

**Attention is drawn to
the order prohibiting
publication of certain
information in this
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 338
3033038

| | |
|---------|------------------------|
| BETWEEN | RPW Applicant |
| A N D | H First respondent |
| A N D | C Second respondent |

Member of Authority: Rachel Larmer

representatives: Samuel Hood, Counsel for Applicant
H in Person and as Director of C

Investigation Meeting: 31 August 2018 at Hamilton

Submissions received: 05 September 2018 from RPW
19 September 2018 from First and Second respondents
12 October 2018 from First and Second respondents
15 October 2018 from RPW

Date of Determination: 01 November 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY (No. 5)**

Non-publication orders

[1] There are **permanent non-publication orders in force** that prohibit publication of the:

- (a) Parties' names and any information that is likely to identify them;¹
- (b) The audio recording H made of the Authority's telephone conference on 27 July 2018;²
- (c) The documents, and/or extracts from any of the documents, at pages 526-670 of the bundle of documents RPW filed with the Authority on 30 August 2018.³

[2] This determination has complied with the Employment Court's prohibition on naming the parties, which took effect on 24 August 2018, by way of Minute of that date.

[3] The Authority was not aware of the Employment Court proceedings or of its Minute that contained the Court's interim non-publication order until after the Authority received a copy of the Employment Court judgment in *RPW v H & C* dated 06 September 2018.⁴

[4] That time delay is why the Authority's second compliance order determination dated 27 August 2018 did not use the Court's intitling.⁵

[5] The Authority recognises that this determination may contain information that could be "*likely to lead to [the parties'] identification.*"⁶

[6] The Authority has endeavoured as far as possible to avoid that, but cannot guarantee that will not occur because of the nature and content of the matters addressed in this determination and the case citations that were required.

Employment relationship problem

The parties

[7] RPW is a charitable trust that employs around 110 employees. It operates in a highly regulated environment within the health sector. RPW is funded by the regional District Health Board (the DHB) and by community donations. RPW is governed by a voluntary Board.

¹ *RPW v H and C* [2018] NZEmpC 120 at paragraph [28].

² Paragraph [316].

³ *Supra.*

⁴ [2018] NZEmpC 103.

⁵ *R v H and C* [2018] NZERA Auckland 275.

⁶ *Ibid* 1.

[8] H is an employment advocate who provides advocacy services through his company C.

[9] H, as C's sole director and shareholder, is the controlling mind of his company, so has complete authority over C's actions. For the purposes of these proceedings, there is effectively no difference between H's actions and C's actions because the two are so closely entwined.

[10] H and C are therefore jointly and severally liable for the various breaches RPW has proven.

Settlement agreement

[11] The issues in this case originate from C's representation of RPW's former employee, "D".

[12] H, on behalf of C, represented D during her mediation with RPW. Mediation resulted in D and RPW entering into a settlement agreement dated 05 March 2018.

[13] The agreement was certified by a mediator from the Ministry of Business Innovation and Employment, Mediation Services under s149 of the Employment Relations Act 2000 (the Act).

[14] The settlement agreement contained a non-disparagement clause that also covered H and C. This clause prevented the parties and their representatives from making disparaging or negative remarks about each other.

[15] H also signed the settlement agreement, along with RPW and D, to record that he personally, in addition to C as D's representative, had agreed to be bound by the non-disparagement clause in it.

[16] H's arguments that the non-disparagement clause did not cover him or C were considered by the Authority in its 16 August 2018 determination, but did not succeed.⁷

⁷ *R v H and C* [2018] NZERA Auckland 253 at paragraphs [82]-[178].

[17] The Authority’s 16 August 2018 determination set out what “*disparaging or negative remarks*” meant.⁸ It also imposed the first compliance order on H and C that required them to:

- (a) refrain from disparaging RPW; and
- (b) remove or redact disparaging material about RPW, that appeared on C’s public Facebook page.

Non-publication orders

[18] The Authority issued a number of non-publication orders in this matter:

- (a) The first non-publication order was issued on 20 July 2018 as part of the Authority’s case management directions;⁹
- (b) The second non-publication order was issued on 27 July 2018;¹⁰
- (c) The third non-publication order was issued on 13 August 2018.¹¹

[19] A second compliance order was issued on 27 August 2018 that ordered H and C to comply with the Authority’s third non-publication order.¹² This meant they had to:

- (a) refrain from publishing RPW’s name or information identifying RPW; and
- (b) remove posts on C’s public Facebook page that named or identified RPW.

[20] H’s and C’s defences for breaching the Authority’s non-publication orders were considered in the Authority’s 27 August 2018 determination, but did not succeed.¹³

[21] H has continued to disparage and make negative remarks about RPW by naming it and posting information that identified RPW, on C’s public Facebook page.

⁸ Supra at paragraphs [208]-[210].

⁹ See the Authority’s email to the parties dated 20 July 2018.

¹⁰ *R v A and C* [2018] NZERA Auckland 237.

¹¹ *R v A and C* [2018] NZERA Auckland 250.

¹² *R v H and C* [2018] NZERA Auckland 275 at paragraphs [107]-[112].

¹³ Supra at paragraphs [61]-[96].

What is this case about?

[22] RPW asked the Authority to impose penalties on H and C under:

- (a) Section 149(4) of the Act for multiple breaches of the non-disparagement clause in the 05 March 2018 settlement agreement;
- (b) Section 134A of the Act for obstructing the Authority's investigation into the claims against them.

[23] Accordingly, this case was solely about whether H and C should have penalties imposed on them for breaching their civil obligations.

[24] The Authority has approached that in two stages. This determination assessed liability for the breaches RPW claimed had occurred. However, in order to give H and C a further opportunity to be heard, subsequent to liability having been established, penalties will be assessed in a later determination.

[25] H has publicly attempted to reframe the case by saying it was about workplace bullying claims. That is not correct.

[26] The only Statement of Problem in this case was lodged by RPW. This matter did not involve any counterclaims by H or C. Nor did it involve any legal claims against RPW by any of C's clients.

[27] If any of C's clients believe they have an unresolved employment relationship problem with RPW, then they are able to lodge their claim with the Authority. To date only one of C's clients - "M" had lodged a claim with the Authority. This is discussed later.

H's and C's defences

[28] The claims H made about "*workplace bullying*" were relevant in so far as they were put forward as a 'defence' (explanation) by H and C for their actions.

[29] The Authority has therefore examined the underlying rationale for H's actions to determine whether they were necessary, reasonable or appropriate. The Authority also reviewed legislation H claimed permitted him and C to act in the way they did or alternatively protected them from the legal consequences of their actions.

[30] When considering the merits of H's defences to these penalty claims, the Authority has assessed his actions in light of what he knew, or ought reasonably to have known, at the time each of the breaches occurred. The inquiry was therefore focused on H's belief that his actions were necessary to prevent serious harm occurring to C's clients.

Right to silence

[31] Because of the risk of penalties being imposed on them, H and C were advised of their right to silence, so they were not required to provide any information that would have proved the penalty claims against them.

[32] The information they provided was at their own discretion.

[33] H and C agreed that they were responsible for all of the various communications and Facebook posts that RPW relied on as giving rise to the penalties it claimed.

C's clients

Person D

[34] RPW initially named D as a respondent party in its first Statement of Problem. However, subsequent to a telephone conference with the Authority, RPW decided to focus these proceedings on H and C, for now.

C's "client authorisation" form

[35] On 05 April 2018, 14 of RPW's employees signed an authorisation for C to act for them regarding their employment with RPW. H is the advocate who has been representing these employees, who are referred to in this determination as "C's clients".

[36] The authorisation letter C's clients signed gave C the right to make the final decision about what actions would be taken on their behalf. It also prevented them from seeking a second opinion on the advice they received from C, by stating that representation could be withdrawn from those who did so.

Representation by public disparagement

[37] It is concerning that H appeared to believe that effective representation of C's clients required him to publicly disparage a wide range of people and organisations, including RPW, who disagreed with H's view of a situation.

[38] Public disparagement and personalised abusive comments under the cloak of 'representation' is unnecessary, inappropriate and should be strongly discouraged in the good faith environment of employment relations.

Risk to C's clients

[39] The requirement in the authorisation form that C's clients abdicate their individual decision making rights, if that is what has in fact occurred, appeared to have created serious problems in this case.

[40] The extent to which C's clients authorised, approved and/or condoned their representatives' actions is, as yet, undetermined.

[41] H said under oath that all communications with RPW and its lawyers had been shown to C's clients, who were fully aware of what had been occurring, and supported the way in which their case was being handled.

[42] The Authority was not prepared to accept that evidence without having first given C's clients an opportunity to give their perspective about that to the Authority, should it prove necessary to do so.

[43] From the evidence I have seen so far, H's decisions and actions in this matter appear to have:

- (a) been adverse to C's clients' best interests;
- (b) placed C's clients at risk of serious potential adverse legal, financial and employment consequences; and
- (c) been contrary to the good faith behaviour required by the Act.

[44] This is particularly concerning in light of the restrictions C placed on its clients' ability to obtain a second opinion about advice H gave them.

Workplace issues

[45] H and C have repeatedly publicly claimed that RPW breached, and was continuing to breach, the Health and Safety at Work Act 2015 (HSAWA) because it had failed, and from H's perspective was continuing to fail, to provide staff with a safe working environment.

[46] H claimed RPW had not responded to workplace bullying complaints made by C's clients but had instead used taxpayer money, meant for health services, to "*bully and blackmail*" H into remaining quiet about serious harm. H also criticised RPW for the time it had taken to address the issues C's clients had raised.

[47] H repeatedly publicly claimed RPW was "*enabling*" and "*condoning bullying*" in its workplace and that it had "*shown no concern*" for C's clients. H also claimed that RPW's claims against him were "*frivolous and vexatious attacks*" to keep him quiet about "*abuse*" being perpetrated against C's clients.

[48] H has presented these alarming claims as if they were established fact. The claims were H's personal opinions, strenuously denied by RPW, and were not objectively supported by the evidence the Authority reviewed.

[49] RPW has comprehensive internal policies and procedures that identified expected standards of behaviour. These also explain how staff can raise concerns or complaints if those standards are not met. RPW has consistently communicated to staff that it was deeply concerned about the health and well-being of all staff and service users.

[50] In response to various workplace issues that were raised with it, RPW engaged an external independent expert investigator (the investigator) to look into all workplace issues. This included complaints by C's clients, complaints against some of C's clients, health and safety issues and any other concerns that arose during/from the investigation.

[51] RPW consulted H over the appointment of the investigator and the proposed Terms of Reference for the investigation. RPW also responded appropriately to the objection H had about the investigator.

[52] H claimed the investigator was biased, due to having reached conclusions in three other investigations that H disagreed with, and that the external investigation would be a “*predetermined sham*”. H never proposed an alternative investigator.

[53] H told the Authority that there could be no independent investigation if an employer engaged and paid an investigator and had set the parameters of an investigation.

[54] H’s complaint about the investigator was objectively unjustified.

[55] Having reviewed the investigator’s methodology and draft report I am satisfied that the investigation was carried out appropriately, in accordance with the available information.

[56] The investigator’s draft conclusions were that:

- (a) C’s bullying allegations were assessed as not having met the WorkSafe New Zealand’s definition of bullying, based on the available evidence;
- (b) Credible evidence supported complaints other staff had made about inappropriate behaviour by some of C’s clients;
- (c) Resentment of some staff had arisen from August 2017 roster changes;
- (d) When management or Human Resources staff had attempted to address that negativity, they had been accused of bullying and harassment.
- (e) It was apparent that the majority of RPW’s staff were proud of RPW and the service they provided to service users and the community.

[57] H tried to obstruct RPW’s workplace investigation. H prevented C’s clients from providing RPW and the investigator with specific details of their workplace concerns. H also stopped C’s clients from meeting with the investigator.

[58] H disparaged the investigator, both to RPW and on Facebook, by name. H claimed the investigation was a predetermined sham. The Authority’s review of the evidence it was based on, determined it was not.

[59] H claimed the complaints about C’s clients were retaliation, so he strongly objected to RPW investigating them. H was wrong to insist that RPW had to ignore any complaints involving C’s clients. RPW had received formal written complaints

from other staff that included information that RPW, as an employer, had a duty to investigate.

[60] In addition to the formal complaints about four of C's clients, RPW had also received information from other staff who were either too scared to publicly identify themselves or who had withdrawn consent to their name being disclosed.

[61] H's public comments gave the impression that RPW had not responded to C's clients' concerns. That is not the case. RPW had just not responded in the way H demanded. H also criticised the time it had taken RPW to resolve the workplace issues. From the evidence I saw, H's actions were a cause of that delay.

[62] H hampered RPW's ability to investigate C's clients' concerns because the complaints they made were generalised and non-specific. RPW therefore quite reasonably attempted repeatedly to obtain specific details from C's clients of each of their complaints so they could be properly investigated.

[63] On at least nine separate occasions RPW asked C's clients to provide specific information about their concerns. Despite these repeated requests, no information was forthcoming. An employer should not have to ask that many times for specific information, particularly when the employees concerned are represented.

[64] RPW invited C's clients to give their information directly to the investigator, outside of RPW's workplace, if they had not wanted to give the information directly to RPW. C's clients failed to provide information about their specific concerns and they also refused to participate in the external investigation.

[65] Both RPW and the investigator expressed concern that failing to provide information about their concerns and refusing to participate in the investigation was not in C's clients' best interests. That did not change their minds.

[66] An employer cannot investigate an employee's concerns if the employee will not provide specific details and will not participate in an investigation. RPW cannot reasonably be criticised for C's clients' repeated failure to constructively engage with it, contrary to C's clients' good faith obligations to do so.

[67] When the Chairman of the Board meet with RPW's staff to personally reassure them that RPW wanted staff to feel free to raise any issues they had, and that all

concerns would be appropriately dealt with, he also explained that the investigator had been engaged to objectively look at, and provide the Board with advice about, any issues that had been raised.

[68] The Chairman asked that confidentiality be respected and he also made himself available to speak with anyone who had questions.

[69] H responded to this meeting by claiming it was "*bullying and intimidation*". H also posted confidential meeting notes, containing personal information about an employee who had made a complaint about one of C's clients, on Facebook alongside disparaging comments that RPW had "*forced staff to meet with them without representation*" and had "*refused to meet with C.*"

[70] RPW warned H that such actions were examples of bad faith and were contrary to C's clients' confidentiality and fidelity obligations. RPW encouraged H to refrain from putting his clients at risk of proceedings and penalties, by engaging in such actions. RPW also pointed out that public posts like that were unhelpful, not in C's clients' best interests and did not shed light on their bullying claims.

[71] When two of C's clients separately arranged to meet with RPW about their issues, H claimed it was "*bullying and intimidation*" for RPW to have spoken with them without him there. H also disparaged RPW for having responded to its employees' requests to meet.

[72] Some of RPW's Board members met with C's clients on 15 May 2018 to hear their concerns in person. RPW also offered C's clients EAP assistance. RPW then compiled the information it had been given during the meeting with some of RPW's Board Members into written statements recording C's clients' concerns. H criticised RPW about that process as well.

[73] RPW commenced an investigation and subsequently updated H about the progress of it on 12 July 2018. RPW also advised him about staffing issues that impacted on the investigation. RPW further noted that the refusal of C's clients to participate in the investigation had brought the independent investigation of their concerns to a stand-still.

[74] RPW filed these proceedings on 13 July 2018 and it has faced escalated and repeated public disparagement from H since then.

[75] Personal grievance claims have been raised for four out of C's 14 clients and that only occurred after RPW had filed these proceedings against H and C. RPW responded to all of the personal grievances that were raised with it.

[76] The apparent lack of action by C in terms of pursuing its clients' concerns, other than continually disparaging RPW on Facebook and elsewhere, has been surprising. Particularly because H, in communications to RPW, stated he would be filing claims against it that H claimed were "*so easy to prove*".

[77] Only one out of C's 14 clients (M) has lodged a claim with the Authority. M did that on 09 August 2018, after H was asked to provide evidence about what had been done for C's clients, in terms of pursuing their concerns with appropriate investigatory authorities.

[78] RPW attended Authority directed mediation for M's case but H and M did not. H claimed that mediation was "*unsafe*" because RPW was a "*hostile employer*" and had "*hostile lawyers*." There was also a dispute over who could attend mediation with M as her support people, in addition to H.

[79] RPW encouraged H and M to attend mediation and suggested the parties meet with a mediator before M's mediation, to explore how the issues relating to who would attend M's mediation, as support people for her, could be resolved. H and M did not avail themselves of that offer.

[80] The Authority discerned no evidence of hostility from RPW or its lawyers in any of the more than 700 pages of evidence it reviewed in this matter or in the voluminous communications that were exchanged in the course of these proceedings. However there was significant evidence of hostility from H towards RPW and its lawyers.

[81] Despite repeated threats to involve WorkSafe, the body that has responsibility for investigating serious harm in the workplace, H told the Authority during the investigation meeting that he and C had not filed any complaints with WorkSafe.

[82] Notwithstanding that failure, H has repeatedly claimed that RPW, its lawyers and the Authority "*has no respect for human life*". H also made that claim about the Law Society.

[83] The parties agreed to attend Authority directed mediation for this matter on 13 August 2018. However that did not occur. H subsequently told Mediation Services he believed the matter should not be mediated.

[84] Mediation Services later advised the Authority that it had cancelled mediation and would not be mediating this matter because Mediation Services' management was not satisfied H would participate constructively.

[85] During the telephone conference for this matter, the Authority had asked the parties if they wanted a separate direction to mediation for the underlying issues between RPW and C's clients, in addition to the direction to mediation that had been made for RPW, H and C in this matter.

[86] The Authority's offer of additional mediation, that was made on 27 July 2018, was declined.

[87] It is worth noting that H had made seven Facebook posts about RPW over the 14 week period 21 April – 27 July 2018.

[88] However, after the Authority's first determination was issued on 27 July 2018, over the five week period from 27 July – 31 August 2018, H made 21 additional Facebook posts about RPW.

[89] The escalation of H's actions against RPW, arising from these proceedings, is clearly evident. There was no evidence provided by H or C of any new workplace incidents that had occurred over that period.

Steps taken to protect the Authority's investigation

[90] H's communication style with the Authority has been bellicose and has consisted of repeated disparagement of everyone associated with these proceedings. H's bombastic tone was ignored, being an unnecessary distraction from the Authority's focus on resolving RPW's substantive claims.

[91] However the emails H sent the Authority on 16 August 2018, the day the Authority's first compliance order was issued, were particularly concerning. They related to the "*blackmail*" claims, which I discuss later.¹⁴

[92] I therefore instructed the Authority Officers to withhold from me all irrelevant, intemperate and potentially prejudicial communications H sent to the Authority. Such communications were instead sent to the Chief of the Authority, or if he was unavailable, to another Authority Member to review.

[93] This process enabled inappropriate material to be withheld from me, and any relevant information to be identified and extracted by a different Member, before H's communications were released to me. I am told that in some cases entire communications had to be withheld from me.¹⁵

[94] On each occasion communications from H were withheld from me, or parts of his communications were redacted by another Member before being released to me, the parties were given an exact copy of the information that had been released to me.

[95] After being informed on 16 August 2018 that H had disparaged me by name on social media, I avoided social media and instructed the parties, and others, not to refer to, or discuss, any disparaging material about me that had not already been produced to the Authority as relevant evidence in this case.

[96] These arrangements ensured that the parties had seen, and had an opportunity to respond to, everything I had seen and heard when investigating RPW's penalty claims.

[97] I am satisfied that these steps helped preserve the ongoing integrity of this investigation.

Consideration of recusal

[98] The evidence RPW produced to the Authority in support of its penalty claims included social media posts on C's public Facebook page that included disparaging and negative remarks about me personally.

¹⁴ See paragraphs [219]- [228].

¹⁵ I have still not seen those communications and their content has not been discussed with me.

[99] H also claimed on social media that I was “*biased*,” and had “*declared my bias*” against him. He said the outcome of these proceedings had been “*predetermined*”, and that the investigation was a “*sham*.” He also claimed I was “*heavily conflicted*” and improperly motivated.

[100] These personalised attacks on the integrity of the Authority’s investigation caused me to carefully assess whether the public interest in the overall administration of justice was best served by recusing myself from this case, even though none of the parties had asked me to do so.

[101] Regardless of the fact that there was no actual bias or conflict of interest, the Authority is keenly aware that justice must not only be done, but it must also be seen to be done.

[102] My consideration of whether recusal was necessary applied the Supreme Court’s judicial bias test as stated in *Saxmere Company Limited v Wool Board Disestablishment Company Limited*.¹⁶

[103] The *Saxmere* test was adopted by the Employment Court in *Bracewell v Richmond Services Limited*¹⁷ and discussed by the Employment Court in *Nisha v LSG Sky Chefs New Zealand Limited*.¹⁸

[104] The Authority applied the *Saxmere* test in *X v New Zealand Fire Service Commission*,¹⁹ *Marx v Southern Cross Campus Board of Trustees*²⁰ and *Spacey v Vice Chancellor University of Waikato*.²¹

[105] The *Saxmere* test asked whether a fair minded and well informed lay observer would have a reasonable apprehension that I may not bring an impartial mind to the issues I was required to determine.

[106] A fair minded lay observer is presumed to be objective and intelligent. They are a non-lawyer who is reasonably informed about the workings of the Authority and about the facts of this case. A fair minded observer also has a basic knowledge of how the parties, their representatives and the Authority Member are expected to interact.

¹⁶ [2009] NZSC 72.

¹⁷ [2015] ERNZ 647.

¹⁸ [2013] ERNZ 626.

¹⁹ [2017] NZERA Wellington 107.

²⁰ [2017] NZERA Auckland 99.

²¹ [2015] NZERA Auckland 348.

[107] Such an observer would also understand the obligations on a presiding Member arising from the oath that every Authority Member swears when appointed, to faithfully and impartially perform the duties of a Member of the Authority.

[108] The issue is not whether it would be better for an alternative Authority Member to have heard this case, but whether there is an objective risk that the public may believe I may not be able to bring an impartial and unprejudiced mind to investigating and determining this particular matter.

[109] In *Nisha v LSG Sky Chefs New Zealand Limited* the Employment Court recognised well established legal authorities that stated that disqualification was not appropriate just because a party believed that the decision maker may decide the case adversely to them.²² There needed to be a reasonable basis for concluding that the case would not be decided impartially.

[110] Disqualification has to be based on ‘firmly established’ evidence of pre-judgment.²³ The bias must be “*real*”.²⁴ There is no evidence of that here. The fact that an advocate may express their subjective opinion did not change the objective reality.²⁵

[111] In *Wall v Work Civil Construction Limited* the Employment Court held that personal attacks by a plaintiff’s advocate against the Judge, described as “*at best impudent and at worst purposefully contemptful,*” should not give rise to a presumption of bias.²⁶

[112] The Court held that it was inappropriate for the Judge to stand down from hearing a matter because of personalised attacks on them. That same reasoning should also apply to Authority Members.

[113] In terms of an objective assessment of how this matter has been handled so far;

- (a) H’s arguments have been considered and comprehensive reasons have been recorded in each determination as to why they did not succeed;

²² [2013] ERNZ 162 at paragraph [34].

²³ *Supra*.

²⁴ *R v Australian Stevedoring Industry Board & Anor* (1953) 88 CLR 100 at page 116.

²⁵ *Dowell v State Insurance* [1999] 2 ERNZ 940 at paragraph [950].

²⁶ Employment Court Christchurch, CC16/01, 10 July 2001 at paragraph [68].

- (b) The Authority's previous determinations applied Employment Court authorities that the Authority was bound to follow;
- (c) H has never challenged any determination I have issued, including the four determinations already issued in this matter;
- (d) The Authority accepted undertakings from H, that RPW urged could not be relied upon;
- (e) In the 16 August 2018 determination, RPW did not succeed on six out of its ten alleged breach of settlement agreement claims;
- (f) In both compliance orders, the Authority included special conditions that reserved H and C the right to raise concerns on behalf of their clients with appropriate authorities that were well placed to address the substance of their concerns;
- (g) These special conditions restricted the non-disparagement clause in a way that was more favourable to H and C than the actual clause they had agreed to, so it could be said to be a 'reading down' of the settlement agreement obligations;
- (h) The first compliance order was also time delayed, contrary to RPW's (as it turned out to be correct) submission that H and C could not be trusted to use the time delay to comply with the order;
- (i) The Authority has proactively protected H's right to silence;
- (j) The Authority declined RPW's application for H and C to produce relevant documents to this investigation in order to protect H and C against self-incrimination; and
- (k) H has been permitted to file material outside of the specified timetable.

[114] As a matter of public policy, attempts by a party to undermine an ongoing investigation into claims against them, by publicly attacking the presiding Member, should not be encouraged by acceding to such tactics.

[115] In this case my recusal would be very unlikely to stop H attacking any Member who had to preside over this case. That is evident from the public disparagement by H of the two other Authority Members who reviewed and redacted prejudicial communications H sent to the Authority.

[116] I am also confident that the New Zealand public understand that the Authority must determine each case based on its merits, without fear or favour, so cannot be seen to be bowing to negative publicity, in the same way that responding to public praise would be equally improper.

[117] There was no evidence of bias, H's disparagement related to decisions he disliked but did not challenge. Public interest requires that parties cannot be allowed to 'Member shop' or derail an investigation by attacking the presiding Member.

[118] In conclusion, I am satisfied that a reasonable and well informed lay observer who understands the Authority's investigation process would conclude that recusal in this case was unnecessary and would have been contrary to the public interest in the overall administration of justice.

Issues to be determined

[119] The following issues are to be determined:

- (a) Did H and C, on a number of specified occasions, breach the non-disparagement clause in the 05 March 2018 settlement agreement which was certified by a mediator under s.149 of the Act?
- (b) Did H and C, on a number of specified occasions, breach any of the Authority's non-publication orders?
- (c) Did H and C, without sufficient cause, obstruct or delay the Authority's investigation into RPW's claims against them?
- (d) Should penalties be imposed on H and C for any breaches that are proven?
- (e) If so, should some or all of any penalties imposed be paid to RPW, or to any other person?
- (f) Is a further non-publication order necessary?
- (g) What if any costs should be awarded?

Did H and/or C breach the non-disparagement clause in the 05 March 2018 settlement agreement which was certified by a mediator under s.149 of the Act?

[120] The first compliance order determined that RPW was entitled to enforce the non-disparagement clause against H and C.²⁷

The non-disparagement clause

[121] Clause 8 of the RPW and D settlement agreement dated 05 March 2018 stated:

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

What is a disparaging or negative remark?

[122] The content of each disparaging and negative remark has not been set out because there is so much of it. Suffice to say, where disparagement has been proven the communication was very obviously disparaging and negative.

[123] The communications that breached the non-disparagement clause consisted of negative remarks that discredited RPW, demeaned it, degraded it, vilified it, were damaging and harmful to RPW's reputation, attacked RPW, criticised RPW, and included comments that were detrimental to RPW.

Defence of truth?

[124] There is no requirement for a disparaging or negative remark to be fabricated or untruthful for it to breach the non-disparagement obligations in the settlement agreement.

[125] The whole point of a non-disparagement clause is to avoid future/ongoing disputes over the merits of the other parties' opinions, perceptions or viewpoints which may well be hotly contested, as was the case here.

[126] H presented his opinions as established facts and claimed all of his disparaging and negative remarks about RPW, and others, were true. The evidence the Authority saw contradicted H's view about that.

²⁷ *R v H and C* [2018] NZERA Auckland 253 at paragraphs [25]-[30]; [39]-[58];[63],[64],[67] & [68].

[127] After having carefully investigated and reviewed the underlying evidence that H based his remarks on, I am satisfied no reasonable person who understood employment law, could have genuinely believed that the alarming and disparaging remarks that H made about RPW and its lawyers were necessary, reasonable or appropriate.

[128] What was true is that some of RPW's staff had raised workplace issues. These issues included claims and counterclaims of inappropriate behaviour and other work related grievances.

[129] RPW engaged an external investigator in April 2018 to investigate and advise on all workplace issues. H tried to block that investigation and C's clients refused to participate in it.

[130] RPW had repeatedly attempted to engage with C's clients about their concerns. RPW had also commenced employment processes related to complaints C's clients had made. H has been updated about those internal processes, but RPW rightly declined to disclose personal information relating to other employees, whom H and C did not represent.

[131] As at 22 August 2018, all of C's clients were at work and the parties agreed, during the investigation meeting, that things were going well in the workplace.

[132] Seen against this background, H's remarks about RPW were overblown. H's alarming claims about serious wrongdoing by RPW, and its professional advisors, were distorted and disconnected from reality.

[133] These conclusions were not drawn lightly.

[134] The significance and impact of including the Authority's assessment of the RPW workplace situation in this determination has been weighed carefully. I have reluctantly recorded my findings in such terms, because it was necessary to address the alarming claims H has repeatedly and publicly made about RPW and its lawyers.

[135] Although no longer visible on C's Facebook page, H's posts have been so widely disseminated on social media that they cannot now be eradicated from the public domain.

[136] As RPW relies on government funding and community donations, there is a public interest in the Authority making an objective assessment of the remarks H has made on social media and elsewhere.

[137] RPW has observed its settlement agreement obligations not to disparage or make negative remarks about H and C. RPW has also observed the privacy of its employees and the confidentiality of the various internal employment processes, and the external independent investigation it had conducted into workplace issues.

[138] However doing so has placed RPW in a very challenging, no win, situation. H has publicly disparaged RPW over a number of months, about claims he knew RPW strenuously denied, knowing RPW could not respond to him without breaching the settlement agreement and its employment obligations to its employees.

[139] When RPW sought to address this impossible situation by filing Authority proceedings to hold H and C to the civil obligations they agreed to, H twisted that reasonable and appropriate action by RPW into claims he was being bullied, blackmailed, mobbed, harassed, attacked, abused and intimidated by RPW. Those claims are unfounded.

[140] RPW has already suffered adverse consequences from not being able to publicly address the claims against it or respond in detail to those who have questioned the Board, RPW's management and other employees about this matter.

[141] After assessing the underlying evidence which H's disparaging and negative remarks were based on, the Authority has concluded that they appear to have been made in bad faith.

[142] It is more likely than not that H made these disparaging and negative remarks about RPW to draw maximum attention to a public social media crusade he was running against RPW, rather than to appropriately address genuine workplace issues.

[143] So, even if a defence of "*truth*" was available, it would not in fact excuse H's and C's breaches of the settlement agreement that occurred in this case.

[144] H either knew, or ought reasonably to have known, that his disparaging and negative remarks about RPW and its lawyers were false and/or misleading. They were not in C's clients' best interests and were also contrary to the wider public interest.

Proven breaches of certified settlement agreement

1145] RPW has proved that H and C jointly and severally breached the settlement agreement 26 times:

- (a) **Twenty-two breaches occurred because the following posts on C's public Facebook page contained disparaging and negative remarks about RPW. These posts either named RPW or included information leading to RPW's identification:**
- (i) The original post on 21 April 2018;**
 - (ii) The first post on 27 April 2018;**
 - (iii) The fourth post on 28 June 2018;**
 - (iv) The first ERA post on 17 July 2018;**
 - (v) The sixth ERA post on 16 August 2018;**
 - (vi) The seventh ERA post on 16 August 2018;**
 - (vii) The eighth ERA post on 16 August 2018;**
 - (viii) The ninth ERA post on 17 August 2018;**
 - (ix) The tenth ERA post on 17 August 2018;**
 - (x) The eleventh ERA post on 20 August 2018;**
 - (xi) The twelfth ERA post on 22 August 2018;**
 - (xii) The thirteenth ERA post on 24 August 2018;**
 - (xiii) The fourteenth ERA post on 24 August 2018;**
 - (xiv) The fifteenth ERA post on 26 August 2018;**
 - (xv) The sixteenth ERA post on 28 August 2018;**
 - (xvi) The seventeenth ERA post on 28 August 2018;**
 - (xvii) The eighteenth ERA post on 29 August 2018;**
 - (xviii) The nineteenth ERA post on 29 August 2018;**
 - (xix) The twentieth ERA post on 30 August 2018;**
 - (xx) The twenty-first ERA post on 30 August 2018;**
 - (xxi) The twenty-second ERA post on 31 August 2018; and**

- (xxii) The twenty-third ERA post on 31 August 2018.
- (b) Three breaches occurred when H and C made disparaging and negative remarks about RPW in emails they sent to the DHB;
 - (i) The first email to the DHB on 15 August 2018;
 - (ii) The second email to the DHB on 16 August 2018.
 - (iii) The third email to the DHB on 24 August 2018.
- (c) One breach arose from the letter H and C sent to the Prime Minister's Office on 19 August 2018 which disparaged and made negative remarks about RPW by name.

[146] These 26 breaches of the non-disparagement clause in the settlement agreement were not necessary, reasonable or appropriate, so H's defences did not succeed.

[147] Eighteen of the 26 breaches of the certified settlement agreement occurred after the first compliance order dated 16 August 2018 had been issued to the parties.²⁸

[148] Significant penalties are required to punish and deter these multiple breaches.

Did H and C breach the Authority's non-publication orders?

Evidential basis for issuing first ex-parte non-publication order

[149] RPW's Statement of Problem and supporting documents showed that H had:

- (a) disparaged RPW on C's public Facebook page;
- (b) publicly disparaged (by name) RPW's external investigator who had been engaged in April 2018 to advise on all of the workplace issues that had been raised with RPW;
- (c) specifically agreed not to disparage RPW in a settlement agreement, certified under s149 of the Act;
- (d) been reminded (prior to the filing of proceedings) of the obligations under the settlement agreement not to disparage RPW;

²⁸

R v H and C [2018] NZERA Auckland 253.

- (e) been advised on multiple occasions that he was in breach of the non-disparagement clause in the settlement agreement;
- (f) been asked by RPW to take down his disparaging posts about it;
- (g) had posted RPW's confidential meeting notes on Facebook. These notes contained one of RPW's employee's name and sensitive and personal information about them. This person was also one of the people who had made a formal complaint about one of C's clients; and
- (h) threatened to make disparaging comments about RPW to the public, government officials, and RPW's funders if RPW did not do what H wanted RPW to do, within the timeframe he said it had to be done.

[150] Case management directions were emailed to the parties on 20 July 2018 that included an ex-parte first non-publication order. This was issued as a direction to 'press pause' on the public dissemination of information about RPW by H until the Authority could hold a telephone conference with the parties.

[151] That approach was consistent with the Authority's objective of addressing underlying employment issues in a speedy low level way without an undue focus on technicalities.

[152] If these directions had been adhered to then this case would have involved only four breaches of the settlement agreement and not the 26 that occurred. It also would have avoided the 24 breaches of non-publication orders that occurred. H's and C's liability for penalties would therefore have been vastly reduced.

[153] The Authority advised the parties that the first non-publication order had been issued to:

- (a) Preserve the position, pending H and C having an opportunity to be heard on RPW's application for a non-publication order;
- (b) Ensure that any potential remedies were not rendered nugatory; and
- (c) Enable the parties' and the Authority's resources to be focused on resolving the substantive issues expeditiously.

[154] The first non-publication order was a temporary holding position, so it expired at 11am on 27 July 2018.²⁹

Proven breaches of first non-publication order

[155] H advised the Authority he intended to ignore the first non-publication order. He therefore failed to remove or redact posts from C's public Facebook page that breached the first non-publication order by naming RPW.

[156] That failure resulted in six Facebook posts breaching the first non-publication order because they all named RPW. These breaches occurred over the period 20-31 July 2018 and consisted of:

- (a) Original post, dated 21 April 2018;
- (b) The first post, dated 27 April 2018;
- (c) The second post, dated 27 April 2018;
- (d) The third post, dated 28 April 2018;
- (e) The fourth post, dated 28 June 2018;
- (f) The first ERA post, dated 17 July 2018.

Proven breaches of the second non-publication order

[157] The second non-publication order took effect from 12pm on 27 July 2018.³⁰ It prohibited publication of the names of the parties and any information that was likely to identify them, subject to three review conditions.³¹

[158] H was told during the telephone conference, and again in the 27 July 2018 determination, to take steps to address public posts that named RPW, to ensure they did not breach the second non-publication order.³²

[159] H told the Authority he would not comply with the second non-publication order. H also said he would challenge it to the Employment Court, but did not do so.

[160] H and C jointly and severally breached the second non-publication order on six separate occasions over the period 27 – 31 July 2018 because they left posts that

²⁹ This was the time the Authority's telephone conference with the parties started.

³⁰ This was the time the Authority's telephone conference with the parties ended.

³¹ *R v A and C* [2018] NZERA Auckland 237 at paragraph [51].

³² *Ibid* 31 at paragraphs [52] and [53].

named RPW, and/or contained information that lead to RPW's identification, visible on C's public Facebook page.

[161] The Authority's initial copy of the third post was difficult to read after it had been photocopied, so RPW's name wasn't obvious. Prior to the substantive investigation meeting a better copy was provided, in which RPW's name was clear.

[162] The third post therefore breached the first and second non-publication orders, because it named RPW.

Proven breaches of the third non-publication order

[163] The third non-publication order issued on 13 August 2018 was more limited than the second. It prohibited publication of RPW's name and information leading to the identification of RPW until further order of the Authority, subject to specified conditions.³³

[164] H and C jointly and severally breached the third non-publication order twelve times. These breaches consisted of:

- (a) Eight social media posts by H, on C's public Facebook page that named RPW or contained information that lead to RPW's identification;
- (b) Three emails, H sent to the DHB on 15, 16 and 24 August 2018 that named RPW;
- (c) One letter H sent to the Prime Minister's Office.

Summary of breaches of the Authority's non-publication orders

[165] H and C jointly and severally breached the Authority's non-publication orders on twenty-four separate occasions:

- (a) the first non-publication order dated 20 July 2018 was breached six times over the period 20-30 July 2018;
- (b) the second non-publication order dated 27 July 2018 was breached six times over the period 27-30 July 2018;

³³

R v A and C [2018] NZERA Auckland 250 at paragraphs [7](b) and (c) and [15].

- (c) the third non-publication order dated 13 August 2018 was breached twelve times over the period 16 August to 02 October 2018.

[166] Five of the twelve breaches of the third non-publication order occurred after the second compliance order was issued on 27 August 2018.

[167] The 24 breaches of the Authority's non-publication orders were not reasonable, necessary or appropriate. Nor was it in the overall public interest for any of these breaches of the non-publication orders to have occurred.

Did H and C, without sufficient excuse, obstruct or delay the Authority's investigation into RPW's claims against them?

Section 134A penalty

[168] Section 134A of the Act provides that a penalty may be imposed on any person who, without sufficient excuse, obstructs or delays an Authority investigation. The reference to "*any person*" applied to H personally and his company C.

[169] The s134A penalties claim required the following issues to be determined:

- (a) Did H and/or C obstruct or delay the Authority's investigation into RPW's claims against them?
- (b) If so, did H and/or C have "*sufficient cause*" for obstructing the Authority's investigation?
- (c) If not, should the Authority exercise its discretion to impose penalties on H and/or C?

Meaning of "obstructs" in s134A of the Act

[170] The Employment Court in *Ahuja v Labour Inspector* considered the meaning of "*obstruct*" in s134A of the Act in a case that involved proven witness intimidation.³⁴ The Court held that the obstruction s134A addressed related to obstruction of the administration of justice. Actual, not just potential, obstruction of justice is also required.³⁵

³⁴ [2018] NZEmpC 31.

³⁵ Supra at paragraph [28].

[171] The Court held that an act that attempted to pervert the course of justice gave rise to a penalty under s.134A of the Act, because such acts undermined and impeded the Authority's ability to do its investigation.³⁶

[172] The Employment Court in *Ahuja* adopted the definitions of “*obstruct*” and of “*obstruction*” in the Oxford English dictionary, namely that “*obstruct*” was an active verb that meant “*stand in the way of,*” whether or not the obstruction was ultimately successful. “*Obstruction*” was ‘the action’ or an act of obstructing something or someone.³⁷

[173] As a cross check, the Employment Court in *Ahuja* also referred to the High Court's decision in *Urlich v Police* which stated:³⁸

An ordinary meaning of “*obstruct*” is to impede, or make more difficult. [...] obstruction occurs where the action makes it more difficult for the police to carry out their duties [...].

[174] The Employment Court in *Ahuja* concluded that a person had obstructed an Authority investigation if the investigation process had become more difficult for the Authority and/or one of the parties.³⁹

[175] The Court considered that approach to the “obstructs” requirement in s134A of the Act was consistent with the good faith object of the Act and with the Authority's role in promoting good faith behaviour.⁴⁰

Did H and C obstruct or delay the Authority's investigation into RPW's claims against them?

[176] At the investigation meeting H told the Authority he was a great believer in the rule of law and had not done anything that would obstruct justice.

[177] H saw all of his actions as necessary. H believed he and C were being attacked for standing up for C's clients, whom H claimed were “*bullied workers*”. H also believed his actions were necessary to “*protect himself*” from “*attacks*” by RPW and its lawyers. By “*attacks*” H was referring to these proceedings.

³⁶ Ibid 34 at paragraph [29].

³⁷ Ibid 34 at paragraph [30].

³⁸ [1989] 4 CRNZ 144. The definition of “*obstruct*” in s.36 of the the Misuse of Drugs Act 1975 in that case was considered as part of the extended phrase “*wilfully obstructs, hinders, resists or deceives.*”

³⁹ Ibid 34 at paragraph [32].

⁴⁰ Supra.

[178] RPW proved that H and C deliberately obstructed the Authority's investigation in multiple ways over the period 17 July – 31 August 2018.

[179] H's and C's repeated obstruction resulted in the Authority's investigation of RPW's claims being far more difficult, resource intensive, lengthy, complex, costly and the resolution of the substantive issues more drawn out, than it would otherwise have been.

[180] The Authority is satisfied on the balance of probabilities that H and C deliberately engaged in conduct specifically designed by them:

- (a) to impede and undermine RPW's ability to enforce its legal rights,
- (b) to undermine public confidence in the Authority in general, and
- (c) to impede, and also undermine public confidence in, the Authority's investigation of RPW's claims against H and C.

[181] H's and C's behaviour was such that it perverted the administration of justice, and therefore met the definition of "*obstructs*" in s.134A of the Act.

[182] Although each obstructive act potentially gave rise to a separate penalty claim, the main types of H's and C's obstructive acts have been summarised into broad categories, to give an overview of the type of conduct that will result in penalties under s134A of the Act being imposed on them.

[183] It is important to note that each category of obstruction identified below contained multiple discrete incidents of obstruction of justice. Categorising the s134A breaches in this way has already involved a substantial globalisation exercise, in terms of the total number of penalties that might be imposed on H and C.

(i) Multiple Facebook posts from 17 July to 31 August 2018

[184] After receiving RPW's claims against him and his company, H stepped up the negative social media crusade he had started running against RPW in April 2018. H extended his social media crusade to RPW's professional advisors, and those associated with these proceedings.

[185] The purpose of RPW's proceedings was to stop H and C from disparaging it, by holding them to the non-disparagement clause they signed.

[186] H subverted and undermined these proceedings by making 27 disparaging posts about RPW on C's public Facebook page over the period 17 July to 31 August 2018, most of which remained publicly viewable until 02 October 2018.

[187] Because H used C's public Facebook page to widely publish disparaging information about RPW, that material cannot be recalled or expunged from the internet, even after removal from C's Facebook page.

[188] The content, timing and extent of H's and C's social media communications made it more likely than not that their negative social media crusade was deliberately designed to undermine these proceedings and to render nugatory any relief RPW may have obtained from the Authority.

(ii) Attempts to obstruct and impede these proceedings.

[189] H attempted, in a number of different ways, to improperly obstruct and impede these proceedings.

[190] H wrote to the Prime Minister's Office asking it to step in and stop this case from proceeding. It was a pointless, but deliberate, exercise given the well-known and well respected separation between the powers of the Executive (such as those of the Prime Minister) and judicial functions (such as those of the Authority).

[191] H's letter to the Prime Minister's Office also involved an implied threat of negative publicity, asking her to intervene "*before it escalates into an even greater fiasco and further damages the Labour Parties (sic) reputation as a worker's party.*"

[192] H then posted his letter to the Prime Minister's Office on Facebook on two different occasions to draw maximum attention to his futile request.

[193] H emailed the DHB that funded RPW to get it to include C's clients' concerns in its audit of RPW. H said he and C would be "*drawing public attention to the (mis)use of taxpayer funds that is meant to be used for providing healthcare.*"

[194] H also sought financial and other information about RPW from the DHB under an Official Information Act request, alongside claims that RPW was failing to provide a safe workplace.

[195] H subsequently told the DHB he would notify the Ministry of Health if the DHB's audit did not identify C's clients' complaints. H referred to his OIA request and stated "*the public will see how their taxpayer funds are being wasted in condoning workplace bullying.*"

[196] H's second email to the DHB said he wanted the matter to be "*urgently brought to the attention of all [DHB] Board members*" because it "*was likely to be in the public arena shortly.*" H told the DHB he would "*be talking to the mainstream media about this matter if [RPW] is not stopped from taking this course of action.*" That reference was to the DHB stopping RPW from continuing with these proceedings.

[197] H also emailed the DHB that RPW was "*using taxpayer money meant for the health vote to try and bully and blackmail [H and C] into remaining quiet about [RPW's] health and safety breaches.*" H said he had lodged a blackmail complaint with the NZ Police and would be escalating that to the Law Society.

[198] H asked the DHB to resolve the issues with RPW "*without [the] DHB being brought into disrepute by their actions in funding this blackmail [of him by RPW and its lawyers].*"

[199] That appeared to be an implied threat that the DHB could itself face adverse publicity over H's issues with RPW, if the DHB didn't stop the proceedings and/or restrict RPW's funding.

[200] H told the Authority at the investigation meeting that he emailed the DHB because he wanted it to stop funding RPW. H also hoped the DHB would sack RPW's voluntary Board. H said he wanted RPW audited and "*shut down.*" When asked to explain what he meant by "*shut down*" H said "*get it to comply with the law.*"

[201] This implied threat to the DHB, of adverse publicity against it, if it didn't withdraw its funding from RPW was an improper attempt to interfere with RPW's ability to continue paying its legal fees, in the hope RPW would be forced to abandon its claims against H and C.

[202] H's attempts to interfere with RPW's funding involved him giving false information to the DHB. H claimed "*there had been no response*" from RPW to C's clients' concerns that the work environment was unsafe. H knew RPW had paid for a

thorough external investigation and that RPW had continued to engage with C's clients regarding their concerns.

[203] Contrary to H's public proclamations, there was nothing improper about RPW's proceedings.⁴¹

[204] RPW's decision that it did not want to be held hostage by H's threats of adverse publicity against it and/or interference with its funding cannot objectively be criticised. It was reasonable and appropriate for RPW to lodge proceedings to enforce its legal rights, particularly after its attempts to resolve the problem without the need for litigation did not succeed.

[205] Despite that, H engaged in communications with the Authority that repeatedly called the legitimacy and integrity of its investigation into question. H also publicly portrayed the Authority's statutory investigation into RPW's claims as illegal, unlawful and even criminal.

[206] When the Authority did not abandon its investigation, H made what the Employment Court characterised as "*disgraceful, contemptuous comments*" on social media about me.⁴²

[207] H also engaged in what the Court described was "*despicable and reprehensible*" public "*attacks*" on me for exercising the Authority's statutory investigatory powers.⁴³

[208] H repeatedly attempted to intimidate RPW and its lawyers, and in particular Mr Hood, from continuing with this litigation by similarly reprehensible public attacks on them.

[209] These ongoing public attacks were designed by H to damage RPW's lawyers' public reputations and to generate public hostility towards them for continuing to represent RPW. H disgracefully portrayed RPW's lawyers' actions, in continuing to act for RPW, as criminal.

⁴¹ The Authority pointed that out in *R v H and C* [2018] NZERA Auckland 253 at paragraphs [167], [168], [172] and [173].

⁴² *RPW v H and C* [2018] NZEmpC 103 at paragraph [22].

⁴³ *RPW v H and C* [2018] NZEmpC 120 at paragraph [23].

(iii) Unfounded claims of misuse of taxpayer money

[210] H made thinly veiled implied threats to RPW, and the DHB that funded RPW, involving negative publicity for them associated with claims of misuse of taxpayer money, if they did not do what H told them to do.

[211] H publicly claimed in his letter to the Prime Minister's Office, in emails to the DHB and on social media that RPW, and its lawyers, had engaged in financial impropriety and were misusing public funds that had been earmarked for healthcare by pursuing legal action against him and his company. H described it as "*Government sponsored bullying* [of him]".

[212] H further claimed that he was being subjected to "*taxpayer funding bullying and blackmail*" by RPW, its lawyers and the Authority because these proceedings had continued, despite H having objected to the Authority's investigation of RPW's claims against him and C.

[213] H speculated on Facebook that RPW was wasting money that was for healthcare on pursuing "*frivolous and vexatious*" claims against him.

[214] H's adverse comments on social media about the cost, and funding, of these proceedings were particularly egregious because it was his own actions that have caused RPW to have to exercise its legal rights.

[215] The legal costs RPW has incurred are attributable to H's breaches of the settlement agreement and to his obstructive actions regarding these proceedings. But for H's breaches and ongoing obstructive actions, RPW would not have incurred the legal costs H publicly criticised it for incurring.

[216] If H had complied with the first non-publication order issued by the Authority on 20 July 2018 then almost all of the expense associated with these proceedings would have been avoided by all parties.

[217] As far back as 27 July 2018 the Authority asked H to "*press pause*" on the disputed communications while the Authority determined the matter. H declined to do so. Instead H deliberately increased his public disparagement of RPW and breaches of the Authority's non-publication orders.

[218] H's claims of misuse of public money in connection with these proceedings were not just wrong but they were also deliberately misleading. They ignored the fact that RPW has attempted to avoid, or limit, the costs associated with this litigation:

- (a) RPW repeatedly reminded H of his legal obligations and encouraged him to not continue breaching them;
- (b) RPW ignored the disparagement H subjected it and its lawyers to and only pursued legal action after H refused to remove publicly disparaging and negative remarks about RPW from C's public Facebook page;
- (c) RPW waited a number of weeks after being publicly disparaged by H before it filed proceedings, hoping the situation could be remedied without legal intervention;
- (d) RPW limited its penalty claims to H's public disparagement of it, when in fact H's ongoing disparagement of RPW has been much more extensive than just the public disparagement associated with these penalty claims;
- (e) RPW would have attended mediation on this matter, but for Mediation Services' cancellation of mediation;
- (f) RPW attempted to settle this matter to avoid incurring legal costs;
- (g) RPW pursued its penalty claims in a moderate, measured, minimal manner; and
- (h) RPW, through counsel, expressed its concern to the Authority about wanting to minimise its legal costs associated with this investigation.

(iv) Obstructive behaviour related to RPW's without prejudice settlement offer

[219] As is standard and well recognised practice in litigation, RPW made a "*without prejudice except as to costs*" settlement offer to H, to enable all parties to avoid the time and cost associated with ongoing litigation. This type of offer is commonly referred to as a "*Calderbank offer*".

[220] H improperly put that private communication into the public domain by posting about it on Facebook without any context.

[221] H publicly claimed that RPW's lawyers were "*blackmailing and bullying him*".

[222] H initially did not explain that the alleged "*blackmail and bullying*" simply consisted of a normal and appropriate without prejudice except as to costs settlement offer. However, some of C's followers realised that was what had occurred and they publicly called H out on it on C's Facebook page.

[223] To boost his spurious blackmail claim, H publicised that he had made a Police complaint alleging:

- (a) Mr Hood had blackmailed him. That was based on the fact RPW made a '*Calderbank*' settlement offer;
- (b) This presiding Member was "*complicit in blackmail.*" That was based on the Authority Officers, as is normal practice, withholding all without prejudice communications from me while the substantive investigation was ongoing.

[224] H then publicly claimed that RPW, its lawyers and the Authority were blackmailing him. He tried to give extra credibility to his untrue assertions of blackmail by saying he had filed a police complaint involving Mr Hood and this Member.

[225] H also claimed he had formally complained to the Law Society about being "*blackmailed*":

- (a) by Mr Hood for making a settlement offer; and
- (b) by this Member, because I haven't seen the without prejudice settlement offer.

[226] H again attempted to lend credibility to his blackmail claims by widely publicising that he had made Law Society complaints about Mr Hood and I.

[227] H also conditioned his followers not to believe the inevitable dismissal of his blackmail claims by the Law Society, by telling his followers the Law Society had "*no respect for human life,*" and that he had "*zero respect for the Law Society complaints process*" and "*zero faith in the Law Society acting impartially.*"

[228] H's blackmail claims were, more likely than not, intended to undermine these proceedings.

(v) Inflaming hostility towards those involved in these proceedings

[229] H's false and misleading communications about these proceedings inflamed the outrage of his followers, who then weighed in on C's Facebook page with their own public disparaging and negative remarks.

[230] H allowed C to host these disparaging and negative comments from C's followers, contrary to H's and C's non-disparagement obligations under the settlement agreement.

[231] H's description of Mr Hood as one of "*the bad guys*" was echoed by his followers who posted a range of public negative remarks on C's Facebook page. Examples included "*fuck the cowards*", "*tell them to go fuck themselves*," that "[Mr Hood] *should be prosecuted under the Crimes Act*" and "*have [Mr Hood] disbarred*".

[232] There was a concerning escalation in the negative remarks that included comments (about Mr Hood), that someone could be paid to "*eradicate a few people*;" or "*have some persuasion happen*." These are examples only, not all of the inappropriate, negative or abusive comments that appeared on C's Facebook page.

[233] One C supporter responded to H's disparaging remarks about those involved in these proceedings by posting on C's public Facebook page:

"One has to wonder how long it will take for an individual to lose hope in the system and take justice into their own hands [...] I can understand how someone who has nothing left to lose might just cross that line".

[234] Another C supporter stated "*I'm surprised someone hasn't taken matters into their own hands*."

[235] Yet another of C's Facebook followers was sufficiently moved by H's rhetoric to threaten violence against Mr Hood.

[236] During the investigation meeting Mr Hood asked H if he was concerned about inciting violence. H denied he had incited violence. H stated he would take down

posts on C's Facebook page about violence when he saw them, but H acknowledged some had remained in public view.

[237] H also volunteered to Mr Hood that he (H) had received a phone call from a C supporter who said they "*would take out Mr Hood if I wanted them to.*"

[238] H appeared, to the Authority, to not be concerned about that threat to RWP's counsel. The Authority is concerned about it.

[239] Inciting that sort of threat against counsel, who was simply doing his job, should have been a clear sign to H that his disparaging public rhetoric about the Authority's process, and H's personalised attacks on named individuals involved in these proceedings, had extended far outside the bounds of appropriate, reasonable or professional representation of C's clients.

[240] H, a self-proclaimed anti-bullying advocate, did not appear to have recognised that.

(vi) Publication of sensitive and/or confidential information

[241] H posted RPW's confidential meeting notes on C's public Facebook page. These contained personal and private information about a named employee.

[242] H has also repeatedly threatened to put all of RPW's communications about internal employment issues into the public domain.

[243] H put the without prejudice settlement offer into the public domain.

[244] H posted communications with the Authority about these ongoing proceedings on Facebook with misleading commentary beside them.

[245] H secretly recorded the Authority's telephone conference, after being repeatedly directed not to. He then put untrue and misleading information about the recording and telephone conference on Facebook.

[246] There was no objectively justified reason for these acts that obstructed this investigation.

(vii) Breaches of Authority orders and directions

[247] H has demonstrated ongoing public contempt for the Authority's investigation process and of the Authority's directions and orders.

[248] H engaged in contemptuous communications with the Authority via his emails and during the telephone conference with the parties on 27 July 2018.

[249] H repeatedly told the Authority he would not participate in its investigation, he would ignore its directions, and he would not observe its orders. H made it clear he did not respect the Authority's investigation process into RPW's claims against him and C.

[250] H and C breached the Authority's non-publication orders 24 times.

[251] H and C breached the two compliance orders the Authority issued a total of 23 separate times.

[252] H publicised these multiple deliberate breaches of the Authority's orders on C's public Facebook page, thereby drawing as much attention as he could to the contemptuous acts that had occurred.

[253] H's obstructive behaviour and contemptuous actions required considerable additional resources to be allocated to the investigation of this matter. This included two other Members having to review all of H's communications, so prejudicial material could be redacted before I saw them.

[254] Another Member had to issue directions regarding material that was withheld from me, which resulted in that other Member being disparaged by H.

(viii) Disparagement of those associated with these proceedings

[255] H has made unfounded criticisms of the following people, by name, on C's public Facebook page:

- (a) RPW's independent external investigator who was engaged by RPW in April 2018 to investigate all workplace issues;
- (b) RPW's Chairman of the Board;
- (c) RPW's legal counsel;

- (d) Another lawyer who represented a different party who had obtained penalties against H and his company for breaching a certified settlement agreement;
- (e) The Chief of the Authority;
- (f) The Authority Member who issued directions to H arising from his inappropriate communications to the Authority;
- (g) This presiding Member.

[256] H's personalised attacks and attempts to publicly malign the professional reputations of these individuals, simply because they had made professional decisions H disagreed with, is unacceptable.

[257] In addition to disparaging named individuals H, in the course of these proceedings, also disparaged RPW, RPW's Board, RPW's lawyers, the Waikato Times, WorkSafe, the Law Society, Mediation Services, the Authority and the Employment Court.

[258] As noted by the Employment Court:⁴⁴

The modus adopted by [H and C] in their attacks on the Authority Member and Court seems to be that, when there is any development in the proceedings which is disadvantageous to [them], disparaging comments are made.

[259] Instead of saying he disagreed with a decision a person or organisation had made, H sought to portray himself as a victim of wrongdoing which he variously referred to as corruption, criminal activity, collusion, improper motivations, dishonesty, bullying, blackmail, intimidation and mobbing.

[260] There were no objectively reasonable grounds to support the repeated public disparagement H engaged in, in connection with these proceedings.

[261] Inflammatory, untrue information H put into the public domain about the people and organisations connected with these proceedings was an improper attempt to undermine the Authority's investigation. It amounted to obstruction of justice.

⁴⁴ [2018] NZEmpC 120 at paragraph [23].

(ix) Attempted intimidation of RPW's counsel

[262] In addition to inciting hostility from C's followers towards Mr Hood, H's actions amounted to attempts to intimidate Mr Hood. The Authority considered that was analogous to a situation of attempted witness intimidation.

[263] H subjected Mr Hood to disgraceful personalised public attacks on C's public Facebook page and in communications with the Authority and others. Without repeating all of these disparaging comments, H has called Mr Hood "*a perpetrator*," "*bully*," "*abusive*" and accused him of criminal activity.

[264] All of H's disparaging remarks about Mr Hood lacked any established evidential foundation, so H must have known they were untrue when he made them.

[265] Mr Hood observed his professional obligations as counsel in his dealings with H and C, and with the Authority, throughout these proceedings. He should be commended for not responding to H's provocative disparagement with anything other than continued professionalism.

[266] H subjected Mr Hood to malicious complaints to the Police and Law Society and then used those spurious complaints to further malign Mr Hood in social media.

[267] Attempts by H and C to intimidate Mr Hood, for not withdrawing as RPW's counsel and/or for not withdrawing these proceedings, amounted to an obstruction of justice.

(x) Attempted intimidation of the law firm representing RPW

[268] H also repeatedly disparaged the law firm RPW engaged to act for it in connection with these proceedings.

[269] H's disparagement of this law firm occurred in his communications with RPW, the Authority, the Prime Minister's Office, the DHB and on C's public Facebook page. H accused the law firm of serious wrongdoing that included, but was not limited to, misuse of public funds and criminal activity.

[270] The evidence the Authority saw proved that the law firm had been representing RPW in a professional manner that was consistent with its Law Society obligations and RPW's good faith obligations.

[271] H's accusations of serious wrongdoing and criminal activity against the law firm in connection with these proceedings were contradicted by the extensive evidence that was made available to the Authority.

[272] In excess of 700 pages of evidence were filed in bundles of documents RPW produced to the Authority to review and use at the investigation meeting. That documentary evidence did not include RPW's affidavit or witness statement. Additional material was also filed by H and C, that was not included in the bundles RPW had filed.

[273] After reviewing this material, hearing from the parties' witnesses, and considering the submissions filed by all parties to this matter, the Authority has concluded that H's alarming public claims of wrongdoing, by the law firm RPW had engaged, were objectively without substance and should not have been made.

[274] The Authority observed that the law firm had consistently engaged with H and C in a polite, professional and constructive manner, despite facing constant disparagement, attacks and baseless accusations from H and C.

[275] H's and C's disparagement of the law firm RPW had engaged was, more likely than not, an improper attempt to intimidate the law firm, by adverse publicity, into withdrawing RPW's claims and/or into withdrawing from continued representation of RPW.

[276] That amounted to obstruction of justice.

(xi) Attempting to undermine public confidence in the Authority's investigation

[277] H and C have continually disparaged the Authority, its Members and me personally in connection with these proceedings. There were too many of these attacks to set them all out in this determination, so some limited examples are referred to below.

[278] H called me "*a liar.*" He implied I was dishonest. He claimed the investigation meeting was "*extremely dangerous*" for him and that it was "*unsafe*" for H to deal with me.

[279] H made these claims about me because I made a factual finding against him in a previous publicly available determination.⁴⁵ H had not challenged that determination, nor had he filed an Authority complaint about it at the time.

[280] Another example, was H's claim that the Authority and I were "*blackmailing*" and "*bullying*" him because I had not seen a *Calderbank* offer.

[281] I did not know that a without prejudice except as to costs settlement offer had been made or that it had been withheld from me by another Member. I would not have expected to have been told that, because it was such a routine decision and standard practice for that to occur.

[282] I found out about it as a result of H's emails on 16 August 2018, that were sent after the Authority's first compliance order was released to the parties, in which he referred to making a police complaint about me involving blackmail.

[283] When H's demands (seen and dealt with by another Member) that the *Calderbank* offer be released to me were not complied with, he filed Police and Law Society complaints "*implicating [me] in blackmail.*" H then publicised these spurious complaints on social media by stating he had involved the Police and Law Society in response to my supposed "*blackmail*" of him.

[284] H claimed he was being "*mobbed*" and "*bullied*" by the Authority and that it was "*actively condoning bullying.*" These claims were made because of determinations issued in these proceedings that H did not like, but had not challenged to the Employment Court.

[285] H claimed that the Authority was engaged in "*a witch hunt*", an "*illegal and unethical campaign against him*," its "*entire process was corrupt*," and "*a farce*" his case was "*particularly sinister*," that it was conducting a "*Salem Witch Trial*" and "*witch hunt.*"

[286] H publicly claimed the Authority was investigating RPW's claims against him for improper purposes that ranged from "*political reasons*" to me being "*mislead*", "*manipulated by*" or colluding/conspiring with, others.

⁴⁵ *T v K* [2017] NZERA Auckland 168 at paragraphs [14] & [15].

[287] H made these serious accusations because he did not like public determinations the Authority had issued in cases in which H had been a party, or advocate, or both.⁴⁶

[288] H criticised the resources the Authority had to devote to this matter, saying there was something “*sinister*” about that, when the level of resources that had to be used in this matter was a direct result of H’s ongoing obstructive behaviour.

[289] H’s actions were inconsistent with him having genuine concerns about the Authority’s investigation process. He did not challenge any of the four determinations that were issued in this case. H did not invoke the Authority’s formal complaint procedure about the way this investigation had been conducted. H did not apply for me to recuse myself. H did not apply to remove this matter to the Employment Court.

[290] H’s actions were therefore, more likely than not, designed to undermine public confidence in the integrity of the Authority’s investigation into the claims against him and his company.

[291] These were improper attempts by H and C to pervert the course of justice, so amounted to obstruction of justice, and therefore of the Authority’s investigation, under s134A of the Act.

Did H and C have “sufficient cause” for obstructing the Authority’s investigation?

[292] H’s ‘defences’ as to why he believed he had “*sufficient cause*” to obstruct the Authority’s investigation were the same defences he raised in explanation to the breaches of the settlement agreement and non-publication orders that occurred.

[293] Previous determinations explain why H’s defences did not succeed regarding his claims that these proceedings were “*frivolous and vexatious*”, the Authority did not have jurisdiction over RPW’s claims, or that the Protected Disclosures Act 2000; the New Zealand Bill of Rights Act 1990; and the Health and Safety at Work Act 2015 (HASAW) protected H and C from liability for their actions.⁴⁷

⁴⁶ *Turuki Healthcare Services v Makea-Ruawhare & Ors* [2018] NZERA Auckland 95; *Turuki Healthcare Services v Makea-Ruawhare & Ors* [2018] NZERA Auckland 136; *Turuki Healthcare Services v Makea-Ruawhare & Ors* [2018] NZERA Auckland 177; *R v A & C* [2018] NZERA Auckland 237; *R v A & C* [2018] NZERA Auckland 250; *R v H & C* [2018] NZERA Auckland 253; *R v H & C* [2018] NZERA Auckland 275.

⁴⁷ *R v H & C* [2018] NZERA Auckland 253 and *R v H & C* [2018] NZERA Auckland 275.

[294] Having now had an opportunity to investigate the basis of H's claims that his actions were necessary to prevent serious harm occurring to C's clients, I find that the following evidence fundamentally undermined that assertion:

- (i) RPW repeatedly expressed a desire to ensure its workplace was safe for all employees and it had communicated that to staff;
- (ii) RPW reassured its staff that all concerns would be taken seriously and appropriate action would be taken to address all concerns that were raised with it;
- (iii) RPW engaged an external investigator in April 2018 to address all workplace issues;
- (iv) H tried to block and obstruct the investigator's investigation into alleged workplace issues;
- (v) C's clients had not utilised RPW's internal complaint procedures before H started publicly disparaging RPW;
- (vi) C's clients had not invoked the problem resolution clauses in their employment agreements before H started publicly disparaging RPW;
- (vii) C's clients did not raise personal grievances until after RPW lodged these proceedings;
- (viii) Only four of C's 14 clients raised personal grievances with RPW;
- (ix) H declined the Authority's offer of mediation on the issues C's clients had with RPW;
- (x) H and C did not make any complaints of alleged serious harm to WorkSafe to investigate on behalf of their clients. M apparently made her complaint to WorkSafe herself;
- (xi) In the more than six months during which H and C have represented C's clients, they had only lodged one claim (M's) with the Authority;
- (xii) H failed to appear at the Authority directed mediation that had been scheduled for M. H also failed to respond to reasonable

suggestions RPW had made to address H's 'support people' concern;

- (xiii) H and RPW had both told C's clients that they were not required to remain at work if they believed a situation was unsafe for them. All of C's clients therefore knew they did not have to expose themselves to potential harm at work, if they believed that was occurring;
- (xiv) H pressed RPW to allow one of C's clients to return to work, which does not make sense if the workplace was as unsafe as H continually claimed it was;
- (xv) H agreed at the substantive investigation meeting that everything was currently going well in RPW's workplace, and had been since at least 22 August 2018. That evidence was also supported by a positive text from one of C's clients;
- (xvi) Public disparagement of RPW diverted the parties' attention and resources from resolving any outstanding or underlying employment relationship issues, so was contrary to C's clients' best interests and exposed them to potential adverse legal, financial and employment consequences;
- (xvii) Both of the Authority's compliance orders reserved H and C the right to raise health and safety concerns with appropriate investigatory authorities, so they had an avenue of redress, if needed; and
- (xviii) The timing of the obstructive behaviour did not relate to any particular workplace incident but was aligned with the Authority's decision making in these proceedings.

No "sufficient excuse" for the obstruction that occurred

[295] H's public interest defence does not succeed.

[296] The government had set up specialist employment institutions to address the issues that H complained about on social media and elsewhere.

[297] If H and C had been genuinely concerned about resolving workplace issues for C's clients, then there were far more effective, timely and appropriate ways of doing that, other than continually publicly disparaging RPW and obstructing the Authority's investigation.

[298] The Authority and the Employment Court were available to deal with employment relationship problems. Urgency could be sought if an employee was at risk of harm. WorkSafe New Zealand was available to investigate workplace harm.

[299] Employment Mediation Services were available to provide free mediation to help the parties in these employment relationships resolve their issues. H and C did not request mediation for any of C's clients. H obstructed Authority directed mediation for this matter, and for M's claims against RPW.

[300] It was not credible that H and C objectively believed they had reasonable grounds for engaging in the types of obstruction of justice that occurred, in order to supposedly protect C's clients from serious harm.

[301] It was more likely than not that H's motivation, for the obstructive acts that occurred, was to halt, impede and/or interfere with these proceedings.

[302] H's real complaint appeared to be based on his dissatisfaction that RPW had taken legal action to enforce the settlement agreement he had signed, so his actions appeared designed to undermine any relief RPW may have obtained from the employment institutions.

[303] Deliberately undermining the administration of justice in this manner was contrary to the overall public interest. H's and C's multiple obstructions of the Authority's investigation were done without sufficient cause.

[304] RPW has discharged its burden of proving that all of the pre-requisite elements of a penalty under s134A of the Act had been met.

Should the Authority exercise its discretion to impose penalties on H and C?

[305] The obstruction of justice that has occurred in this case was very serious. Punishment and deterrence are required.

[306] After categorising the multiple breaches of s134A of the Act that H and C are jointly and severally liable for into 11 types of conduct, globalisation of penalties under s134A has already occurred. Eleven breaches of s134A will therefore attract penalties for the purposes of assessing the level of penalties to be imposed.

What penalties should be imposed?

Additional evidence relevant to the assessment of penalties

[307] The Authority has previously identified to the parties the factors that would be considered when it assessed penalties. The parties were invited to address those factors. RPW did, but H and C did not.

[308] The Authority previously informed H that it could consider his financial circumstances when assessing penalties, but it was up to him to provide full disclosure of all relevant financial information, if he wanted that to occur.

[309] The type of financial evidence the Authority expected to see was identified to H, to give him an opportunity to provide it.⁴⁸ H was offered a non-publication order to keep his and his company's financial information private and confidential.

[310] H told the Authority during the investigation meeting that he would never pay a cent in penalties, and that even if he had the money, him paying penalties was not going to happen.

[311] Notwithstanding that advice, H and C will be given a fifth and final opportunity to provide any evidence or submissions they want the Authority to consider when penalties are assessed.

[312] H and C have until **3pm on 12 November 2018** to file any evidence or submissions they want the Authority to consider when penalties are assessed. Financial information must be filed by way of affidavit.

[313] RPW has until **3pm on 21 November 2018** to file any evidence or submissions relating to the assessment of penalties.

[314] Penalties will be assessed on the basis of 26 breaches of the settlement agreement and 11 identified categories of obstructive conduct, and obstructions of

⁴⁸ Authority's directions to the parties dated 22 and 24 August 2018.

justice, of the Authority's investigation, noting that the 11 obstructions under s134A of the Act have already been globalised.

Potential mitigating factors

[315] H and C are also invited to provide evidence regarding mitigating factors they want the Authority to take into account when penalties are assessed. Potentially mitigating factors could include some or all of the following topics, plus any other relevant information H and C may wish to raise:

- (a) Any apologies that have occurred, and whether these were private or public;
- (b) Retraction of the disparaging and negative remarks, and whether that was done publicly or privately;
- (c) Steps to remedy the harm the breaches have caused R;
- (d) Steps taken to address the potential adverse consequences H's and C's actions have exposed C's clients to;
- (e) Undertakings regarding future conduct;
- (f) Acknowledgment of wrongdoing and/or acceptance of responsibility.

Is a further non-publication order required?

[316] **A fourth non-publication order is issued** under clause 10(2) of the Second Schedule of the Act **prohibiting publication** of:

- (a) The **audio recording** H claimed he made of the 27 July 2018 telephone conference;
- (b) The documents or extracts from the documents, at **pages 526-670 of the bundle** of documents RPW filed with the Authority on 30 August 2018.

[317] The parties were given an opportunity to address the Authority on whether a third compliance order should be made regarding the audio recording, and they provided submissions on that issue.

[318] Given the serious potential consequences associated with a breach of a compliance order, I have decided to give H the benefit of the doubt and issue a non-

publication order, instead of a third compliance order. Section 140(6) of the Act sets out possible consequences for breaching the Authority's compliance order.

[319] However if the fourth non-publication order is breached, then a third compliance order is likely to be made.

[320] A fourth non-publication order is necessary to prevent improper or unauthorised use of information collected during a private and confidential process, similar to a judicial conference - which is also not recorded, in circumstances where the integrity of the recording and the proper context for the information it contained cannot be assured.

[321] The non-publication order regarding specific evidence filed by RPW was necessary to protect internal employee processes that involved private and personal information about individuals, who were not parties or witnesses in these proceedings.

[322] The Authority had directed RPW to provide this information for the purposes of this investigation, so it could more fully understand the basis of H's and C's concerns about RPW's workplace.

[323] The Authority considered it was necessary and appropriate to protect this type of sensitive information from improper use and/or publication and that doing so outweighed any public interest there may have been in this material being put out into the public domain.

Notice to H, C and C's clients

[324] H, C, and C's clients are formally put on notice that additional potential penalty claims under s.134A of the Act may result from further:

- (a) breaches of the non-publication orders;
- (b) disparagement of the Authority and/or Authority Members involved in these proceedings;
- (c) attempts to interfere with RPW's funding;
- (d) disparagement of RPW's lawyers;
- (e) breaches of the Authority's two compliance orders.

Costs

[325] Costs are reserved.

Rachel Larmer
Member of the Employment relations Authority