

NOTE: This determination contains an order at paragraphs [7] – [10] prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 172
3109232

BETWEEN KEY INDUSTRIES LIMITED
Applicant

AND CAMPBELL JAMES PERRIN
Respondent

Member of Authority: Rachel Larmer

Representatives: Nic Scampion, James Carnie and Lisa Lamers, counsel
for the Applicant
Simon Greening and Kylie Hudson, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions and Further Information Received: 28 November 2022 from the Applicant
16 December 2022 from the Respondent
1 February 2023 from the Applicant

Date of Determination: 11 April 2023

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] The Authority has issued two non-publication orders in this matter, which have been updated in this determination into a third non-publication order.

First non-publication order

[2] The first non-publication order was issued in the substantive (damages/penalties) determination dated 26 August 2020.¹

[3] That non-publication order prevented Key Industries Limited's confidential information from being published, subject to the condition that:²

- (a) It did not apply to Key Industries (as the owner of the information); or
- (b) The parties when they were communicating with, or providing information to, the employment institutions.

Second non-publication order

[4] The second non-publication order was set out in the special damages determination dated 4 November 2022.³ This recorded that Key Industries' legal invoices were subject to legal professional privilege, which it had not waived.

[5] The second non-publication order varied the original non-publication order by including Key Industries' legal invoices, and associated information about the legal fees it had incurred, as part of the confidential information that could not be published, subject to the same conditions as the first non-publication order.

Third non-publication order

[6] For ease of reference, the Authority considered it appropriate to issue a third non-publication order that consolidated the previous non-publication orders issued on 26 August 2022 and 4 November 2022.⁴

(i) Updated non-publication order

[7] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act ("*the Act*"), the Authority orders that Key Industries' confidential information and legally privileged information about the legal fees it has incurred may not be published, subject to the conditions in paragraph [10] below.

¹ *Key Industries Limited v Perrin* [2022] NZERA 416, at [1],[2] and [22].

² *Key Industries*, above.

³ *Key Industries Ltd v Perrin* [2022] NZERA 573, at [4]-[6].

⁴ Above n1 and n3.

(ii) Confidential information covered by this non-publication order

[8] Key Industries' confidential information that is covered by this updated non-publication includes its:

- (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) Stock management and reporting system;
- (i) Information relating to its' marketing or sales activities;
- (j) Sales targets and statistics;
- (k) Surveys, research and reports; and
- (l) Customer and supplier contracts.

(iii) Legally privileged material covered by this non-publication order

[9] Key Industries' legally privileged material, that is covered by this non-publication order, consists of:

- (a) All invoices for legal fees and disbursements. This includes the amounts and content of these invoices;
- (b) Its memorandum dated 9 September 2020 and its attachments;
- (c) Mr Visser's affidavit dated 17 December 2021; and
- (d) Details about the legal fees incurred, and the supporting information, that was filed its submissions dated 28 November 2022.

(iv) Conditions of this updated non-publication order

[10] This updated non-publication order is subject to the following conditions:

- (a) It does not apply to Key Industries (as the owner of the information that is subject to the non-publication order);
- (b) It does not apply to the parties' communications with the employment institutions; and
- (c) It does not apply to any information that is contained in any of the Authority's four determinations, as these are a matter of public record.

Previous determinations

[11] The Authority has issued three determinations:

- (a) A preliminary determination dated 12 March 2021, that addressed Mr Perrin's failure to provide information he had undertaken to provide;⁵
- (b) The substantive determination dated 26 August 2022, that determined remedies, penalties and part of Key Industries' special damages claim;⁶
- (c) The special damages determination dated 4 November 2022, that determined Key Industries' special damages claim that related to its High Court proceedings.⁷

Preliminary determination

[12] Costs were reserved in the preliminary determination, in which Key Industries succeeded in its claims that Mr Perrin had not met the obligations he had agreed to in his written undertakings.

[13] In particular, Mr Perrin failed to provide Key Industries with relevant documentation, which related to its claims that he had misappropriated and misused Key Industries' confidential information, and had sought to use that confidential information to set up in business in competition with it.

[14] Mr Perrin was ordered to download all documents contained in a Dropbox folder, which were to be copied onto a USB device, that was then to be provided to Key Industries. Mr Perrin

⁵ *Key Industries Limited v Perrin* [2021] NZERA 101.

⁶ Above n1.

⁷ Above n3.

was also ordered to lodge and serve an affidavit that met the undertakings he had given in June 2021.

The substantive determination

[15] The determination dated 26 August 2022 determined remedies/damages and penalties (“*the substantive determination*”). It also set out the details of the undertakings that Mr Perrin provided on 25 June 2020 and 28 August 2020.⁸

[16] As per the substantive determination, Key Industries succeeded with its claims for:

- (a) Non-publication orders regarding its confidential information;
- (b) Findings that Mr Perrin had:
 - (i) Breached his employment agreement at least 218 times; and
 - (ii) Obstructed and delayed the Authority’s investigation on 43 separate occasions;
- (c) Penalties for:⁹
 - (i) Breaches of Mr Perrin’s employment agreement, under s 134(1) of the Act; and
 - (ii) Obstructing and delaying the Authority’s investigation, under s 134A(1) of the Act.
- (d) Apportionment of part of the penalties awarded to it (Mr Perrin was ordered to pay the \$37,500 penalty for his multiple breaches of his employment agreement to Key Industries, as per s 136(2) of the Act, instead of the Crown);
- (e) A compliance order that required Mr Perrin to comply with the following clauses in his employment agreement with Key Industries dated 1 July 2014:
 - (i) Clause 12.1 that prohibited him from using any of its confidential information, messages, data or trade secrets that he had obtained during his employment after the termination of his employment; and

⁸ *Key Industries*, above n1, at [8]-[14].

⁹ The total penalty imposed on Mr Perrin was \$45,000, consisting of \$37,500 for breaching his employment agreement plus \$7,500 for obstructing and delaying the Authority’s investigation.

- (ii) Clause 14.6 that required him to return all of Key Industries' materials or property (and all copies) to it upon termination.
- (f) Special damages of \$2,804.10 for LawFlow services incurred in connection with the organisation and analysis of data, consisting of 85,000 outlook files.

[17] The Authority also:

- (a) Sought further information regarding Key Industries' special damages claim for recovery of legal fees that were unrelated to these Authority proceedings;¹⁰ and
- (b) Noted that Key Industries' interest claim, related to its special damages claim for legal fees, would be dealt with when the special damages were determined.
- (c) Reserved costs and disbursements.

[18] The substantive determination recorded that Key Industries did not succeed with its claims for:

- (a) Special damages for:
 - (i) \$6,713.12 for investigative services undertaken by a Forensic Analyst, because that would be awarded to it as a disbursement when costs were assessed;¹¹ and
 - (ii) \$135,260 for executive and management time spent on investigating and responding to Mr Perrin's breaches of his employment agreement;
- (b) A partial stay of its future damages claim;
- (c) General damages;
- (d) Exemplary damages;
- (e) Future damages;
- (f) Loss of Profits;
- (g) Injunctions against:

¹⁰ These related to the High Court proceedings.

¹¹ This was a GST inclusive amount, as per the invoices that were submitted.

- (i) The New Zealand entity ‘Agserv GP Limited’ (referred to as “*Agserv GP*”);
 - (ii) The Australian entity ‘Agserv Pty Limited’ (referred to as “*Agserv*”);
 - (iii) Mr Michael Eris Hess (who is known as “*Eris*” and who is Agserv’s Managing Director. He is also the sole director and shareholder of Agserv GP); and
 - (iv) Mr Jason Green, who is Agserv’s General Manager in Australia;
- (h) A stay of the substantive matter, so it could pursue claims against Agserv, Agserv GP, Eris Hess and/or Jason Green;
 - (i) A *quia timet* injunction.¹²

[19] The Authority also determined that it did not have jurisdiction over claims that Key Industries wanted to pursue against Agserv, Agserv GO, Mr Hess or Mr Green.

The special damages determination

[20] The special damages determination dated 4 November 2022 addressed Key Industries’ claim for recovery of \$171,529.53 special damages relating to its High Court proceedings and for interest on that amount.

[21] Mr Perrin was ordered to pay Key Industries special damages of \$93,120.97 inclusive of GST, that covered the period 11 May 2020, when Mr Perrin’s breaches were first discovered to 7 October 2020, being the date the High Court proceedings were settled. It was also awarded interest on that amount from 1 November 2020.

[22] Interest was also awarded from 14 December 2021 on the \$2,804.10 award of special damages that related to recovery of the LawFlow invoices.

Employment relationship problem

New additional special damages claim

[23] Key Industries sought to recover an additional award of special damages totalling \$2,699.40 including GST, that consisted of:

¹² This is an injunction that addresses an imminent or threatened breach that has not yet occurred.

- (a) \$1,550.00 High Court filing fees; and
- (b) \$1,149.40 LawFlow file hosting services for the period 1 February 2022 to 28 November 2022.

[24] This has been referred to as “*an additional special damages claim*” because the two amounts claimed have not previously been requested by Key Industries, so were not addressed in the Authority’s previous determinations.

[25] The special damages determination dated 4 November 2022 awarded Key Industries special damages for the legal costs it incurred in connection with the High Court proceedings it pursued as a result of Mr Perrin’s breaches.¹³ The Authority found there was a clear causal link between Mr Perrin’s breaches and the quantified actual loss/damage Key Industries suffered, because of Mr Perrin’s breaches.

[26] Key Industries omitted to add the High Court filing fee of \$1,550 to the special damages claim that was the subject of the Authority’s previous determination. It therefore now asked the Authority to address that omission.

[27] The Authority would have included the High Court filing fee as part of the special damages awarded in its 4 November 2022 determination, had it known about it. The Authority’s investigation is still ongoing, so there is no reason the High Court filing fee cannot now be addressed.

[28] Because the High Court proceedings were entirely unconnected to these Authority proceedings, they cannot be awarded as part of the costs or disbursements that are awarded by the Authority in this matter. The High Court filing fee has therefore been dealt with as an award of special damages, consistent with the reasoning in the Authority’s 4 November 2022 determination.

[29] The Authority previously awarded Key Industries special damages for the costs of the LawFlow invoices it incurred up to 31 January 2022, because that was quantified loss/damage that was proven to have been incurred because of Mr Perrin’s breaches.¹⁴ Key Industries now

¹³ Above n3, at [61].

¹⁴ Above n1, at [118] and [119].

sought to recover as special damages the extra LawFlow costs it has incurred since the Authority issued its special damages determination on 4 November 2022.

This determination

[30] Agreement on costs was not reached. Key Industries sought an award of additional special damages, along with an award of costs and disbursements for these Authority proceedings. This determination addresses those claims.

Indemnity costs claimed

[31] Key Industries asked the Authority to award it indemnity costs, instead of adopting its usual notional daily tariff approach to assessing costs.

[32] It recognised that an award of indemnity costs would be exceptional, but pointed out that was appropriate in this case because of “*flagrant and reprehensible misconduct*” by Mr Perrin that had unnecessarily inflated Key Industries’ actual legal costs.

[33] Key Industries therefore sought indemnity costs of \$379,300.36, excluding GST, for the costs it had actually incurred up to 4 November 2022, being the date the Authority issued its special damages determination.¹⁵

Alternative uplifted tariff costs claim

[34] Alternatively, if its request for an award of indemnity costs was declined, then Key Industries sought an uplift to the notional daily tariff to reflect that Mr Perrin’s actions had unnecessarily increased its actual legal costs.

[35] Key Industries agreed that for tariff purposes this matter should be treated as if it had involved a six-day investigation meeting, giving a notional starting tariff of \$22,000.

[36] Key Industries submitted that:

- (a) The notional starting tariff of \$22,000 should be uplifted to \$351,076.24, excluding GST, being the amount of additional legal costs it had incurred because of the way Mr Perrin had elected to conduct himself;

¹⁵ Above n3.

- (b) In *Tex Onsite Ltd v Hill* tariff costs were uplifted to the equivalent of 47% of the indemnity costs that had been claimed (but declined) and in *Whitten v Ogilvy* the uplifted tariff costs were equivalent to 67% of the indemnity costs sought (but also declined);¹⁶ and
- (c) An award at a similar level as those two cases would equate to tariff costs in this matter of \$176,000 to \$220,000, which represented 46.4% to 58% of the actual costs Key Industries had incurred.

[37] As an alternative argument, if the Authority declined to increase the notional starting tariff by \$351,076.24, then Key Industries submitted that it should be uplifted by a factor of at least eight to ten times, to reflect the particular circumstances of this case. Doing so would result in a costs award of \$176,000 to \$220,000, which Key Industries put forward as a third alternative costs approach.

Disbursements claimed

[38] Key Industries sought reimbursement of the following disbursements (inclusive of GST):

- (a) \$6,713.32 Forensic Investigator fees, as per invoices provided;
- (b) \$71.56 for the Authority's filing fee;
- (c) \$516.83 for photocopying, printing and disbursements fees charged by Key Industries' solicitors; and
- (d) \$48.47 for providing the physical copy of Mr Andre Visser's very lengthy affidavit that had 75 exhibits appended to it.

[39] Key Industries said the photocopying and other document reproduction costs sought were not "*usual business expenses*", but were costs incurred for these proceedings that had been specifically calculated/invoiced, so were not a standard or fixed fee.

Mr Perrin's position on costs

[40] Mr Perrin submitted that the Authority should reject the claim for indemnity costs and instead adopt its usual notional daily tariff based approach to assessing costs. He said his

¹⁶ *Tex Onsite Ltd v Hill* [2016] NZERA 67 and *Whitten v Ogilvy New Zealand Limited* ERA Auckland, AA200A/10, 21 June 2010.

conduct could be appropriately addressed by adjusting the notional starting tariff, in the usual way.

[41] Mr Perrin agreed that a six-day investigation meeting should be adopted to fix a notional starting tariff, given the complexity and duration of this matter. He agreed that the notional starting tariff for assessing costs was therefore \$22,000.¹⁷

[42] Mr Perrin submitted that a modest increase to that of 75 percent (\$16,500) would constitute a reasonable and appropriate uplift to reflect any bad behaviour that had occurred. That would result in a costs award of \$38,500, which he submitted would be consistent with the need for costs in the Authority to be moderate and to not punish him, while still appropriately reflecting that his conduct had unnecessarily increased Key Industries' actual costs.

[43] Mr Perrin also submitted Key Industries should not be reimbursed for "*photocopying and printing*", as that was a normal business expense associated with the running of a law firm.

Authority's investigation

[44] By agreement with the parties, costs were determined 'on the papers'. Both parties filed written submissions. Mr Perrin was invited to provide evidence about his financial situation, if 'ability to pay' was a factor he wanted the Authority to consider, however he did not do so.

[45] When assessing costs the Authority referred back to its previous determinations, Directions, Minutes and Orders.¹⁸ Memorandums and affidavits filed by the parties have also been reviewed to identify what conduct by Mr Perrin actually increased Key Industries' costs, and to assess by how much it had likely done so.

[46] Key Industries filed additional information to support its costs and disbursements claims, including copies of invoices.

[47] Key Industries filed a nine page "*Schedule of the Specific Work Done*" and a 13 page "*Summary of Mr Perrin's conduct and additional steps/work necessary*" (referred to as "*the*

¹⁷ The current daily tariff is \$4,500 for the first day then \$3,500 for subsequent days of investigation meeting time.

¹⁸ Above n1, n3 and n5.

Summary”), that ran from June 2020 to December 2021. The Summary recorded that Mr Perrin’s conduct had unnecessarily increased Key Industries actual costs by \$351,076,24.

[48] A ten page “*Timeline of Events*” that ran from 22 April 2020 to 26 May 2022 was provided by Key Industries (“*the Timeline*”). The Timeline summarised the key steps Key Industries (and where appropriate the Authority) had taken to resolve the claims and the actions that Mr Perrin had agreed (or been directed/ordered) to do, but had not done. Communications that had occurred with Mr Perrin and his representatives about that were also identified.

[49] Mr Perrin did not dispute any of the information in the Summary or Timeline, or the extent or amount of the additional legal costs Key Industries said it had incurred as a result of the manner in which he had elected to defend its claims. Nor did Mr Perrin claim that any of the costs Key Industries had incurred were unreasonable or had been unnecessary.

Issues

[50] The following issues are to be determined:

- (a) Should Key Industries be awarded additional special damages?
- (b) What costs and disbursements did Key Industries incur?
- (c) Should indemnity costs be awarded?
- (d) If not, how much did Mr Perrin’s conduct cost Key Industries’ in unnecessarily incurred additional costs?
- (e) What costs should Key Industries be awarded?
- (f) What disbursements should Key Industries be awarded?
- (g) Should Key Industries be awarded interest?

Should Key Industries be awarded additional special damages?

[51] The purpose of special damages is to compensate a party for loss, damage or harm it has suffered.

[52] The Authority determined in its 26 August 2022 and 4 November 2022 determinations that the required causal link had been established between Mr Perrin’s breaches and the costs Key Industries incurred in connection with:

- (a) The LawFlow file hosting services;¹⁹ and
- (b) The High Court proceedings.²⁰

[53] Key Industries has also proved the actual losses it now sought to recover by an award of additional special damages were reasonably necessary, and the amounts incurred were reasonable.²¹ These amounts are therefore quantified losses that are recoverable by an award of special damages. The requirements for an award of special damages have therefore been met.

[54] The filing fee was omitted from the special damages claim Key Industries made that resulted in the Authority's earlier award of special damages for High Court costs, so it should now be reimbursed, consistent with the findings made in the special damages determination dated 4 November 2022.²²

[55] The LawFlow file hosting services incurred by Key Industries up to 31 January 2022 were awarded in the 26 August 2022 determination.²³

[56] Consistent with that same reasoning, Key Industries should also be able to recover the costs of LawFlow for the period 1 February 2022 to 28 November 2022, because it needed to keep 85,000 Outlook documents (emails and attachments) organised, until the challenge rights associated with these proceedings have been exhausted.

Additional special damages awarded to Key Industries in this determination

[57] Mr Perrin is ordered to pay Key Industries additional special damages of \$2,699.40 including GST, consisting of:

- (a) \$1,550.00 to reimburse the High Court filing fees; and
- (b) \$1,149.40 to reimburse LawFlow file hosting services incurred from 1 February 2022 to 28 October 2022.

¹⁹ Supra n14.

²⁰ Supra n13.

²¹ As per the legal test requirements for an award of special damages.

²² Above n3, at [61] and [62].

²³ Supra n14.

What costs and disbursements did Key Industries actually incur?

[58] As per invoices provided, Key Industries incurred actual legal costs in respect of these Authority proceedings of \$379,300.36, excluding GST, and mediation costs (not recoverable), as well as the costs incurred in connection with the High Court proceedings, as that was covered by its special damages claim.

[59] Key Industries separated out the costs invoiced by Clendons from the costs invoiced by Mr Scampion and provided detailed, clear and comprehensive information to support its costs and disbursements claims.

Should indemnity costs be awarded?

[60] Key Industries relied on the following factors to support its claim for indemnity costs:

- (a) The breaches by Mr Perrin of his employment agreement represented an existential threat to Key Industries' business, because he had articulated a desire to ruin the company;
- (b) Mr Perrin was warned in pretrial communications of the potential cost consequences of not fully or promptly addressing his breaches;
- (c) Mr Perrin engaged in egregious and flagrant misconduct which included breaches of confidence;
- (d) Mr Perrin engaged in obstructive behaviour which included deleting evidence in order to conceal the full extent of his breaches;
- (e) Mr Perrin provided untrue information to Key Industries and to the Authority;
- (f) Mr Perrin's defence of Key Industries' claims was without merit;
- (g) Mr Perrin did not claim that any of the legal work or expenses incurred by Key Industries were unnecessary or unreasonable.

[61] Key Industries said these Authority proceedings were necessary and the legal expenses were reasonably incurred, because it was seeking to avoid a business loss of at least \$2 million per year, which it claimed was the amount of business Mr Perrin and Mr Green expected to take from it.²⁴

²⁴ Above n1, at [39] - [47] and [73].

[62] Key Industries said it had been acutely conscious of the costs it had been incurring throughout, so had sought to limit legal costs to only what was necessary to protect its business.

[63] Key Industries submitted the level of the legal costs it incurred had to be seen within that context, because it estimated the damage to its business would have exceeded \$5,000,000, and its business may not have survived, had it not addressed Mr Perrin's (subsequently admitted) breaches in the way it did.

[64] Key Industries said that the various obstacles that Mr Perrin put in its way, including actions he took to obstruct the Authority's investigation, caused delays and forced Key Industries to obtain and analyse evidence from multiple third party sources and it had to incur legal costs in addressing Mr Perrin's conduct. That significantly increased its costs, so Key Industries submitted that Mr Perrin should be held financially responsible for that conduct.

Review of previous awards of indemnity costs by the Authority

[65] Over the past 13 years there have only been five cases in which the Authority awarded indemnity costs, with the largest award of indemnity costs award being \$37,722 and the smallest being \$987.50. Key Industries sought more than ten times the highest award of indemnity costs previously made by the Authority.

[66] The Authority awarded indemnity costs in the following cases:

- (a) In *Patel v Adamar Holdings Limited & Anor* an employee was awarded indemnity costs of \$37,722 plus \$215.31 disbursements because the employer had advanced a "hopeless case" of unsubstantiated fraud allegations, which the Authority viewed as "irrelevant" to what should have been a straightforward personal grievance claim.²⁵

The costs determination did not state the number of days of investigation meeting time involved, although a reading of the substantive determination in *Patel* suggested it had involved three days.²⁶ The daily tariff at that time was \$3,500 per day, so the starting point for assessing tariff costs would have been \$10,500. The employee therefore received \$27,222 more than tariff costs.

²⁵ [2014] NZERA 135.

²⁶ [2014] NZERA 23.

- (b) In *Phibbs v Poutiri Community Practices Limited* two applicants filed claims against four respondents.²⁷ Indemnity costs of \$5,937.50 were awarded to the third respondent and indemnity costs of \$987.50 were awarded to the fourth respondent. The Authority told the applicants during the first case management conference that their claims against the third and fourth respondents had no prospect of success.

Although the applicants later withdrew their claims against the third respondent, and the Authority dismissed their claims against the fourth respondent for want of jurisdiction, the respondents were awarded indemnity costs because they had to incur legal costs defending claims that should never have been made against them. It was unclear what an award of tariff costs would have been.

- (c) In *South Pacific Meats Limited v New Zealand Meatworkers and Related Trades Union Inc* the unsuccessful employer had indemnity costs of \$3,496 awarded against it.²⁸ The Authority had informed the employer during the first case management conference that its substantive claim was misconceived, and had no prospect of success, because the relief sought was ultra vires. However, the employer proceeded anyway.
- (d) In *Chand v Whyte Group Limited* indemnity costs of \$2,152 were awarded to the employee as part of the enforcement of a settlement agreement, which provided that a party responsible for breaching it “*will fully indemnify the other for all costs incurred in pursuing the enforcement action*”.²⁹ Because the employer breached the terms of the Settlement Agreement, it was ordered to pay indemnity costs, as per the specific term to that effect in the Settlement Agreement.
- (e) In *L v M* the starting point for tariff costs was \$5,250. However, a partial award of \$29,400 indemnity costs was made to the successful employer.³⁰ It was not full indemnity costs, because the employer only recovered the actual costs it had

²⁷ [2014] NZERA 277.

²⁸ [2015] NZERA 137.

²⁹ [2015] NZERA 5.

³⁰ [2013] NZERA 566.

incurred from the date its first “*Calderbank*” offer had been unreasonably rejected.³¹

The *Calderbank* offer had been made at an early stage, before the parties incurred any costs associated with preparing evidence for the Authority’s investigation meeting. This matter could also be viewed as an example of the Authority uplifting the notional starting tariff by \$24,150, to reflect the *Calderbank* offer.

[67] Although the Authority has the discretion to award indemnity costs, such awards are exceptional and occur rarely. Previous cases do not support an award of indemnity costs at the level Key Industries sought.

[68] In *Phibbs*, *South Pacific* and *Chand* the low amount of indemnity costs awarded (the lowest being \$987.5 and the highest being \$5,937.50) was not comparable with the \$379,300.36 indemnity costs Key Industries sought.³²

[69] In *Patel* the Authority awarded \$27,222 more than tariff costs and in *L v M* the Authority awarded \$24,150 more than tariff costs.³³ Key Industries has sought \$357,300.36 more than tariff costs, which is unprecedented.

Finding on indemnity costs claim

[70] Key Industries’ claim for indemnity costs is declined. An award of the indemnity costs claimed in this matter would be out of alignment with the approach taken by the Authority in previous indemnity costs cases.

[71] Unlike the cases of *Phibbs* and *South Pacific Meats Limited*, the Authority did not tell Mr Perrin from that outset that his defence had no prospect of success.³⁴ There was no *Calderbank* offer as there was in *L v M*, or settlement agreement as there was in *Chand*, that affected the assessment of costs in this matter. Nor did Mr Perrin pursue hopeless counterclaims, as the unsuccessful employer did in *Patel*.³⁵

³¹ A ‘*Calderbank*’ offer is a without prejudice except as to costs settlement offer.

³² *Phibbs* above n22; *South Pacific* above n23 and *Chand* above n24.

³³ *Patel* above n21 and *L v M* above n25.

³⁴ Above n22 and n23.

³⁵ The counterclaim Mr Perrin lodged on 11 August 2020 was withdrawn on 15 October 2020.

[72] It is preferable for the Authority to apply its usual notional daily tariff approach, as that can be adjusted to reflect the particular circumstances of this matter. It also gives those appearing before the Authority some idea of the costs consequences of doing so.

[73] A known and consistent approach to assessing costs is important, so parties can base decisions about the nature and extent of legal support they will use based on their prior knowledge of the Authority's unique costs framework.

[74] An award of indemnity costs would be disproportionate to the way in which the Authority has awarded costs in most other cases to date. Indemnity costs would also be disproportionate to the quantum of financial remedies recovered by Key Industries and it would not adequately reflect that Key Industries had 'mixed success' because it did not succeed on all of its claims.

How much did Mr Perrin's conduct actually cost Key Industries' in additional costs?

[75] Key Industries' Statement of Problem, seeking an urgent injunction against, Mr Perrin was lodged on 17 June 2020. The injunction application was resolved by Mr Perrin providing written undertakings.

[76] The Summary document Key Industries prepared in support of its costs application established that from as early as 7 July 2020 Mr Perrin had failed to comply with his undertakings, even though Key Industries had explained to him what was required.

[77] Key Industries' memorandum dated 8 October 2020 set out (among other things) the evidence, information and access that Mr Perrin had failed to provide, contrary to his undertakings. Mr Perrin admitted most of the alleged breaches in a Joint Memorandum filed on 26 November 2021, and then almost all of the remaining alleged breaches on 19 January 2022.

[78] Once liability had been established, then the Authority moved into the assessment of remedies/damages and penalties part of its investigation.

[79] However, prior to that Key Industries and the Authority were required to engage in a long drawn out process that attempted to hold Mr Perrin to his undertakings, to provide relevant information about the alleged breaches, in the face of his repeated and ongoing resistance to doing so.

[80] The intensive focus on gathering the information from Mr Perrin, that he had undertaken to provide but had not actually provided, occurred over the period from 8 October 2020, when the Authority became actively engaged in addressing the breaches of undertakings that were occurring, to 26 November 2021, which was the date on which most of the alleged breaches had been admitted by Mr Perrin.³⁶

[81] Mr Perrin's conduct obviously, unnecessarily and unreasonably increased Key Industries' actual legal costs over that period. The time and costs incurred from 8 October 2020 to 26 November 2021 would not have been incurred at all had Mr Perrin complied with his undertakings or with the Authority's directions/orders, or if he had honoured his previous agreements he had made via counsel to provide that information.

[82] Based on a review of the Summary document and invoices, the Authority finds that Key Industries' total additional costs incurred from 8 October 2020 to 26 November 2021 was \$152,244.53.

[83] The Authority's costs investigation therefore focused on what part of the actual additional legal costs Key Industries had incurred from 8 October 2020 to 26 November 2021 should be recoverable from Mr Perrin.

[84] As at 26 November 2021 Mr Perrin, while acknowledging 218 breaches of his employment agreement by that date, still disputed 43 instances of obstructing or delaying the Authority's investigation. Two months later, on 19 January 2022, Mr Perrin admitted all of these alleged breaches.

[85] Costs incurred by Key Industries from the lodging of its Statement of Problem on 17 June 2020 up to the filing of its 8 October 2020 memorandum, along with the costs it incurred after 26 November 2021 when most of the breaches were admitted, were excluded from the Authority's analysis of what amount of costs Mr Perrin had caused Key Industries to unnecessarily incur. That represented a conservative approach towards assessing what unnecessary additional costs Mr Perrin had actually caused Key Industries to incur.

[86] The Authority also considered that the invoiced activities in the excluded periods were what would broadly be expected to occur in the normal course of claims of this type. Those

³⁶ Mr Perrin still disputed 43 alleged breaches as at that date, but those were admitted by 19 January 2022.

costs were therefore excluded from any potential tariff uplift, as they were deemed to have already been covered by an application of the notional daily tariff.

What costs should Key Industries be awarded?

Notional starting tariff

[87] The parties agreed with the Authority that the notional starting point for assessing costs should be \$22,000, as that represented the daily tariff for a six-day investigation meeting. This consisted of \$4,500 for the first day and \$3,500 for the subsequent days of investigation meeting time.

Should the notional starting tariff be increased?

[88] The parties agreed the notional starting tariff needed to be uplifted.

[89] Mr Perrin's proposed uplift of only \$16,500 was manifestly inadequate. Key Industries' proposed uplift of \$351,076.24 was manifestly excessive and its submission that the daily tariff should be increased by a factor of eight or ten was well outside of the parameters of how the tariff has been applied by the Authority.

Analysis of previous large costs awards the Authority has made

[90] The Authority reviewed other high awards of costs that it has made over the past 13 years, to get clarity of what factors have increased tariff costs and by how much. It was clear from the following case review that the extent of any tariff uplift will always depend on the particular facts of each case.

[91] Over the past 13 years the highest award of costs and disbursements the Authority made was an award of \$92,408 to the successful employee in *Pickering v Detection Services Limited*.³⁷ That included \$66,658 to reimburse forensic accounting costs incurred by the successful employee, meaning the employee received an award of \$25,750 costs out of the \$143,966 legal costs actually incurred.

[92] In *Pickering* the employee's actual costs and expenses, including legal fees, were \$210,000 (including GST and disbursements). This comprised legal fees of \$143,966, forensic accountants' fees and disbursements of \$66,658 and hearing fees of \$2,300. The employee

³⁷ [2013] NZERA 28.

sought an award of \$138,601 as a contribution towards total costs, which represented about two-thirds of the total costs incurred.

[93] The Authority's investigation meeting took between five and seven days and involved two distinct and complex claims. The daily tariff was uplifted from \$3,500 (which it was at that date) to \$5,000 for two days' investigation meeting time.

[94] In *Brennan v Afos Limited* the successful employee incurred actual costs and disbursements of \$82,000. Indemnity costs were declined and he was awarded uplifted tariff costs of \$48,442, consisting of \$40,666 costs plus \$7,776 disbursements (for reimbursement of the expert accountant's fees and of the filing fee), which were apportioned between three respondents.³⁸ The unsuccessful employer had to pay \$45,234.88 consisting of legal costs of \$38,333.32 plus \$7,776.56 disbursements, with the balance of the costs imposed being shared equally between the two other respondents.

[95] *Brennan* was a very lengthy and complex matter, that had required considerable work over a three year period. It is therefore of limited assistance in terms of assessing costs in other cases. The Authority was required to issue ten determinations, which had involved multiple claims, three respondents and an unsuccessful counterclaim. A detailed costs assessment was done for each stage of the Authority's investigation, which reflected the particular facts of that matter.

[96] The highest award of tariff costs only (excluding disbursements) was to the employer in *Lawson v New Zealand Transport Agency*.³⁹ The employer had incurred \$33,000 costs and was awarded that full amount, but not on an indemnity costs basis.

[97] The \$33,000 costs award was based on an adjustment being made to the daily tariff, which at that time was \$3,500. The case had involved a five and a half day investigation meeting, so the notional starting point for assessing costs was \$19,250. The Authority then increased the notional starting tariff by \$13,750.

[98] The employer had incurred substantial costs after its Calderbank offer had expired, with the employee's failure to respond to the Calderbank offer being a significant factor in the amount of costs awarded. The employee's conduct had also caused delays, and issues with the

³⁸ [2018] NZERA 31.

³⁹ [2015] NZERA 173.

employee's witnesses, and the employee's decision to change counsel, had unnecessarily prolonged the investigation meeting. The uplift made to the tariff reflected those circumstances.

[99] There have been six other cases over the past 13 years in which the Authority awarded the successful party tariff costs (excluding disbursements) of between \$30,000 and \$32,755.

[100] In *Performance Cleaners All Property Services Wellington v Chinan* the employee unsuccessfully sought indemnity costs of \$50,124 plus GST.⁴⁰ The Authority uplifted the (then) notional daily tariff from \$3,500 to \$9,500 (plus GST), to reflect the additional costs the employee incurred in successfully defending the employer's claims. The tariff increased after the Statement of Problem in *Chinan* had been lodged.

[101] The successful employee in *Chinan* was awarded \$32,775 costs plus \$2,276 disbursements, as the three-day investigation meeting went over time by 4.5 hours as a direct result of the employer's conduct, so that extra time was reflected in the costs awarded.

[102] In *Tex Onsite Limited v Hill* indemnity costs and disbursements of \$83,633 incurred by the successful employer was declined. Instead, the employer received uplifted tariff costs of \$31,500 plus \$16,137 disbursements for a three-day investigation meeting. The notional daily tariff at that time of \$3,500.⁴¹

[103] The tariff in *Tex Onsite* was uplifted to reflect nine days' investigation meeting time, that consisted of a three day investigation meeting plus six days of preparation time. That amount of time was considered appropriate, due to the analysis required of detailed digital forensic reports and, to reflect the preparation involved with the employer's successful urgent application.

[104] The costs awarded reflected that the employee's conduct had unnecessarily increased the employer's costs, and the high disbursements awarded reimbursed the costs of a digital forensic specialist's services.

[105] In *JCE v Chief Executive of the Department of Corrections* the successful employee sought \$90,204 indemnity costs and disbursements.⁴² Indemnity costs were declined and

⁴⁰ [2017] NZERA 112.

⁴¹ Above n16.

⁴² [2018] NZERA 175.

uplifted tariff costs of \$31,000 plus disbursements of \$5,764.25 for expert medical fees were awarded.

[106] *JCE* involved a five-day investigation meeting. The complexity of the matter resulted in a \$1,500 uplift to the daily tariff, which at that point was \$4,500 for the first day then \$3,500 for subsequent days. The starting point based on the uplifted tariff was \$26,000, but the Authority awarded an extra \$5,000 to account for remedies submissions it had requested.

[107] In *Gazeley v Oceania Group (NZ) Limited* the successful employer's actual costs were \$136,000. Its claim for reimbursement of \$60,000 costs plus disbursements of \$5,900 was declined.⁴³ The employer was awarded uplifted tariff costs of \$30,000 plus disbursements of \$2,954 (for travel and accommodation of counsel), predominantly because the unsuccessful employee had unreasonably rejected two Calderbank offers.

[108] The daily tariff in *Gazeley* was uplifted from \$3,500 to \$5,000 per day, and applied to six days of investigation meeting time, which was slightly more than the four and a half days of investigation meeting time that had actually been involved. The increase reflected that the employee's conduct had lengthened the investigation time required. The employee's interim reinstatement and removal applications and all of her substantive claims were unsuccessful.

[109] In *Jiang v ONO* the successful employer sought costs of \$33,000, which reflected a 50 percent uplift to the notional daily tariff for the two-day investigation meeting and a claim for six days' of preparation time. The employer was awarded tariff costs of \$30,000 to reflect that the complexity of the matter required preparation beyond what was normally required for an Authority investigation meeting. *Jiang* involved a two-day investigation and additional time for the non-publication order, that was dealt with 'on the papers' as an interlocutory application.

[110] In *Jiang* the employee's unreasonable rejection of a Calderbank offer caused the employer to subsequently incur an additional \$12,400 in costs. The Calderbank offer was made before any preparation had been required, and if accepted it would have financially benefited the employee, who did not succeed with his claims. The employee's advocate had also

⁴³ [2013] NZERA 67.

contributed to delays and had obstructed the Authority's investigation, so that was taken into account when costs were assessed.

[111] In *Best v Wellington Combined Taxis Limited* the successful employer sought indemnity costs of \$60,000 plus GST or uplifted tariff costs of \$40,000 - \$50,000.⁴⁴ Indemnity costs were declined. The successful employer was awarded uplifted tariff costs of \$30,000, to reflect that the employee's conduct had contributed to prolonging the investigation meeting.

[112] The notional starting point based on the daily tariff was \$20,000, which was then increased by \$10,000 to fully compensate the employer for a day of investigation meeting time that was wasted due to the employee's conduct.

Precedent value

[113] None of the cases reviewed by the Authority were comparable with this matter, so they are of limited assistance. As such, previous cases have limited precedent value and the highly unusual facts make this matter an outlier. This costs award can be viewed as exceptional and therefore a reflection of the unique facts involved.

The Authority is not a Court

[114] The Authority is not a Court. Successful parties cannot expect to be awarded Court level costs. The Authority has its own unique approach to costs, which is focused on access to justice and modest costs awards. The daily tariff has been put in place to give parties an idea of what the costs consequences of pursuing a claim or losing a claim are likely to be.

[115] The tariff has been set at a modest level. Even where the tariff is uplifted, it usually results in a low proportion of actual costs awards being awarded. The Authority has not previously applied high multipliers to the notional starting tariff. To do so now would effectively undermine the tariff approach, because it would take the level of costs awarded in this matter outside the Authority's normal costs parameters.

[116] It is not uncommon for parties who have incurred significant costs in connection with Authority proceedings to find themselves out of pocket. That reality should form part of the 'litigation risks assessment' prudent parties do when appearing before the Authority.

⁴⁴ [2022] NZERA 38.

Effect of previous penalty on costs

[117] Penalties and costs are two entirely different matters, that cannot be mixed together. Costs must not be used to punish a party, even more so when the ‘bad behaviour’ has already attracted penalties, as was the case with Mr Perrin.⁴⁵

[118] However, the mere fact that obstructive conduct by a party has already been penalised under s 134A(1) of the Act does not mean that the same conduct, if it also unnecessarily increased another party’s actual costs, cannot still result in an uplift being made to the notional starting tariff.

How much should the notional starting tariff be uplifted?

[119] The conduct Mr Perrin engaged in that unnecessarily and unreasonably increased Key Industries actual costs included:

- (a) Pursuing unmeritorious defences for two years and five months, which required Key Industries to file extensive evidence proving almost all of the 261 breaches it alleged he had engaged in;
- (b) Abandoning all of his defences at the last minute, after significant costs had been incurred, by admitting the 261 alleged breaches;
- (c) Deliberately destroyed relevant evidence, to put it beyond the reach of the Authority, leading Key Industries to incur costs attempting to summons witnesses outside New Zealand to obtain missing information;
- (d) Repeatedly breaching his High Court and Authority undertakings to provide relevant information to Key Industries, which required Key Industries to make repeated applications to the Authority to obtain that information;
- (e) Breaching the Authority’s directions and orders, that resulted in a series of Authority Minutes being issued and two separate investigation meetings being held to address missing information;
- (f) Providing false and misleading information to the Authority, that required Key Industries to incur additional costs in identifying and explaining the deficiencies in his evidence;

⁴⁵ Above n1, at [230].

- (g) Withholding information he clearly had, which required Key Industries to incur additional costs attempting to obtain this information from multiple other sources;
- (h) Providing deficient affidavits and statements to the Authority, that caused Key Industries to incur extra costs cross referencing the extensive documentation to show what was missing and why the Authority could be confident the information existed;
- (i) Failing to engage with the Authority or do what he had agreed to do, which resulted in six case conferences to involve him in the investigation.

[120] The limited information provided by Mr Perrin, in breach of his undertakings and the Authority's orders and directions, meant Key Industries' counsel were required to engage in multiple additional communications that would not otherwise have been necessary with:

- (a) Mr Perrin;
- (b) His counsel (when he was represented);
- (c) The Authority;
- (d) The Forensic Investigator;
- (e) Agserv GP;
- (f) Agserv Pty Ltd;
- (g) Agserv's counsel
- (h) Eris Hess;
- (i) Jason Green;
- (j) Customers; and
- (k) Others.

[121] Key Industries had to file eight lengthy memoranda with the Authority, in attempts to hold Mr Perrin to his legal obligations. It had to review multiple deficient statements from Mr Perrin and respond to them. Key Industries incurred additional costs writing to Mr Perrin to ensure he was aware of his legal obligations and knew what had to be provided by him and why what he had provided was insufficient.

[122] There was a direct causal link between Mr Perrin’s breaches of his undertakings and/or the Authority’s directions/orders and the additional costs Key Industries incurred by addressing those breaches.⁴⁶

[123] Mr Perrin’s conduct caused the Authority’s investigation to become far more complicated, protracted and therefore costly than it otherwise would have been, had he done what he had already agreed to do in his two written undertakings.

[124] The specific findings by the Authority in previous determinations that supported a significant uplift to the notional starting tariff included:

- (a) Key Industries “*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*”;⁴⁷
- (b) Mr Perrin engaged in “*behaviour [...] that delayed the determination of the substantive claims and made it more complex and costly*”;⁴⁸
- (c) Mr Perrin “*deliberately deleted relevant information, even after the Authority had expressly told him not to*”;⁴⁹
- (d) Mr Perrin “*repeatedly failed to comply with timetable directions and [...] continually failed to provide information that he had undertaken to provide*”;⁵⁰
- (e) Mr Perrin “*knew what was required of him in terms of providing information and meeting timetable directions, because he was repeatedly reminded about that*” but chose “*not to meet his obligations*”;⁵¹ and
- (f) Mr Perrin “*intentionally elected not to comply with his legal obligations*”.⁵²

[125] The Authority has focused solely on conduct that Mr Perrin deliberately engaged in that he knew, or ought reasonably to have known, was unnecessarily inflating Key Industries’ costs.

⁴⁶ This amount excluded costs associated with Mr Perrin’s pursuit of defences that he ultimately abandoned.

⁴⁷ Above n1, at [187].

⁴⁸ Above, at [183].

⁴⁹ Above n1, at [189].

⁵⁰ Above, at [183].

⁵¹ Above, at [188].

⁵² Above, at [189].

These inflated costs effectively resulted from Key Industries' ongoing attempts to hold Mr Perrin to his legal obligations.

[126] The specific conduct by Mr Perrin the Authority relied on to significantly uplift the notional starting tariff involved deliberate, blatant breaches of legal obligations that were clearly known and understood by Mr Perrin, and which he had repeatedly committed to meeting.

[127] Mr Perrin had agreed to provide information to Key Industries in his undertakings. He had also agreed to do so via counsel and during case managements conferences with the Authority. Mr Perrin's legal obligations had been repeatedly explained to him by Key Industries and the Authority, so his breaches were clearly deliberate.

[128] The notional starting tariff of \$22,000 should be uplifted by a factor of three to appropriately reflect the conduct by Mr Perrin which unnecessarily and unreasonably increased Key Industries' actual legal costs.

Outcome – costs awarded to Key Industries

[129] Mr Perrin is ordered to contribute \$66,000 inclusive of GST towards Key Industries actual legal costs.

[130] That outcome meant Key Industries has been awarded \$44,000 costs in excess of the daily tariff. An award of \$66,000 costs excluding disbursements is the highest costs award made by the Authority to date. That reflected the exceptional nature of this case and the unusual facts, so it is unlikely to be used as a costs precedent.

[131] Although the total costs award of \$66,000 may appear high in comparison with other Authority cases, or a large sum for an individual to pay, it is appropriate in all the circumstances. It represents less than 44 percent of the additional costs the Authority determined Mr Perrin had unnecessarily caused Key Industries to incur, and less than 18 percent of the total actual costs it has incurred.

[132] Costs awarded in this matter have not been imposed to punish Mr Perrin (as the penalties imposed did that) but instead reflect a principled application of the Authority's uplifted notional daily tariff approach. The high award is a reflection of the extent to which Mr Perrin's actions unnecessarily inflated Key Industries' actual costs.

What disbursements should Key Industries be awarded?*Forensic investigator fees*

[133] Mr Perrin is ordered to reimburse Key Industries \$6,713.32 including GST, for the actual Forensic Investigator fees it incurred. These were incurred directly as a result of his breaches, so reimbursement of the full amount is appropriate.

Photocopying

[134] Key Industries' request for reimbursement of \$516.83 for photocopying and printing fees and \$48.47 for providing a physical copy of Mr Andre Visser's affidavit was declined.

[135] Preparing documentation, including copies of affidavits or witness statements, or documents to be presented to the Authority as part of its investigation is considered to a normal cost that Mr Perrin should not be required to reimburse.

Authority's filing fee

[136] Mr Perrin is ordered to reimburse Key Industries \$71.56 for the Authority's filing fee.

Disbursements awarded

[137] Mr Perrin is therefore ordered to reimburse Key Industries total disbursements of \$6,784.88 including GST, consisting of:

- (a) \$6,713.32 for the Forensic Investigator's fees; and
- (b) \$71.56 for the Authority's filing fee.

Should Key Industries be awarded interest?

[138] It is not appropriate to award interest on legal costs at this stage, because the costs that have been awarded in this determination are a consequence of these Authority proceedings. They therefore do not at this stage fall within "*the recovery of money*" requirement in clause 11 of Schedule 2 of the Act.

[139] However, the award of special damages for the LawFlow costs did involve "*the recovery of money*", so in accordance with the Authority's power in clause 11 of Schedule 2 of the Act, Mr Perrin is ordered to pay Key Industries interest on \$2,699.40 special damages it has been awarded. Interest is to run from 14 November 2022, being the date of the last LawFlow invoice had to be paid, until that amount has been paid in full; and

[140] The amount of interest payable in accordance with the determination, is to be calculated in accordance with the Interest on Money Claims Act 2016, using the civil debt calculator on the Ministry of Justice website.

Summary of outcome

[141] Within 28 days of the date of this determination, Mr Perrin is ordered to pay Key Industries \$75,484.28 plus the interest awarded in this determination, being:

- (a) \$2,699.40 additional special damages;
- (b) \$66,000 contribution towards actual legal costs; and
- (c) \$6,784.88 to reimburse disbursements.

Rachel Larmer
Member of the Employment Relations Authority