards.

[132] The Authority therefore considered it likely the legal fees incurred from that date were associated with preparing these Authority proceedings. The required ‘bright line’ between the two different types of legal fees incurred was therefore not established for the period after 5 June 2020.

Further information required in support of special damages claimed

[133] The Authority has not been given sufficient evidence of the legal fees incurred within the above two periods identified in paragraph [128] to be able to quantify this aspect of the special damages claim. Key Industries has 14 days to file that information and Mr Perrin has 14 days to respond.

Should the special damages be reduced as a result of the High Court settlement agreement?

[134] Mr Perrin submitted that if special damages were awarded, the amount that had been paid to settle the High Court proceedings should be offset against the damages that were awarded.

[135] The Authority disagreed. Mr Perrin did not make the payment he has referred to and the Settlement was not with him. The payment made was not for legal fees, so was therefore not relevant to an award of special damages (for legal fees) the Authority was assessing in these proceedings.

Should Key Industries be awarded exemplary damages?

[136] The Authority declined to award exemplary damages. It was satisfied that the imposition of statutory penalties on Mr Perrin under s 134(1) of the Act would be sufficient to punish him for his culpable conduct and to deter him from such actions in future.

What, if any, general damages should Key Industries be awarded?

[137] The Authority declined to award general damages. The imposition of the Authority’s usual penalty jurisdiction, with the ability to apportion some of the penalties imposed to Key Industries, was considered sufficient to recognise the harm Mr Perrin caused Key Industries.

Should Key Industries be awarded future damages and/or loss of profits

[138] This claim relied on Key Industries' view that Agserv would not have been established in New Zealand in June 2020, so would therefore not have operated in the New Zealand market, but for Mr Perrin's breaches of his obligations to Key Industries.

[139] Agserv GP had not been, and was not currently, operating in New Zealand and may not ever operate here at all.

[140] The evidence did not establish Key Industries had actually sustained any loss of profits. The future damages for loss of profits claim was also speculative. The evidence did not establish there would be any future loss, so Key Industries' claims for loss of profits and future damages did not succeed.

Should the Authority issue an injunction against Mr Perrin, Agserv, Mr Hess and/or Mr Green?

[141] Key Industries submitted that the Authority should exercise its jurisdiction under s 162 of the Act to issue a permanent *quia timet* injunction on Mr Perrin that prevented him working for Agserv (or any related entity) in New Zealand. A *quia timet* injunction is the Latin name for an injunction that addresses an imminent threatened or apprehended breach that has not yet occurred.¹⁸

[142] Key Industries also sought injunctions against Agserv, Mr Hess and Mr Green on the basis an injunction would afford it the protection it required against Agserv GP's misuse of its confidential information.

[143] The Authority was not satisfied there was an imminent or threatened breach that required restraining. Agserv GP was not operating and Mr Perrin was employed elsewhere.

[144] Key Industries already had protection from its confidential information being misused due to the signed undertakings Mr Hess, Mr Green and Mr Perrin provided in the High Court proceedings in August 2020, the Settlement in October 2020, Mr Perrin's 25 June 2020 undertakings and from the non-publication order and the compliance order issued by the Authority in these proceedings.

¹⁸ *Kumar v Elizabeth Memorial Home* [1998] 2 ERNZ 61 at [67].

[145] Mr Perrin has suffered serious financial consequences as a result of his breaches. The penalties that are to be imposed on him have also been set at a level that aimed to deter future breaches from occurring. Mr Perrin is also now subject to a compliance order that prevents him misusing Key Industries' confidential information, should he have retained any.

[146] The injunction sought by Key Industries also went further than was necessary. It was anticompetitive in nature and would have imposed a far longer restraint on Mr Perrin than his employment agreement had specified.

[147] Key Industries was not entitled to protection from competition, so it would not be appropriate to prevent Agserv GP from commencing business in New Zealand or Mr Perrin from working for it in the future.

[148] Key Industries has had more than two years since the breaches occurred to secure its relationships with customers and suppliers and to make contingency plans in the event Agserv GP started operating in New Zealand.

[149] The Authority was also not satisfied the evidence had established that future loss, that needed restraining, was imminent. Accordingly, Key Industries' request for a quia timet injunction did not succeed.

Should the Authority issue a partial stay of the future damages claimed in these proceedings?

[150] Key Industries asked the Authority to stay the future damages claim for loss of profits, for three years or other reasonable period of time, so it could see whether Agserv commenced operations in the New Zealand market, and is so then how it did that.

[151] That request is declined. This matter needs to be brought to a timely conclusion. It is not appropriate to keep this matter on hold for another three years, or any other period of time. Key Industries' application for a partial stay did not succeed.

Should the Authority issue a compliance order?

[152] Multiple breaches of Mr Perrin's employment agreement have occurred. Some of the undertakings Mr Perrin made in response to those breaches were also not fully complied with.

[153] It is necessary and appropriate to issue a compliance order under s 161(l)(n) of the Act to prevent further breaches occurring. The application for a compliance order was not opposed by Mr Perrin.

[154] Section 137(3) of the Act required the Authority to specify a time within which the compliance order is to be obeyed rather than the duration of the order.¹⁹ Mr Perrin is therefore required to obey this compliance order upon receipt of this determination.

The terms of the compliance order

[155] Mr Perrin is ordered to comply with clause 12.1 (relating to his confidentiality obligations and confidential information) and clause 14.6 (return of employer's property) of his employment agreement dated 1 July 2014.

[156] In particular;

- (a) Clause 12.1 prohibited Mr Perrin from using any of Key Industries' confidential information, messages, data or trade secrets that he obtained during his employment after the termination of his employment; and
- (b) Clause 14.6 required Mr Perrin to return all of Key Industries' materials or property and all copies of it to Key Industries upon termination.

[157] This compliance order meant that if Mr Perrin locates or discovers any further confidential information then it must be turned over to Key Industries and Mr Perrin must not use, or retain copies of it.

What penalties should be imposed on Mr Perrin for his breaches?

Penalty jurisdiction

[158] Section 134(1) of the Act provides that every party who breaches an employment agreement is liable to a penalty. Section 134A of the Act provides that every person who, without sufficient cause, obstructs or delays an Authority investigation is liable to a penalty.

¹⁹ *Credit Consultants Debt Services NZ Ltd v Wilson* (No 3) [2007] ERNZ 252.

Authority's approach to assessment of penalties

[159] Section 133A of the Act sets out seven mandatory statutory considerations that the Authority must have regard to when determining penalties.

[160] The full Employment Court in *Borsboom v Preet PVT Limited* identified four additional considerations it said needed to be assessed by the Authority when determining penalties, in addition to the seven mandatory considerations set out in s 133A of the Act.²⁰ The Employment Court in *Preet* also recommended the Authority adopt its four-step process when assessing penalties.

[161] The Chief Judge of the Employment Court in *Nicholson v Ford* drew together the mandatory considerations under the Act and the factors the Employment Court had identified in *Preet* by listing them into a 12-step process.²¹ The Court in *Nicholson* identified that there were four sub-steps under the *Preet* step 1 consideration. This determination has assessed each of the considerations identified in *Nicholson*.

Number of breaches for penalty setting purposes

[162] There were 261 breaches in total that will attract penalties.

[163] There were 218 breaches by Mr Perrin of his employment agreement, after the Authority has given him the benefit of the doubt about the four instances of alleged disclosure of confidential information to Mr Green that Mr Perrin disputed.

[164] There were 43 instances of Mr Perrin obstructing or delaying the Authority's investigation, on the basis conduct prior to the lodging of the Statement of Problem on 17 June 2020 has been excluded.

Nature of each breach

(i) Duty of fidelity/breach of good faith

[165] There were five instances in which Mr Perrin diverted business opportunities away from Key Industries. Each instance was a breach of his duty of fidelity and of the good faith obligations he owed to Key Industries, as his employer.

²⁰ [2016] NZEmpC 143.

²¹ [2018] NZEmpC 132.

(ii) Breach of confidence/misuse of confidential information

[166] There were 53 breaches of confidence and/or misuse of confidential information. This involved Mr Perrin sending confidential documents to his personal email.

(iii) Confidential information discussed with and/or sent to Agserv

[167] There were 49 instances of Mr Perrin sending and/or discussing Key Industries' confidential information with Jason Green, Agserv's General Manager. That total excluded the four instances Mr Perrin had disputed.

[168] The confidential information shared with Mr Green included an Excel spreadsheet containing five years of customer sales data, quotes, product pricing, and communications Mr Perrin had with Mr Green about Key Industries' markets, its financial situation, details about Key Industries' losses including why those losses had occurred, what customers were dissatisfied and why, the way it operated its business.

[169] It also possibly included an analysis of how fast a new Agserv entity could gain market share if competing with Key Industries, if Key Industries' reading of the 14 May 2020 email exchange between Mr Perrin and Mr Green was preferred over the 'redundancy' explanation Mr Green's counsel put forward in July 2020.

(iv) Solicitation of clients and customers

[170] There were 109 instances of Mr Perrin soliciting Key Industries' customers. The solicitation can be categorised as follows:

- (a) 24 instances of Mr Perrin contacting Key Industries' customers during his employment, contrary to express instructions to him not to do so.
- (b) 33 instances of Mr Perrin contacting Key Industries' customers during his notice period, contrary to express instructions not to do so.
- (c) 52 instances of Mr Perrin contacting Key Industries' customers during his restraint and/or, after he had provided an undertaking, during the period of the undertaking.

(v) Failing to return and/or destroying Key Industries' property

[171] There were two instances of Mr Perrin breaching his contractual obligation to return Key Industries' property to it and/or of destroying Key Industries' documents, contacts and other information held on the devices he had used while employed. These breaches involved the attempted factory reset of his company iPhone and the factory resetting/reformatting of his Key Industries laptop before he returned them.

(vi) Obstructing and delaying the Authority's investigation

[172] Mr Perrin engaged in 43 instances of, without sufficient cause, obstructing or delaying the Authority's investigation into the claims against him. An overview of the nature of the obstruction and delaying behaviour that Mr Perrin engaged in is set out in paragraph [22] of this determination.

Maximum penalties

[173] Mr Perrin is an individual, so under s 135(2)(a) of the Act he faces a potential maximum penalty of \$10,000 per breach. Because there were 261 breaches in total, his potential maximum penalties are therefore \$2,610,000.

Globalisation

[174] The purpose of globalisation is to address multiple breaches involving the same conduct by reducing them to one representative breach of the overall conduct that is to be punished by a penalty.

[175] Globalising breaches in that way meant that the employment institutions could begin assessing penalties from a more realistic starting point than would otherwise have been the case without globalisation.²² The Authority therefore applied the same approach the Employment Court adopted towards globalisation in *A Labour Inspector v Matangi Berry Farm Limited*.²³

[176] Mr Perrin's 43 breaches of s 134A of the Act were globalised into one representative breach of obstructing and delaying the Authority's investigation.

²² *A Labour Inspector v Parihar* [2019] NZEmpC 145.

²³ [2020] NZEmpC 43. The Authority also dealt with globalisation in this way in *Spirax Sarco Limited v Hewitt* [2021] NZERA 246; *Electropar Limited v Smith* [2019] NZERA 703; *New Era IT Limited v Hood* [2021] NZERA 535 and *Tradestaff Group Limited v Bailey* [2019] NZERA 658.

[177] Mr Perrin's 218 breaches of his employment agreement were globalised into five representative breaches of:

- (a) The duty of fidelity and good faith obligations. That involved diverting of opportunities away from Key Industries;
- (b) Confidence and misuse of Key Industries' confidential information. That involved Mr Perrin downloading then emailing Key Industries' confidential information to his personal email accounts;
- (c) The non-solicitation obligations. That involved him soliciting Key Industries' customers on multiple occasions (and some customers/clients more than once) by phone, email, via Facebook and possibly by text message;
- (d) The failure to return Key Industries' property. That involved him wiping (or attempting to wipe) his work devices (laptop, iPad and mobile phone) which deleted Key Industries' contacts and other client/customer information;
- (e) His confidentiality obligations. That involved him disclosing Key Industries' confidential information to a competitor (Agserv and Jason Green), that two weeks later set up new Agserv business in New Zealand (that Mr Perrin became the Manger of).

Adjustment of potential maximum penalties after globalisation has occurred

[178] Globalisation reduced the 43 breaches of s 134A to one representative breach and the 218 breaches of the implied and express obligations in his employment agreement to five representative breaches.

[179] Accordingly, the total maximum potential penalties for the:

- (a) 218 breaches of the employment agreement reduced from \$2,180,000 to \$50,000, to reflect the five representative types of the globalised breaches that had occurred.
- (b) 43 breaches of s 134A of the Act (obstructing and delaying the Authority's investigation) reduced from \$430,000 to \$10,000, to reflect one globalised, representative, breach.

Mandatory statutory consideration 1: s 3 object of the Act

[180] The s 3 object of the Act included building productive employment relationships through the promotion of good faith. The breaches that occurred were the antithesis of good faith behaviour. Mr Perrin's actions also seriously undermined the implied mutual obligations of trust and confidence are fundamental in an employment relationship.

Mandatory statutory consideration 2: the nature and extent of the breach or involvement in the breach

[181] The nature of the breaches of Mr Perrin's employment agreement were serious because they undermined his employer's business. The extent of the breaches was also extensive. Multiple breaches occurred repeatedly over a number of weeks. Mr Perrin was personally responsible for all of these breaches.

[182] Mr Perrin's misuse of confidential information was particularly egregious. If Key Industries had not discovered, then acted decisively to address, the misuse of its confidential information, then its business could have potentially been severely impacted.

[183] The obstructive behaviour Mr Perrin engaged in delayed the determination of the substantive claims and made it more complex and costly. Mr Perrin repeatedly failed to comply with timetable directions and he continually failed to provide information that he had undertaken to provide. The breaches of s 134A of the Act were multiple and occurred over many months.

Mandatory statutory consideration 3: whether the breach was intentional, inadvertent or negligent

[184] The wrongdoing involved blatant breaches of Mr Perrin's employment obligations. He was clearly put on notice of his obligations in his redundancy letter but deliberately flouted that reminder.

[185] Mr Perrin engaged in a deliberate course of conduct over a number of weeks that he must have known would be damaging to Key Industries' business. He intentionally disclosed highly sensitive, valuable and confidential information, that Key Industries had painstakingly build up over 20 years of business, to a competitor.

[186] The evidence demonstrated an intentional and persistent pattern of Mr Perrin delaying, obstructing and failing to co-operate with the Authority's investigation. He failed to provide information he had been directed to provide and he repeatedly breached timetable directions.

[187] Key Industries and the Authority devoted considerable time and resources clearly identifying to Mr Perrin what he needed to do and why, so that he knew what was required of him in order to meet his undertakings. Mr Perrin was represented (although there were a number of different representatives) for most of these proceedings.

[188] Mr Perrin knew what was required of him in terms of providing information and meeting timetable directions, because he was repeatedly reminded about that. He therefore choose not to meet his obligations, and those repeated and ongoing failures by him obstructed and delayed the Authority's investigation.

[189] Mr Perrin also deliberately deleted relevant information, even after the Authority had expressly told him not to. That proved Mr Perrin's breaches of s 134A of the Act were deliberate, and that he had intentionally elected not to comply with his legal obligations.

[190] Instead of giving a full and frank account of his activities, as his undertakings required him to do, Mr Perrin made it very difficult for Key Industries to be able to understand the full scope of what he had done. Mr Perrin's actions significantly delayed the Authority's substantive investigation, while Key Industries sought visibility on the extent of Mr Perrin's wrongdoing.

Mandatory statutory consideration 4: the nature and extent of any loss or damage suffered by Key Industries or gains made or losses avoided by Mr Perrin because of the breach

[191] There was no evidence of direct loss or damage, such as actual loss of business arising from the breaches. However, Key Industries has had to expend significant time and resources protecting its rights. It has incurred significant legal costs, all of which will not be recoverable.

[192] A competitor has also had access to Key Industries valuable and sensitive internal business information. Although Agserv has undertaken that it has not retained any confidential information, Key Industries is distrustful of that assurance.

[193] Mr Perrin personally benefited from Agserv's decision to set up a new branch in New Zealand (Agserv GP), shortly after it received Key Industries' confidential information, because he was employed to manage the new business.

Mandatory statutory consideration 5: whether Mr Perrin has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach

[194] When confronted about the breaches, Mr Perrin gave untrue information and disingenuous explanations. He also failed to fully co-operate with Key Industries' attempts to understand the full extent of what had occurred. Although Mr Perrin has repeatedly said he has not retained any of the confidential information, and he has provided undertakings to that effect, Key Industries did not believe him.

[195] The two undertakings Mr Perrin provided to Key Industries aimed to address its concerns regarding the breaches that had occurred. However, Mr Perrin's failure to fully comply with the obligations he had agreed to in his undertakings caused Key Industries to incur significant time and costs attempting to address his failures to do so.

[196] Mr Perrin did resign from his employment with Agserv GP and Agserv GP has not been operating in New Zealand. Those actions mitigated the potential adverse effects of Agserv having received Key Industries' confidential information. However, the disruption to Key Industries' business, and the stress the breaches caused for the employees involved in investigating and addressing the breaches, has not been remediated.

Mandatory statutory consideration 6: the circumstances in which the breach, or involvement in the breach, took place including any vulnerability

[197] The breaches were premeditated. Mr Perrin took a number of steps while employed to secretly send Key Industries' confidential information to his personal email accounts. This included taking photos of sensitive pricing documents. He also stored Key Industries' information so it was available to him after his employment ended.

[198] These were grievous breaches that occurred, and also continued, even after Mr Perrin had been put on notice of his obligations.

[199] Mr Perrin's submission that he was suffering depression was unsupported by medical evidence. The doctor's letter Mr Perrin provided was dated 19 April 2021 (approximately 12 months after the first breaches occurred) and did not refer to his situation at that time. The doctor's letter did not mention depression but instead said (among other things) "[...] *he is going through a legal battle which has created significant mental stress.*"

[200] The Authority was not satisfied that the breaches that occurred arose due to ill health.

Mandatory statutory consideration 7: whether Mr Perrin had previously been found in proceedings under the Act or any other enactment, to have engaged in similar conduct

[201] There was no evidence that Mr Perrin has been found to have engaged in similar conduct in the past.

Preet additional mandatory consideration 1: deterrence, having regard to the particular person to be penalised

[202] There is a compelling public policy need to denounce Mr Perrin's wrongdoing in the strongest terms. He deliberately flouted his obligations to his employer to benefit himself.

[203] Mr Perrin's breaches of his undertakings indicated there was a need to really bring the message home to him personally that he is required to fully comply with his legal obligations.

[204] Penalties must be set at a level that not only deters Mr Perrin personally from engaging in similar conduct in future, but that also acts as a more general deterrent to others who may be inclined to engage in similar conduct.

Preet additional mandatory consideration 2: degree of culpability

[205] These were serious breaches for which Mr Perrin had a very high level of culpability.

Preet additional mandatory consideration 3: the general desirability of consistency in decisions on penalties

[206] There were no directly comparable cases. However, the Authority has reviewed the following cases that involved similar types of breaches, to ensure consistency with other cases is achieved.

[207] The highest penalty imposed on an individual by the Authority was for \$50,000 in *Zeald New Zealand Limited v Bernard* for 263 breaches by an employee who took the employer's confidential information and set up in competition.²⁴

[208] In *Nova Energy Limited v Mitchell & Ors* the Authority imposed a globalised penalty of \$30,000 on the employee who had breached his contractual obligations, resulting in the loss of seven customers and the re-signing of another 81 customers at lower rates that match what they had been offered by the competitor.²⁵ The company involved in the breaches had a \$50,000 penalty imposed on it. The high level of damages awarded (in excess of \$1,000,000) was taken into account when penalties were assessed.

[209] In *Tag Oil (NZ) Ltd v Watchhorn* a penalty of \$12,000 was imposed on an employee for four breaches of his employment agreement, that involved taking (without proven disclosure or use of) the employer's confidential information.²⁶ This had been downloaded on eight occasions, that had occurred on four different dates. Penalties were imposed based on the number of dates on which confidential information had been downloaded. Half of the penalty was to be paid to the employer.

[210] The Authority in *New ERA IT Limited v Hood* imposed a total penalty of \$15,000 for five globalised breaches of a s 149 Settlement that was (mostly) based on terms in the employment agreement.²⁷ The breaches included solicitation of clients, solicitation of employees, use of the employer's confidential information, disparagement of the employer, and breaches of the post-employment restraint (non-compete) obligations. The employer was awarded all of the penalty imposed.

[211] In *Tibbitts v EWP Sales Limited* the Authority imposed a penalty of \$10,000 for "deliberate and flagrant" breaches of a s 149 Settlement Agreement, that had involved breaches of the employee's restraint of trade clause.²⁸ All of the penalty was awarded to the employer.

²⁴ [2013] NZERA 402.

²⁵ [2015] NZERA 337.

²⁶ [2014] NZERA 58.

²⁷ [2021] NZERA 535.

²⁸ [2015] NZERA 212.

[212] In *Bananaworks Communications Limited v Shi & Ors* the Authority found two employees had breached their contractual duty of fidelity and statutory good faith obligations.²⁹ The breaches involved deliberately deleting work related data off the employer's computers and using client information obtained during their employment to solicit clients for their new employer. A penalty of \$6,825 was imposed on the first employee and of \$9,250 on the second employee for these breaches of their employment agreements. The employer was awarded all of the penalties imposed.

[213] In *Tradestaff Group Limited v Bailey* the Authority imposed a penalty of \$5,915 on the employee who had emailed confidential information to her personal email and who had started work for a competitor within the contractual restraint period.³⁰ All of the penalty was paid to the employer. The employee's downloading and use of the employer's confidential information was treated as one indivisible breach for the purposes of penalties.

[214] In *Gibb Design v Biddle* the Authority awarded damages of \$98,525.80 arising from the employee's breaches of his employment agreement and imposed a penalty of \$8,000 for a breach of good faith, that involved failure to return his work product to the employer.³¹ The penalty was spilt equally between the Crown and employer.

[215] The Authority in *Electropar Limited v Smith* awarded special damages of \$22,337.75 and imposed a globalised total penalty of \$14,000 for two breaches of the employment agreement.³² The employee transferred large amounts of the employer's information to five external hard drives and emailed information to a personal email address. This included confidential information about the employer's products, relationships with suppliers, quotes, pricing to clients and product testing. The employee also refused to return the employer's property.

[216] The multiple instances in *Electropar* of the employee copying the employer's information were treated as a single course of conduct, and therefore as one breach, when penalties were assessed. The failure to return the employer's property, when requested, was

²⁹ [2021] NZERA 425.

³⁰ [2019] NZERA 658.

³¹ [2022] NZERA 335.

³² [2019] NZERA 703.

treated as a separate breach of the employment agreement. The entire penalty had to be paid to the employer.

[217] In *RPW v H & C* the advocate first respondent and the company second respondent deliberately engaged together in numerous acts of obstruction that resulted in the Authority's investigation being far more difficult, resource-intensive, lengthy, complex and costly than it otherwise would have been.³³ Eleven categories of obstructive conduct were globalised into five breaches of s 134A of the Act, for which penalties of \$12,000 were imposed on each of the two respondents.³⁴

[218] In *Woods v United Cleaning Services Limited* the Authority imposed a penalty of \$8,000 on United Cleaning Services for breaches of s134A of the Act, that involved repeated and continual failure to comply with the Authority's directions to provide it with a client list on a confidential basis.³⁵

Starting point for setting penalties

[219] The Authority adopted a starting point for imposing penalties of 60% of the potential maximum penalty.

[220] That meant the starting point for setting penalties for the five breaches of the employment agreement was \$30,000, being 60% of the maximum potential penalty of \$50,000. The starting point for setting the penalty under s 134A of the Act was \$6,000, being 60% of the potential maximum penalty of \$10,000.

Preet additional mandatory consideration 4: ability to pay

[221] There was no evidence that financial incapacity was an issue in this matter.

Preet additional mandatory consideration 5: is the anticipated outcome proportionate to the breach or breaches for which the penalty is imposed?

[222] The significant globalisation that had already occurred meant it was not appropriate to further reduce penalties.

³³ [2019] NZERA 338 at [179].

³⁴ Other penalties were also imposed on the respondents for serious, significant and sustained breaches of a s 149 mediated settlement.

³⁵ [2014] NZERA 177.

[223] However, the anticipated outcome of \$30,000 for the breaches of the employment agreement plus \$6,000 for the breaches of s 134A of the Act was not proportionate to the seriousness of wrongdoing that had occurred. See paragraphs [228] to [230] for the adjustment that has been made in response to this finding.

Preet step 1 – nature and number of breaches

[224] The nature of Mr Perrin's breaches is addressed in paragraphs [162] and [168]. The number of Mr Perrin's breaches is set out in paragraphs [172] and [173].

Preet step 2 – provisional starting point

[225] The provisional globalised starting point for assessing penalties is set out in paragraph [220].

Preet step 3 – ability to pay the provisional penalty

[226] Mr Perrin did not provide the Authority with evidence of his financial circumstances or ability to pay.

Preet step 4 – proportionality or totality test to ensure that the final penalty is just

[227] At this point, the Authority had to stand back and assess whether the final overall penalty was proportionate to the wrongdoing being penalised, whether it achieved consistency with other Authority cases, whether a penalty at this level was likely to be paid, whether further discounting was required or other steps were needed to avoid double discounting due to the globalisation that had already occurred.

[228] Penalties at 60% of the potential maximum penalty did not appropriately reflect the aggravating factor that was associated with the repeated, ongoing, deliberate breaches by Mr Perrin of his undertakings. The proportion of penalties to be imposed needed to be increased to 75% of the potential maximum to reflect that.

[229] The penalties were therefore increased to \$37,500 for the five globalised breaches of the employment agreement and to \$7,500 for the one representative breach of s 134A of the Act.

Imposition of penalties

[230] After carefully weighing all of the relevant competing factors, the Authority was satisfied that penalties of \$37,500 for breaches of the employment agreement and a penalty of \$7,500 for obstructing and delaying the Authority's investigation were appropriate. That resulted in total penalties for all breaches of \$45,000.

Should some or all of the penalties imposed on Mr Perrin be paid to Key Industries instead of or as well as the Crown?

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

[232] Penalties may not be used to compensate a party, because that is the role of damages. However, the fact that a party has suffered harm that cannot be compensated is relevant to the Authority's decision about how penalties should be apportioned.

[233] The multiple breaches of the employment agreement that occurred did not involve breaches of a statutory obligation but instead related to obligations between the parties. Key Industries has incurred the time, cost, stress and business disruption associated with addressing these breaches and bringing them to the Authority attention.

[234] It is therefore appropriate to award all of the penalties imposed for these breaches to Key Industries to acknowledge (but not compensate) the harm Mr Perrin's breaches have caused it.

[235] The penalty imposed for the breach of s 134A of the Act is a statutory penalty. All of that penalty should be paid to the Crown, to reflect the penalty has been imposed to address a public good, namely constructive participation in the Authority's investigation process.

Apportionment of the penalties imposed on Mr Perrin

[236] Within 28 days of the date of this determination, Mr Perrin is ordered to pay a penalty of \$7,500 to the Crown bank for his breaches of s 134A of the Act.

[237] Within 28 days of the date of this determination, Mr Perrin is ordered to pay Key Industries total penalties of \$37,500 for his multiple breaches of his employment agreement, under s 134(1) of the Act.

Should Key Industries be awarded interest?

[238] Key Industries' interest claim will be determined when the special damages claim for legal fees is determined.

What costs and disbursements should Key Industries be awarded?

[239] Costs are reserved and will be dealt with by an exchange of memoranda after the outstanding special damages and interest claims have been determined.

Summary of outcome

[240] The Authority makes the following findings and orders:

- (a) Key Industries' confidential information is subject to a non-publication order, see paragraphs [1] and [2];
- (b) The confidential information covered by the non-publication order is identified in paragraph [22];
- (c) The Authority's file has been sealed so may not be accessed without the prior leave of the Authority, see paragraph [3];
- (d) The Authority did not have jurisdiction to investigate claims against Agserv, Agserv GP, Mr Hess or Mr Green in these proceedings, see paragraph [100];
- (e) The Authority declined to stay these proceedings so Key Industries could join more respondents, see paragraphs [101];
- (f) Within 28 days of the date of this determination Mr Perrin is ordered to pay special damages of \$2,804.10 for the costs of LawFlow, see paragraph [119];
- (g) Key Industries' special damages claim for the Forensic Analyst did not succeed, because that will be dealt with as a disbursement when party to party costs are determined, see paragraph [120];
- (h) Key Industries' special damages claim for executive and management time did not succeed, see paragraph [126];
- (i) Key Industries will be awarded some legal fees as special damages, see paragraph [128]. A timetable has been set for the parties to file further information to enable the Authority to quantify and determine this aspect of Key Industries' special damages claim, see paragraph [133];

- (j) Key Industries' special damages will not be reduced by the amount paid in the High Court Settlement, see paragraph [135];
- (k) Key Industries' claims for exemplary and general damages did not succeed, see paragraphs [136] and [137];
- (l) Key Industries' claims for future damages and loss of profits did not succeed, see paragraph [140];
- (m) Key Industries' application for a quia timet injunction did not succeed, see paragraph [149];
- (n) Key Industries' request for a partial stay of its future damages claim was declined, see paragraph [151];
- (o) A compliance order was issued that required Mr Perrin, upon receipt of this determination, to comply with the clauses 12.1 and 14.6 of his employment agreement, see paragraphs [156] and [157];
- (p) Mr Perrin is ordered to pay a globalised penalty, as per paragraphs [230] of:
 - (i) \$7,500 for the one representative breach of s 134A of the Act, for obstructing and delaying the Authority's investigation; and
 - (ii) \$37,500 for five representative breaches of s 134(1) of the Act, for breaches of his employment agreement;
- (q) Within 28 days of the date of this determination Mr Perrin is ordered to pay all of the:
 - (i) \$7,500 penalty to the Crown bank account, see paragraph [236]; and
 - (ii) \$37,500 penalty to Key Industries, see paragraph [237];
- (r) Key Industries' interest claim will be determined when the special damages claim for legal fees is quantified and determined, paragraph [238];
- (s) Costs will be determined by an exchange of costs memoranda after the outstanding special damages (for legal fees) and interest claims have been determined, see paragraph [239].