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

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 121
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 as First Respondent and as sole director of Second Respondent, C
Investigation Meeting:	31 August 2018 at Hamilton
Submissions and other information received:	From the Applicant from 31 August 2018 up to and including 19 November 2018 From both Respondents from 31 August 2018 up to and including 11 December 2018
Date of Determination:	05 March 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY
(No. 6)

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] While the Authority has endeavoured, as far as possible, to avoid including information that may identify the parties, that has been unavoidable in some respects due to the:

(a) Nature and extent of information that has already been put into the public domain by H and C;

(b) Previous media reports;

(c) Need to discuss information in this determination which is relevant to the Authority's assessment of penalties; and

(d) Citations that have been required for cases cited in this determination.

Employment Court judgments

[3] The Employment Court has issued three judgments relating to these Authority proceedings.[4]

[4] H's and C's repeated public claims that these proceedings are frivolous and vexatious, and that the Authority has acted unlawfully by investigating and determining RPW's claims, are contradicted by the observations the Employment Court has made about H and C in each of its three judgments.

[5] The Court has described the conduct H and C engaged in as:[5]

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1 *RPW v H* [2018] NZEmpC 120 at [28].
2 *RPW v H* [2018] NZERA Auckland 338 at [316].
3 Above n2.
4 *RPW v H* [2018] NZEmpC 103; *RPW v H* [2018] NZEmpC 120; and *RPW v H* [2018] NZEmpC 131.
5 *RPW v H* [2018] NZEmpC 103 at [13], [14], [20] and [22]; *RPW v H* [2018] NZEmpC 120 at [19]-[20], [22] and [23]; and *RPW v H* [2018] NZEmpC 131 at [12].

(a) "*serious breaches of conditions of a mediated settlement*";

(b) Involving "*quite serious contemptuous remarks* [about the Authority Member that] *have been put into the public domain*";

(c) "*potentially exposing* [their client…] *to fines or even, although unlikely, imprisonment*";

(d) "*potentially exposing* [their client] *to the risk of remedies against her*";

(e) "*clearly stepping outside* [their] *proper role"* as employment advocates;

(f) Involving "*disgraceful, contemptuous comments* [on] *social media*";

(g) "*not only disparaging but could also be described as abusive*";

(h) "*brazen, intentional breaches*" of the Authority's compliance orders;

(i) "*a crusade against* [RPW]";

(j) Involving "*attacks on the Authority Member*";

(k) Breaches that "*appear to be being worn* [by them] *almost as a badge of honour*;"

(l) Undermining "*the effectiveness of* [their anti-bullying] *crusade* [which] *has been compromised by* [their] *inappropriate behaviour in this case*;"

(m) Involving social media posts that "*could only be described as despicable and reprehensible*";

(n) "*tantamount to contempt of the Authority and Court*";

(o) Having "*embarked upon deliberate breaches to advance their crusade*";

(p) "*blatant and misguided*";

(q) "*an affront to the purposes of the mediation process*".

The Authority's determinations

[6] This is the sixth determination issued by the Authority in respect of claims involving these parties.[6] None of the Authority's previous determinations in this matter have been challenged and the time for doing so has expired.

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[6] *R v H* [2018] NZERA Auckland 237; *R v H* [2018] NZERA Auckland 250; *R v H* [2018] NZERA Auckland 253; *R v H* [2018] NZERA Auckland 275 and *RPW v H* [2018] NZERA Auckland 338.

Breaches proven in the Authority's substantive determination

[7] The Authority's substantive determination issued on 1 November 2018 held that H and R had both deliberately breached:[7]

(a) A settlement agreement that was certified under s 149 of the Employment Relations Act 2000 (the Act), that prevented H and C from disparaging RPW ("*the certified settlement*") by publicly disparaging RPW on 26 separate occasions; and

(b) Section 134A of the Act, for engaging in multiple actions that, without sufficient cause, obstructed the Authority's investigation into the claims against them. These multiple breaches of s 134A of the Act were globalised in the substantive determination into 11 separate types/categories of actions that obstructed and/or undermined the overall administration of justice.

Assessment of penalties for the proven breaches

[8] The purpose of this determination is to assess the imposition of penalties on H and C for the multiple breaches referred to above at [7].

[9] H and C both admitted to doing all of the actions, and engaging in all of the communications, that resulted in the proven breaches occurring. There was no difference between H's actions and C's actions. Every breach H individually engaged in C also individually engaged in.

[10] H and C committed all of the breaches together, so they are both liable for the multiple intentional, purposeful breaches that occurred.[8] When assessing penalties, H and C must each be separately considered to assess their involvement and individual culpability.

[11] The Employment Court in *Labour Inspector v Sampan Restaurant Limited and Yang,* a case involving the assessment of penalties on an employer company and on a director as 'a person involved in the breach' under s 142W of the Act, held that it would be wrong for the

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7 *RPW v H*, above n2, at [145] and [184]-[291].
8 *RPW v H*, above n2, at [9] and [10].

Authority to set an overall penalty and then apportion it based on the maximum prescribed penalties.[9]

[12] The Court in *Sampan* considered the approach in other legislation and jurisdictions regarding the imposition of fines on corporations but expressly recognised that the exercise of the penalty discretion in the employment institutions was necessarily nuanced and would be very fact based.[10]

[13] The Court held that the employment institutions had to be mindful not to take a formulaic approach to imposing penalties. Consequences arising from the imposition of penalties, to ensure the penalty discretion reflected proportionality, fairness and justice, had to be considered. Those same principles apply to the Authority's exercise of its penalty discretion in this matter.

[14] Although the Authority's penalty discretion must be exercised for H and C separately, as occurs in other jurisdictions, the issue of double punishment is a factor that may be considered when penalties are imposed.[11]

[15] Penalty factors must be separately considered and weighed for H and C individually to determine whether there are any material differences that need to be reflected in the penalties imposed.

[16] H is the public face of C and, as its sole director and shareholder, he has complete authority over all of C's actions and communications. However it is important to acknowledge that from a legal perspective H and C are in fact two separate legal personalities with separate legal identities. The penalties imposed in this matter expressly recognise that.

Issues to be determined when assessing penalties in this matter

[17] The issues for the Authority to determine in this matter are:[12]

(a) What if any penalties should be imposed on H for his breaches of the certified settlement?

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9 *Labour Inspector v Sampan Restaurant Limited* [2018] NZEmpC 69 at [46].
10 At [17]-[44].
11 *Labour Inspector v Sampan Restaurant Limited*, above n9, at [32]-[37].
12 The Authority's conclusion on each of these issues is summarised in paragraph [356].

(b) What if any penalties should be imposed on C for its breaches of the certified settlement?

(c) What if any penalties should be imposed on H for his obstructions of the Authority's investigation?

(d) What if any penalties should be imposed on C for its breaches of the Authority's investigation?

(e) Who should any penalties that are imposed be paid to?

(f) What if any costs should be awarded?

The Authority's penalty jurisdiction

[18] Penalties are discretionary, with the discretion to be exercised on a principled basis.

[19] Section 133 of the Act provides the Authority with full and exclusive jurisdiction to impose penalties in accordance with the penalty provisions in the Act.

[20] Section 149(4) of the Act gives the Authority power to impose a penalty for breaches of a certified settlement agreement. H and C both engaged in 26 breaches of the certified settlement.

[21] Section 134A of the Act gives the Authority power to impose a penalty for obstructing or delaying the Authority's investigation. Every separate act of obstruction may potentially attract an individual penalty.

[22] However H and C both engaged in so many deliberate acts that obstructed the Authority's investigation that it was impractical to individually identify each separate breach of s 134A of the Act.

[23] Accordingly, the Authority in its substantive determination globalised the multiple obstructions that occurred into 11 different types of behaviour or actions that breached s 134A of the Act.

[24] That globalisation represents a very significant reduction in potential penalty liability for H and C. Further globalisation of these 11 s 134A breaches will occur and is discussed in more detail at paragraphs [54], [55], [67]-[70] of this determination.

Mandatory statutory penalty considerations under s.133A of the Act

[25] Section 133A of the Act sets out a non-exhaustive list of factors the Authority must consider when assessing penalties.

[26] Section 133A states:

> (a) The object stated in s 3 of the Act;
> (b) The nature and extent of the breach or involvement in the breach;
> (c) Whether the breach was intentional, inadvertent, or negligent;
> (d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;
> (e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
> (f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
> (g) Whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

Other penalty considerations from Employment Court cases

[27] In addition to the mandatory s 133A factors, the Employment Court has provided further guidance to the Authority in assessing penalties, including in the leading case of *Borsboom v Preet PVT Limited.*[13]

[28] Additional penalty considerations identified in *Preet* include:[14]

(a) The need for penalties to act as a deterrent, both to the particular party being penalised and to the wider community in general;

(b) Culpability of the party being penalised;

(c) Consistency with penalty awards in similar cases;

(d) Ability to pay the penalty imposed; and

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[13] *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.
[14] Above n13, at [65]-[69].

(e) Proportionality of the penalty when compared to the breach that is being penalised.

[29] The Chief Judge of the Employment Court in *Nicholson v Ford* and in *A Labour Inspector v Daleson Investments Limited* summarised the applicable framework to be applied by the employment institutions when assessing penalties, having regard to the statutory requirements, and the full Court's judgment in *Preet.*[15] The Authority has adopted that approach.

***Preet's* - four step penalty assessment process**

(a) The full Court in *Preet* set out a four step penalty assessment process it considered would be helpful for the Authority to use when imposing penalties:[16]

(b) Step 1 – identify the number and nature of the breaches. This has four subs-steps, namely:

(i) Identify the number of breaches;

(ii) Identify the nature of each breach;

(iii) Identify the maximum penalty for each of the identified breaches; and

(iv) consider whether "*global*" penalties should apply.

(c) Step 2 – establish a provisional starting point by assessing the severity of the breach in each case. Consider both aggravating and mitigating features.

(d) Step 3 – consider the means and ability of the party in breach to pay the provisional penalty reached in step 2.

(e) Step 4 – apply the 'proportionality' or 'totality' test to ensure the amount of each final penalty is just in all of the circumstances.

[30] The Court noted that "*globalisation"* of penalties could occur at any step in the recommended four step process, but warned that globalisation should not diminish the significance of repeated, or a series of, breaches.[17]

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15 *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investments Limited* at [2019] NZEmpC 12 at [19] and [20]; *Borsboom v Preet PVT Limited,* above n13.

16 *Borsboom v Preet PVT Ltd*, above n13, at [151], [201] and [202].

17 *Borsboom v Preet PVT Ltd*, above n13, at [100] and [139]-[142].

[31] The Court in *Preet* also recommended that the decision maker stand back and assess whether the final penalty was proportionate to the breaches in issue and likely to be paid.[18]

[32] The Employment Court in *Nicholson* noted that care should be taken at steps 3 and 4 to avoid double discounting of penalties on the grounds of financial capacity.[19]

Mandatory statutory consideration 1: the object stated in s 3 of the Act

[33] The Act aims to promote mutual good faith behaviour.

[34] It recognises that creating and maintaining productive employment relationships is characterised by good faith and legally compliant dealings between those in employment relationships.

[35] The Act does not mandate 'self-help' vigilante remedies, such as people taking the law into their own hands by publicly attacking/abusing/intimidating others, over employment issues.

[36] This is especially pertinent when the issues involve disputed matters that have not been the subject of objective findings by the employment institutions, such as the issues that H and C claimed gave rise to their breaches, which involve as yet unproven, and strongly disputed, allegations only.

[37] Instead the Act sets up mechanisms for employment problems and disputes to be appropriately addressed and resolved in a good faith manner.

[38] People who believe they have an employment problem are expected to utilise these problem resolution processes - not just descend into dishing out their own subjective form of 'justice' or retribution against perceived wrongdoers.

[39] The objects of the Act expressly recognise (among other things) that employment relationships must be built on mutual trust and confidence and mutual good faith behaviour. Mediation is also promoted as the primary problem solving mechanism.

[40] H's and C's breaches:

(a) Fundamentally undermined the stated objects of the Act;

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[18] At [146]-[148].

[19] *Nicholson v Ford*, above n15.

(b) Were contrary to the trust and confidence inherent in employment relationships;

(c) Were the antithesis of good faith behaviour; and

(d) Fundamentally undermined mediation as the primary problem solving mechanism for employment relationship problems.

[41] The seriousness of the breaches being penalised in this determination was recognised by the Employment Court, when it described H's and C's actions as:[20]

> "[…] an affront to the purposes of the mediation process under the Act to resolve employment relationship problems and promote good faith dealings".

[42] H's and C's breaches undermine the rule of law in a manner that clearly contravenes the Act.

[43] The Employment Court in *RPW v H* commented that H and C, although advocates, should still act in the same way as legal counsel would act when representing clients with employment issues.[21]

[44] The Court described H and C as having embarked on a crusade that was outside the proper role of an employment advocate and which had put C's client at risk of adverse consequences.[22]

[45] No-one should be publicly vilified, abused or attacked for invoking the statutory problem resolution processes provided for in the Act, or for representing parties who have done so.

[46] Penalties must be set at a level that deters H and C from acting, or representing clients, in a manner that breaches and contravenes the objects of the Act.

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

Preet sub-step 1 - identify number of breaches

[47] The penalties to be imposed on H and C arise under different sections of the same Act, namely:

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20 *RPW v H* [2018] NZEmpC 131 at [12].
21 *RPW v H* [2018] NZEmpC 103 at [21].
22 At [20]-[22].

(a) Section 149(4) for breaches of a certified settlement; and

(b) Section 134A for obstructing the Authority's investigation.

(i) Section 149 breaches of the certified settlement (disparagement of RPW)

[48] H and C both breached a non-disparagement clause in the certified settlement by publicly disparaging RPW 26 times. The proven breaches consisted of:[23]

(a) 22 Facebook posts H made, and C hosted on its public Facebook page, that were disparaging and negative about RPW;

(b) Three emails H and C sent to the DHB that was RPW's primary funder;

(c) A letter H and C sent to the Prime Minister's Office.

[49] Although 26 breaches of the certified settlement have been proven, only the nine breaches that occurred before the Authority's first compliance order went into effect at 6pm on 16 August 2018 will attract penalties in this determination.[24]

[50] The nine breaches of the certified settlement that will be penalised in this determination are:[25]

(a) The "*original post*" on 21 April 2018;

(b) The "*first post*" on 27 April 2018;

(c) The "*fourth post*" on 28 June 2018;

(d) The "*first ERA post*" on 17 July 2018;

(e) The "*sixth ERA post*" at 11.34am on 16 August 2018;

(f) The "*seventh ERA post*" at 13.11pm on 16 August 2018;

(g) The "*eighth ERA post*" at 4.27pm on 16 August 2018;

(h) The "*first email to the DHB*" sent at 6.27am on 15 August 2018;

(i) The "*second email to the DHB*" sent at 11.54pm on 16 August 2018.

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23 *RPW v H*, above n2, at [145].
24 *R v H* [2018] NZERA Auckland 253 at [195].
25 *RPW v H*, above n2 at [145].

[51] The 17 additional breaches of the certified settlement that occurred after 6pm on 16 August 2018 are not addressed in this determination because they have already been the subject of Employment Court proceedings.[26]

[52] Confining these penalties to only nine breaches of the certified settlement ensures the Authority's penalties do not overlap with the fine imposed by the Court, therefore avoiding any suggestion of double punishment occurring for the same breaches.

(ii) Section 134A breaches (obstruction of the Authority's investigation)

[53] H's and C's proven breaches of s 134A of the Act were globalised in the substantive determination into 11 broad categories of actions (types of behaviour) that obstructed the Authority's investigation by undermining the administration of justice.[27]

[54] These 11 breaches set out in the substantive determination are now further globalised in this determination into five main breaches of s134A of the Act, for the purposes of imposing penalties on H and C.

[55] This additional globalisation of the proven breaches of s 134A of the Act down from 11 to five breaches is discussed in paragraphs [67] – [70].

Preet sub-step 2 – identify nature of each breach

[56] H's and C's breaches are at the top end of the scale of seriousness because they undermine the rule of law.

[57] They involve extreme disparagement of RPW in breach of the certified settlement and very serious breaches of s 134A of the Act.

[58] H's and C's breaches undermined the overall administration of justice and struck at the very heart of the way in which Parliament intended employment relations to operate in New Zealand.

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26 *RPW v H*, above n5.
27 *RPW v H*, above n2, at [184]-[291].

[59] Although the breaches of the certified settlement and of s 134A of the Act occurred under the same Act, they should be regarded as separate, not indivisible, breaches for penalty purposes.

[60] Consolidating the multiple breaches that occurred into only one indivisible breach to be penalised would result in an artificially low potential maximum penalty and would not appropriately reflect the serious wrongdoing that has occurred.

Preet sub-step 3 – identify the maximum penalty for each of the identified breaches

[61] Section 135(2) of the Act provides that an individual like H is subject to a penalty not exceeding $10,000 per breach and a company like C is subject to a penalty not exceeding $20,000 per breach.

[62] H faces potential maximum penalties of $140,000 consisting of:

(i) $90,000 maximum penalty for his 9 breaches of the certified settlement (9 x $10,000);[28] and

(ii) $50,000 maximum penalty for his five globalised breaches of s 134A of the Act (5 x $10,000), discussed below.[29]

[63] C faces potential maximum penalties of $280,000 consisting of:

(i) $180,000 for 9 breaches of the certified settlement agreement (9 x $20,000);[30] and

(ii) $100,000 for its five globalised breaches of s 134A of the Act (5 x $20,000), discussed below.[31]

[64] If penalties were imposed on H and C separately, then the total maximum combined penalties that could potentially be imposed on both of them together would be $420,000.

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28 *RPW v H*, above n2, at [145].

29 These are the 11 breaches of s 134A of the Act that were identified in *RPW v H*, above n2, at [184]-[291] which have been further globalised in this determination, for penalty purposes, into only five breaches of s 134A of the Act that will attract penalties.

30 *RPW v H*, above n2, at [145].

31 Above n29.

Preet sub-step 4 – whether penalties should be globalised?

[65] Globalisation of the nine breaches of the certified agreement into only one breach for the purposes of imposing a penalty under s 149(4) of the Act would be inappropriate.

[66] It could create a perverse incentive for a person, such as H, to engage in multiple breaches if they believed that multiple breaches would only attract one maximum penalty of $10,000 on an individual (like H) or $20,000 on a corporation (like C).

[67] However, the original 11 proven breaches of s 134A of the Act have been further globalised in this determination into only five main overarching breaches that will each attract individual penalties. Each separate breach under this additional globalisation is discussed later in this determination.

[68] The s 134A breaches of the Act that will now attract penalties consists of:

(a) Repeated breaches of Authority directions and orders;

(b) Repeated public disparagement of individuals (excluding the disparagement of Mr Hood, which is so serious it needs to be penalised separately) and organisations involved in these proceedings;

(c) Repeated public attacks on RPW's counsel, Mr Hood;

(d) Misuse of confidential or sensitive information H and C obtained as advocates; and

(e) Attempts to interfere with RPW's ability to continue with these proceedings.

[69] The above five breaches represent types or categories of behaviour that each include multiple breaches of s 134A of the Act. However, for penalty purposes these five individual types or categories of breaches will each be treated as only one breach, although they are representative of many separate breaches.

[70] That therefore reflects additional significant globalisation that reduces H's and C's potential penalty liability.

Summary of breaches that will attract penalties in this determination

[71] Penalties will therefore be assessed in this determination on the basis of:

(a) Nine breaches of the certified settlement; and

(b) Five breaches of s 134A of the Act.[32]

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

[72] H was in the driver's seat for all of the breaches that occurred. H purposely used his company C as the vehicle for committing, and attracting maximum attention to, the breaches that H intended to occur.

[73] The breaches that occurred were very serious. They fundamentally undermined the problem resolution mechanisms and good faith principles that underpin and are promoted by the Act. The breaches all occurred over an extended period of time.

[74] H's and C's breaches substantially escalated during the period the Authority was investigating this matter. The Employment Court in *RPW v H* observed the self-serving nature of H's and C's breaches when it noted that disparagement of the employment institutions occurred when there was any development in the proceedings that H and C viewed as disadvantageous to them.[33]

[75] The nine breaches of the certified settlement that attract penalties occurred over the period 21 April to 16 August 2018. Six of these nine breaches would not have occurred if H and C had not also breached the Authority's non-publication orders.

[76] The five types of breaches of s 134A of the Act all occurred over the period 17 July to 02 October 2018. The nature of the obstruction of the Authority's investigation that H and C both engaged in is at the most serious end of the scale. H and C both:

(a) Sought to prevent the claims against them being investigated;

(b) Engaged in repeated public attacks on, and personalised abuse of, individuals and organisations involved in these proceedings;

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[32] Above n29.

[33] R*PW v H*, above n2 at [23].

(c) Rendered the civil obligations they voluntarily entered into under the certified settlement nugatory by defiantly breaching the Authority's orders;

(d) Destroyed the value for RPW of the benefits it obtained from its mediated settlement with C's client "D";

(e) Put their client D at risk of adverse consequences arising from H's and C's breaches;

(f) Put C's clients, who were also RWP employees, at risk of severe adverse consequences while also delaying the resolution of their underlying concerns;

(g) Deliberately sought to inflict reputational harm on RPW and its professional advisors for exercising their right to enforce the civil obligations H and C had voluntarily agreed to; and

(h) Acted to undermine public confidence in the impartiality of the employment institutions.

Mandatory statutory consideration 3: were the breaches intentional, inadvertent or negligent?

[77] All of H's and C's breaches were deliberate and intentional.

[78] H deliberately used C to embark on an improper public crusade against RPW, its advisors and the Authority. The Employment Court in *RPW v H* observed that:[34]

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

[79] The first breach of the certified settlement occurred on 21 April 2018.

[80] That was three weeks after H and C were served with the Authority's first determination in *Turuki Healthcare Services v Makea-Ruawhare.*[35] H and C were two of the four respondents in *Turuki,* with the other two respondents being one of C's client's and one of C's employees.

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34 *RPW v H*, above n1, at [23]. .

35 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 95.

[81] The first *Turuki* determination found that H and C (and the other C employee) had engaged in a "*flagrant breach"* of a non-disparagement clause C had agreed to in a certified settlement that had involved another C client (not client "D").[36]

[82] H and C have not challenged that first *Turuki* determination. They did however challenge, and seek a stay of, the second and third *Turuki* determinations that related to penalties, damages and costs.

[83] The Employment Court imposed a stay that was conditional on the disparaging material about the employer, its counsel, the Authority and the Court being removed from C's public Facebook page.[37] The *Turuki* challenge has not yet been heard.

[84] The Authority's three *Turuki* determinations put H and C on notice that the Authority considered a non-disparagement clause in a certified settlement signed by C would be enforceable, and that deliberate breaches of it would attract penalties.[38]

[85] Knowing that, H and C nevertheless engaged in even more serious, and more extensive, breaches and widespread disparagement of others than had occurred in *Turuki*. That indicates a serious escalation in deliberate wrongdoing by H and C.

[86] Before filing these proceedings RPW also tried to avoid the need for litigation. It:

(a) Engaged an external independent expert to investigate and report on all workplace issues, including those involving C's clients;

(b) Reminded H and C of their legal obligations under the Act;

(c) Encouraged H and C to comply with the Act when advocating for or representing C's clients;

(d) Reminded H and C, a number of times, that they were legally required to comply with the non-disparagement clause they had agreed to in a certified settlement;

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36 At [18].

37 *C v Turuki Healthcare Services Charitable Trust* [2018] NZEmpC 115 at [19].

38 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 95; *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 136; and *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 177.

(e) Put H and C on notice they were at risk of penalties for breaching a certified settlement if they continued to do so;

(f) Attempted to resolve the issues between the parties without the need for litigation by responding to the various matters H and C had raised with it.

[87] However H and C elected to take the law into their own hands regarding untested disputed allegations involving C's clients. H and C did not want to be bound by the certified settlement, so they ignored their obligations under it.

[88] When H and C did not agree with the Authority's decisions and determinations in this matter, instead of filing a challenge in the normal way, they elected to act in ways that obstructed the Authority's investigation and undermined the overall administration of justice.

[89] That was clearly contrary to the rule of law.

[90] It is fundamental to our justice system that everyone, regardless of whether or not a particular person agrees with the law, is governed by the same legal obligations under applicable law.

[91] Reasonable people understand that the rule of law only works if it is applied to everyone equally, regardless of who they are, how they may feel about a law, or what the nature of their claim or concern may be.

[92] It should go without saying, but it bears repeating here – a person or entity cannot simply pick and choose what laws they want to observe and what laws they will simply ignore, without expecting there to be legal consequences for deliberate breaches of the law.

Mandatory statutory consideration 4: the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person involved in the breach because of the breach or involvement in the breach

(a) Loss or damage to C's client "D"

[93] H's and C's breaches could have severe consequences for C's client D, who was a party to the certified settlement with RPW. H and C have put D personally at risk of adverse financial consequences, such as penalties and legal costs.

[94] D has also been exposed to the stress of legal proceedings. RPW's original Statement of Problem named D as a party, but it subsequently decided to focus these proceedings on H and C.

[95] That does not prevent RPW from pursuing claims against D personally within 12 months of each of the breaches occurring. D has received the full value of the bargain she entered into under a mediated settlement, while RPW has not.

[96] D now has to live with the stress and uncertainty of potential penalty claims hanging over her until the 12 months time limit for RPW to pursue penalties against her personally expires.

(b) Loss or damage to C's clients

[97] Fourteen RPW employees initially authorised C to act for them. H's and C's breaches have put these clients at risk of serious adverse financial, legal and employment consequences.

[98] H's and C's breaches inappropriately and unnecessarily exposed C's clients to:

(a) Disciplinary action for potential serious misconduct;

(b) Legal proceedings being filed against them personally;

(c) The risk of penalties under the Act being imposed on them personally; and

(d) Adverse public comment being made about the manner in which they have elected to address their employment issues, because their advocate has deliberately and repeatedly acted in a manner that is contrary to the objects and underlying philosophy of the Act.[39]

[99] H's and C's breaches have also:

(a) Undermined the credibility of C's clients regarding their concerns, because their advocate has repeatedly publicly disparaged RPW and engaged in personalised attacks on its Board members and professional advisors;

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39 H and C told the Authority their clients all authorised, were aware of and agreed with all of H's and C's actions that were proven to have breached the Act. C's clients have not given evidence about that.

(i) Instead of utilising the problem resolution mechanisms contained in the Act;

(ii) Instead of using RPW's internal complaint policies/procedures in an appropriate manner;

(iii) Instead of invoking the problem resolution clause in their employment agreements;

(iv) While obstructing RPW's ability to investigate any workplace issues by failing to provide specific information about their concerns;

(v) While refusing to engage with an independent external investigation being conducted by a highly experienced employment expert; and

(vi) Instead of filing claims with the Authority.[40]

(b) Unnecessarily delayed the resolution of any genuine employment issues C's clients may have had by:

(i) Diverting RPW's time and resources into having to litigate to exert their legal right not to be repeatedly publicly disparaged by H and C; and

(ii) Inappropriately undermining their confidence in the employment institutions, particularly the Authority.

(c) Likely caused unnecessary stress and anxiety for C's clients by making self-serving and bad faith claims that their advocate has been "*bullied"*, *"blackmailed"* and *"constantly attacked*" by RPW, its professional advisors and the Authority, in circumstances where any reasonable person would understand that the professionals involved were exercising their professional duties and obligations in a normal and appropriate manner.

(c) Loss or damage to other RPW employees

[100] One of the breaches in this matter included confidential information about a former employee being posted by H on C's public Facebook page. This employee, (who C did not

[40] Only one of C's clients has filed a claim with the Authority and that occurred on 09 August 2018.

represent), was also publicly disparaged by H and C in Facebook posts that breached the certified settlement.

[101] Another RPW employee (who C did not represent) had to take time off work because of the improper personalised disparagement H and C subjected her to for exercising her professional duties regarding formal complaints made about some of C's clients.

[102] These personalised public attacks by H and C on RPW employees who are involved in on-going employment processes, have made complaints about, or who have relevant information involving C's clients, would likely be distressing for those on the receiving end of them.

[103] It is also likely to have a chilling effect on other employees speaking up, because H's and C's breaches of s 134A of the Act show that by doing so those other RPW employees risk public vilification on C's Facebook page if H does not agree with them.

[104] That should not be happening in the good faith environment of employment relations that Parliament has intended to apply to employment issues.

[105] There are contractual and statutory mechanisms available to C's clients to address any employment issues they may have in a way that is fair to all involved. They are expected to utilise those problem resolution mechanisms instead of acting in ways that breach the Act.

[106] Authorising, allowing or condoning an advocate or representative to engage in public disparagement of others is not an acceptable way for those in employment relationships to address employment related concerns, regardless of the nature of the concerns involved.

[107] It is harmful not just to those involved in this matter but to employment relations in general. It is an approach to representation, or resolving workplace issues, that is the opposite of the mutual good faith obligations imposed by the Act.

(d) Loss or damage to RPW

[108] H's and C's repeated blatant breaches of the certified settlement deprived RPW of the full benefit of the bargain it entered into with D.

[109] RPW has been required to expend considerable time and resources to prevent H's and C's multiple breaches of the certified settlement. H's and C's breaches have also resulted in reputational damage to RPW that is not readily quantifiable, and for which it is unlikely to ever be adequately compensated.

[110] H's and C's breaches of s 134A of the Act have obstructed and impeded RPW's ability to exercise its legal rights to such an extent that the Employment Court observed that "*it has seemed that anarchy has reigned*."[41]

[111] H's and C's attacks have ignored their obligations under the Act by putting adverse information into the public domain that they know is strongly disputed without RPW, and others, being able to adequately publicly respond to it.

[112] RPW has been unable to correct the public record by providing a public response to H's and C's multiple breaches of the certified agreement and of s 134A of the Act.

[113] RPW cannot discuss its confidential internal employment processes, it cannot release private information about its employees (including C's clients) and it cannot breach the certified settlement just because H and C have done so.

[114] RPW has been disadvantaged because it has fully observed all of its legal obligations, when H and C have not. It should go without saying that a party that is fully complying with its legal obligations should not be harmed with impunity by a party that chooses not to.

[115] RPW's witness gave evidence about the difficulties it has faced in recruiting to vacant roles because of adverse information H's and C's breaches put into the public domain. The same problem is likely for future Board positions.

[116] Concern expressed by the local community about the disparaging information now in the public domain is anticipated to have an adverse impact on RPW's ability to fundraise from the community and therefore resource new projects. H's and C's breaches have had adverse consequences for others, not just RPW.

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41 *RPW v H*, above n20, at [12].

(e) Loss or damage to RPW's Board

[117] H's and C's breaches have subjected RPW's voluntary Board members to considerable inappropriate stress, pressure and public social media abuse.

[118] Board time and resources have been diverted from normal business in order to deal with H's and C's repeated breaches. Board members have been concerned about being publicly attacked by H and C, as has happened repeatedly to the Chair of the Board.

[119] The Chair of the Board gave evidence of the stress H's and C's repeated breaches have put him under personally and as a Board member. He is a farmer who volunteers his time to RPW as an act of public service, as do other Board members.

[120] The personalised attacks by H and C on Board members, and the reputational damage this causes to RPW and Board members, is likely to discourage others in the community from donating their time and energy to RPW.

[121] The Chair faces reputational damage from H's and C's breaches that is difficult to quantify, which will not be compensated and which cannot be undone. The Facebook material, while no longer visible on C's public page, has already been seen, liked and forwarded multiple times, potentially to thousands of people.

[122] The social media material that gave rise to most of the breaches cannot now be expunged from the internet. The non-publication orders in place mean the Chair cannot publicly correct the false, misleading and deceptive material H and C have disseminated about him.

[123] The Chair of the Board, who has not been objectively held by the employment institutions to have engaged in wrongdoing, has been unfairly subjected to so called public 'naming and shaming' by H and C in circumstances where the matters H and C has attacked him about are strongly disputed.

[124] Meanwhile H and C, who have been found by the employment institutions to have engaged in serious wrongdoing, will continue to receive the benefit of anonymity as a result of the permanent non-publication order that is in place.

(f) Loss or damage to RPW's professional advisors

[125] H's and C's breaches involve the public disparagement of RPW's independent professional advisors by personalised public attacks on their integrity. These attacks appeared designed to intimidate RPW's professional advisors by publicly sullying or damaging their reputations as a result of their involvement with RPW.

[126] This attempted intimidation by H and C of RPW's professional advisors included bad faith claims of serious wrongdoing, including bullying, professional incompetence, misuse of taxpayer funds and criminal actions.

[127] These attacks have included, but are not limited to, posts on C's public Facebook page. While the disparaging material is no longer visible on C's Facebook page, it has already been seen by potentially thousands of people and will remain in the public domain indefinitely.

[128] H's and C's breaches are similar to witness intimidation. Instead of being aimed just at a witness, such as the Board Chair, H and C have also targeted professional advisors in what appears to be a thinly veiled attempt to deter them from providing their services to RPW and/or from continuing with these proceedings.

[129] Many of H's and C's personalised attacks on RPW's professional advisors occurred after RPW and its advisors failed to give in to H's and C's threats and demands.

[130] The personalised attacks by H and C on Mr Hood are disgraceful. There is no objective justification for what H and C have subjected Mr Hood to. He has been unfairly publicly maligned and abused simply for acting as RPW's counsel. H's and C's subjective attacks on Mr Hood are objectively unsustainable on the evidence presented to the Authority.

[131] H and C appear to have deliberately tried to damage Mr Hood's professional standing and reputation because he did not give in to H's and C's threats and demands but instead has continued to represent RPW, and pursue these proceedings, in accordance with his professional obligations as counsel.

[132] H and C have subjected Mr Hood to spurious claims of serious wrong doing. They made false claims of blackmail to the New Zealand Police and the Waikato District Law

Society against Mr Hood simply for sending a "*without prejudice except as to costs*" settlement offer on RPW's behalf.

[133] H and C have both made, what could objectively be described, as abusive comments about Mr Hood on social media and repeatedly in communications with the employment institutions and others. H and C have hosted comments on C's public Facebook page from uninformed supporters, who have allowed themselves to be influenced by H's and Cs antagonistic rhetoric, suggesting Mr Hood should be harmed for representing RPW.

[134] One C supporter phoned H and made a death threat against Mr Hood as a result of the false, misleading and derogatory information H and C were posting online about Mr Hood.

[135] When questioned about that, H appeared to the Authority to be unconcerned because he immediately sought to justify his posting of information that had incited the threats against Mr Hood.

[136] H and C are responsible for stirring up this animosity towards Mr Hood. They are inciting this hostility towards him as a result of the information they are, unreasonably and unprofessionally, deliberately putting into the public domain. These personalised attacks have no doubt been very stressful for Mr Hood.

[137] H's and C's breaches of s 134A of the Act risk intimidating other service professionals from providing services to RPW and/or other employers C's current or future clients may make claims against.

[138] C's breaches are therefore not just damaging to RPW's professional advisors in particular but are also damaging to employment relations in general.

[139] These types of blatant attacks on, and attempted intimidation of, those involved in Authority proceedings is unacceptable. Such behaviour undermines the overall administration of justice and must be strongly deterred.

(g) Loss or damage to the public in general

[140] The fact that H's and C's breaches deliberately nullified a material term in a certified settlement may make other parties in general more reluctant to resolve their employment problems in that way.

[141] It may also make other parties, who in future are required to engage with H and C, more reluctant to enter into certified settlements with H's and C's clients (current and future) because of the nature and extent of the deliberate breaches that have occurred in this matter.

[142] The s 134A breaches occurred because RPW exercised its legal right to enforce civil obligations, to which H and C had voluntarily agreed. RPW has therefore suffered greater damage simply because it filed, and then in the face of H's objections continued with, these proceedings. That could discourage others from exercising or enforcing their legal rights.

[143] H's and C's reprehensible public attacks on the integrity of the employment institutions, which include claims that the decision makers are (among other disparagement) "*biased*", "*corrupt*" and "*bullies*", undermines the problem resolution processes Parliament has put in place to assist parties in employment relationships to resolve their issues in a good faith manner.

(h) Gains made by H and C from the breaches

[144] Having reviewed the harm H's and C's breaches have had on others, the Authority is now required to consider the benefits, advantages or gains H's and C's breaches have had for them.

[145] H and C did not want to be bound by the certified settlement they had agreed to, so they acted in a way that effectively nullified their civil obligations. This enabled them, and D, to get the financial benefits of the certified settlement while simultaneously fundamentally undermining the benefit RPW derived from it.

[146] The breaches H engaged in on C's public Facebook page generated likes, comments and shares that increased the visibility of H and C in social media.

[147] H and C used their breaches to improperly paint themselves as victims of bullying, blackmail, corruption, conspiracy and collusion by RPW, its legal representatives and the employment institutions instead of parties who were being legitimately held to account for repeatedly and deliberately breaching their civil obligations.

[148] This false and self-serving narrative by H and C that they were victims who had been "*bullied*", and "*blackmailed*" for representing C's clients enabled them to avoid addressing the real issue - that their behaviour was contrary to their obligations under the Act,

undermined the rule of law, improperly and unnecessarily exposed C's clients to the risk of adverse consequences, and has delayed the resolution of C's clients' concerns.

[149] H and C appear to have used public disinformation to avoid having to take responsibility for their actions and to arouse sympathy and social media engagement from their followers. The Employment Court in *RPW v H* held that H was acting outside of his proper role as an advocate and should cease doing it.[42]

[150] H's and C's belief that there was a public interest in them publicly disparaging others and obstructing the Authority's investigation into the claims against them was unreasonable, so does not mitigate their actions, for the reasons explained in the Authority's substantive determination.[43]

Mandatory statutory consideration 5: whether H and/or C have paid compensation, reparation or restitution, or have taken other steps to avoid or mitigate any actual or potential adverse effects of their breaches

[151] H and C mitigated four breaches of the certified agreement by removing this material from C's public Facebook page on 31 July 2018, in response to the Authority's 27 July 2018 determination.[44]

[152] H and C mitigated some of the breaches of s 134A of the Act by removing the offending material from C's Facebook page on 2 October 2018. This was done as a result of the Employment Court's advice to do so.[45]

[153] The removal of Facebook posts that breached the Act occurred after the damage from the breaches had been done. It is also likely, although no longer visible on C's public Facebook page, those posts remain viewable elsewhere on social media.

[154] The mitigation H and C is entitled to credit for occurred such a long time after many of the breaches had occurred, that the substantial amount of damage had effectively already been done before mitigating action was taken.

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42 *RPW v H*, above n21, at [22].
43 *RPW v H*, above n2, at [37]-[89] and [295]-[303].
44 *RPW v H* [2018] NZERA Auckland 237 at [52] and [53].
45 *RPW v H*, above n22.

[155] Although the Authority identified potentially mitigating factors in its substantive determination and invited H and C to address those factors in their submissions, they elected not to do so.[46]

[156] None of the potentially mitigating factors identified by the Authority have occurred. There has been no apology, no acknowledgment of wrongdoing, no insight into the harm the breaches have caused to others, no acceptance of responsibility, no reassurances or undertakings about H's and C's future conduct.

[157] H and C have not retracted or corrected the false or misleading information they have put out on social media about Mr Hood, RPW's law firm or the employment institutions.

[158] Accordingly, the reputational damage H's and C's breaches have caused to individuals and organisations associated with these proceedings has not been addressed or remedied.

[159] There is no evidence that H and C have advised their social media followers that public comments that attack and/or abuse others are unacceptable and will no longer be hosted by C on its public Facebook page.

[160] There was no evidence that H or C had done anything to ensure that C's clients were properly advised of the personal risk of adverse consequences they faced as individuals if H and C continued to represent them in a manner that was contrary to the objects of the Act.

[161] That omission is significant in light of H's and C's threats in their submission to the Authority to "*go public again*", with the risks that will create for C's clients.

[162] In terms of s 133A(e) of the Act, H and C have not paid any compensation, reparation or restitution. Nor have they taken steps to mitigate any actual or potential adverse effects of their breaches of the Act, other than removing Facebook posts from public view on 2 October 2018.

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[46] *RPW v H*, above n2, at [315].

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

[163] These breaches occurred because H and C considered effective advocacy for C's clients required them (H and C) to:

(a) Breach a certified settlement by publicly disparaging, and making negative remarks about, RPW; and

(b) Engage in multiple obstructions of the Authority's investigation into serious breaches of the Act by H and C.

[164] It obviously does not.

[165] Parties and their representatives strongly disagree with each other all the time without breaching the Act. There is no need for them to do so. Any differences or disputes between parties can be objectively resolved by the employment institutions if need be.

[166] Even if H and C had valid points or criticisms to make, that could be done in an appropriate and professional way that did not involve publicly disparaging, attacking or abusing others. It should also have been done in a way that did not expose C's clients to unnecessary risks of adverse consequences.

[167] H and C's belief that their breaches were necessary to protect C's clients from harm was not supported by the available evidence for the reasons set out the Authority's substantive determination.[47]

[168] There were more timely and effective ways of addressing C's clients' concerns that did not involve breaching the Act. These included, but were not limited to:

(a) Raising concerns using RPW's internal complaints processes and procedures;

(b) Invoking the problem resolution clause in the employment agreement;

(c) Providing specific information of their concerns to RPW to enable it to conduct a workplace investigation;

(d) Engaging with the external independent investigator who was compiling a report on all workplace issues;

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47 *RPW v H*, above n2, at [294].

(e) Responding to information that had been provided by other RPW employees;

(f) Applying for free mediation from Mediation Services; and

(g) Filing proceedings with the Authority.

[169] In terms of analysing the breaches of the certified settlement that occurred:

(a) Three breaches occurred before these Authority proceedings had been served on H and C;

(b) The first three breaches initially occurred before a non-publication order had been imposed. However the public posts containing these breaches remained visible on Facebook for 11 days after non-publication orders had been imposed, despite the Authority informing H and C that the non-publication orders required them to be removed or redacted. The simultaneous breach of a non-publication order, along with the certified settlement, is an aggravating feature;

(c) The remaining six breaches of the certified settlement that will attract penalties also breached non-publication orders, which is an aggravating factor;

(d) Four of those six breaches of the certified settlement occurred over the period 21 April to 31 July 2018. The posts that contained these breaches were removed from C's public Facebook page by 31 July, which is a mitigating factor;

(e) One breach occurred on 15 August, when H and C knew the first compliance order determination was imminent. That breach involved an email to the DHB that has not been withdrawn or retracted. In the absence of H and C taking any remedial action regarding that breach, it can therefore be said to be continuing. That is an aggravating factor;

(f) Four more breaches occurred on 16 August, after the first compliance order had been issued to the parties but before it went into effect. Three of these four breaches lasted until 2 October 2018. The fourth breach consisted of an email to the DHB, which has not been retracted or withdrawn, so can therefore be said be continuing. That is an aggravating factor;

(g) The 16 August breaches involved blatant misuse by H and C of the time delay condition the Authority had imposed (for their benefit) on its compliance order. Instead of using that time to remedy their previous breaches, H and C cynically

engaged in further serious breaches of the certified settlement. This is a highly aggravating factor.

[170] In terms of the multiple breaches of s 134A of the Act that occurred, each of the initial acts that amounted to obstructions of the Authority's investigation all occurred over the period 17 July to 31 August 2018.

[171] However the Authority notes that the multiple Facebook posts that breached s 134A of the Act all remained publicly visible on C's public Facebook page until 2 October 2018. It can therefore be said that while each of the originating obstructive acts occurred on or before 31 August 2018, they all continued until 2 October 2018.

[172] Although the Facebook posts that breached s 134A of the Act are no longer visible on C's public Facebook page, these posts have already been shared multiple times by others, so they have not and cannot ever be entirely removed from the internet. That means these breaches involve some lingering harm that cannot ever be completely extinguished. That is an aggravating factor.

[173] The circumstances of these breaches of s 134A of the Act involved H and C deliberately taking steps to:

(a) Prevent RPW from enforcing a certified settlement;

(b) Interfere with, and impede, the Authority's investigation of RPW's claims against H and C; and

(c) Undermine public confidence in the employment institutions.

[174] These breaches are very serious. They were objectively unreasonable, unnecessary and potentially adversely affected many people.

Mandatory statutory consideration 7: whether H and/or C have previously been found in proceedings under the Act to have engaged in any similar conduct

[175] In *Turuki Healthcare Services v Makea-Ruawhare* the Authority previously imposed penalties and damages on H and C (and another C employee who was also a respondent in that matter) for breaching a non-disparagement clause in a certified mediated settlement.[48]

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[48] *Turuki Healthcare Services v Makea-Ruawhare*, [2018] NZERA Auckland 136 at [47].

[176] In staying the Authority's penalties and costs determinations, the Employment Court noted H's and C's behaviour towards the Authority in *Turuki* when it was attempting to investigate the claims against (among others) them "*was obstructive*".[49]

[177] The Employment Court also stated that H's and C's:[50]

> constant disparagement of the defendant, legal counsel and the Authority was not in keeping with the duty of good faith, which [they] as employment advocates […] were bound to observe.

[178] The Court further noted that H's and C's own counsel in *Turuki* submitted to the Court that H's and C's behaviour "*has not always been appropriate*".[51]

[179] Because the *Turuki* challenge has not yet been determined, for the purposes of assessing penalties in this matter, the Authority will:

(a) Treat H and C as first time breachers/offenders;

(b) Not use the maximum penalty imposed in *Turuki* as a precedent.

***Preet* additional consideration 1: deterrence, both particular and general**

[180] The purpose of penalties is to punish the wrongdoer and deter repeated wrongdoing, both by the party in breach and by others.

[181] There is also a need to preserve the sanctity of settlement agreements by ensuring they will be upheld, particularly because the Act promotes and encourages the resolution of employment resolution problems in that way. The Employment Court in *Lumsden v "SkyCity"* noted that:[52]

> There is a broader public interest in deterring parties from reneging on s 149 settlement agreements, and of underscoring the importance of compliance, however inconvenient that may be.

[182] This matter requires the Authority to send a strong message to H and C in particular, and more generally to the wider community that:

(a) Breaching a certified settlement and obstructing an Authority's investigation are very serious breaches of the Act; and

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49 *C v Turuki Healthcare Services Charitable Trust*, above n37, at [11].
50 At [11].
51 At [11]. .
52 *Lumsden v SkyCity Management Limited* [2017] NZEmpC 30.

(b) Breaches of this nature will be appropriately punished by the employment institutions.

[183] Consideration of the 'deterrence factor' involves setting penalties at a level that:

(a) Deters H and C from reneging on settlements by breaching certified settlement terms they have expressly agreed to be bound by;

(b) Underscores to H and C in particular, and to others more generally, the importance of complying with certified mediated settlements, even if they later decide they don't like the agreed terms of the settlement so do not wish to be bound by it;

(c) Deters those who are covered by the terms of a certified settlement from acting in a way that deprives a party to the settlement of the full benefit of the civil bargain they agreed to enter into in order to resolve their employment related issues by agreement;

(d) Deters H and C from obstructing Authority investigations, particularly by engaging in conduct that is:

(i) Contrary to the object of the Act;

(ii) Contrary to the overall rule of law in general;

(iii) Undermining of the effective administration of justice by the employment institutions;

(e) Deters H and C in particular, and other employment representatives more generally, from intimidating, by publicly attacking or abusing, others who are involved in employment proceedings under the guise of 'representation'. Representation of others in the employment sphere needs to be conducted in a manner that is consistent with the objects of the Act.

[184] Because H and C have attempted to pass off their serious breaches of the Act as necessary or appropriate representation of C's clients, there is an obvious need for the Authority to bring home to H and C, by way of penalties, the expected standards of behaviour they are required to meet:

(a) When providing services in their capacity as employment advocates to their employee clients;

(b) When engaging on behalf of their employee clients with opposing parties and those parties' representatives;

(c) As parties to certified settlements;

(d) As parties in Authority proceedings; and

(e) As advocates engaging with, or appearing in, the employment institutions.

[185] H's and C's breaches (and behaviour in connection with these proceedings) have fallen far short of the minimum expected standards of appropriate behaviour from a party, or professional behaviour from a representative. Such behaviour must be strongly discouraged.

[186] The Employment Court warned H in *RPW v H* that:[53]

> If he wishes to continue acting as an advocate for the people he says that he acts for, then he is now clearly stepping outside his proper role and should cease doing it.

[187] The lack of remorse and insight by H and C about the seriousness of their breaches of the Act, or regarding the risk of adverse consequences they have exposed their clients to, is concerning.

[188] This attitude suggests that the Authority should be mindful of the need for public protection, not just of RPW or of C's current and future clients, but also of other parties and their representatives who are required to engage with H and C regarding employment related issues.

[189] The need for public protection is also evident from the influence H's and C's serious breaches have had on others. For example:

(a) The Employment Court in *RWP v H* described comments that H incited, and which C hosted on its public Facebook page, from supporters attacking counsel and the employment institutions as "*clearly uninformed and ignorant*";[54]

(b) The Employment Court in *RWP v H* also noted that C's Facebook posts *"contain extensive comments which are not only disparaging but could be described as abusive*."[55]

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53 *RPW v H*, above n1, at [23].
54 *RPW v H*, above n1, at [23].
55 At [19].

(c) The Employment Court in *RWP v H* described the social media posts on C's public Facebook page as "*despicable and reprehensible*."[56]

(d) H admitted a C supporter made a death threat against Mr Hood because the supporter was apparently so upset about what he had seen on C's public Facebook page.

[190] It is therefore necessary for the penalties imposed to be at a level that clearly reflects, to H and C as well as to the wider community, that personalised abuse, public attacks and widespread disparagement of others who you do not agree with is not an acceptable way of attempting to resolve employment relationship problems.

[191] Such actions are contrary to the Act and cannot be condoned by the employment institutions.

***Preet* additional consideration 2: degree of culpability**

[192] H and C both have a very high degree of culpability.

[193] H and C engaged in multiple, brazen, widespread, intentional breaches of their obligations under the Act. They deliberately publicised their breaches widely, meaning their breaches cannot ever be completely remedied.

[194] The Court described some of H's posts on C's public Facebook page as *"tantamount to contempt of the Authority and the Court"* and their actions as *"an affront to the purposes of the mediation process […] and […] "good faith dealings."*[57]

[195] H's and C's claim that they were simply representing C's clients was unreasonable, so is not a mitigating factor. The Employment Court held that H's actions were "*outside his proper role*", involved "*inappropriate behaviour*" and that H's and C's breaches of the Authority's orders were also "*inappropriate*".[58]

[196] There was no element of appropriate representation that mandated H and C to engage in widespread on-going disparagement that was abusive of others, or in repeated deliberate obstructions of the Authority's investigation.

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56 At [23].
57 *RPW v H*, above n20, at [12].
58 *RPW v H*, above n21, at [22] and *RPW v H*, above n1, at [22] and [25].

[197] H and C were obliged to pursue any unresolved employment relationship problems C's clients had by filing their claims with the Authority.

[198] The only one of C's 14 clients who has filed a claim with the Authority (in August 2018) did so after the Authority's inquiries regarding what claims had been filed by C for its clients, given C had been acting since April 2018. The one claim that was filed occurred after the Authority had issued directions and orders in respect of these proceedings.[59]

[199] Any of C's clients who filed claims with the Authority but were subsequently unhappy with an Authority determination, had the inherent right to file a challenge. This right of de novo challenge allows them to have their claims heard afresh by the Employment Court.

[200] The rule of law requires that disagreement with an Authority determination be dealt with by way of challenge, not by simply defying the Authority's orders, or personally attacking and abusing the decision maker in a way that undermines the effective administration of justice. Adherence by members of society to the rule of law prevents anarchy from reigning.

[201] The Employment Court held that the attacks on the Authority by H and C which they and their supporters engaged in "*could only be described as despicable and reprehensible.*"[60]

[202] Accordingly, it should have been obvious to H and C that their behaviour was unacceptable and fell outside the parameters of appropriate representation of C's clients.

Preet **additional consideration 3: the general desirability of consistency in penalty decisions**

Previous penalties imposed for breaches of a non-disparagement clause in a certified mediated settlement

[203] The Authority identified 11 cases in which a penalty was imposed for a breach of a non-disparagement clause in a certified mediated settlement:

(a) In *Kea Petroleum Holdings Limited v McLeod* the Authority imposed a penalty of $2,000 on a former employee, who had made two disparaging Facebook

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59 *RPW v H*, above n40.
60 *RPW v H*, above n1, at [23].

posts.[61] The first post was a disparaging article, which was republished on an international bulletin board. The second post involved a disparaging comment about Kea's managing director. Both posts had been removed by the time penalties were assessed. The employee also accepted responsibility, expressed remorse and provided an undertaking to not mention Kea again on Facebook. The breaches by H and C are far more serious and the mitigating factors in *Kea* do not apply here.

(b) In *Jacks Hardware and Timber Limited v Beentjes* the Authority imposed a $2,000 globalised penalty on a former employee for an unspecified number of text messages, some of which contained disparagement of a managing director and the employee's former manager.[62] The breaches by H and C are more extensive, more harmful, and involve more people than the *Jacks Hardware* case.

(c) In *Wanaka Sun (2003) Limited v Woodrow* the Authority imposed a $250 penalty on a former employee who was overheard saying that she had found Wanaka Sun a stressful place to work.[63] This breach was described as being of a "*very mild character, with no discernible harm occasioned*". It is not comparable to the breaches in this case.

(d) In *Silver Fern Farms Limited v Norton* the Authority imposed a $2,000 penalty on a former employee who sent an email to five people that disparaged Silver Fern Farms by making serious allegations against it and encouraging people to boycott it.[64] The Authority ordered that $1,500 of the penalties be paid to Silver Fern Farms. The breaches by H and C were far more serious and widespread than in *Silver Fern Farms.*

(e) In *Free v Shelf Company No. 5 Limited* the Authority imposed a $5,000 penalty on the former employer (Shelf Company) for sending a letter to another company that called Shelf Company's former employee's professional competency into question. The letter was intended to support a negligence claim that the other company was pursuing against Ms Free.[65] The penalty imposed

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61 *Kea Petroleum Holdings Limited v McLeod* [2014] NZERA Wellington 113.
62 *Jacks Hardware and Timber Limited v Beentjes* [2015] NZERA Christchurch 29.
63 *Wanaka Sun (2003) Limited v Woodrow* [2017] NZERA Christchurch 3.
64 *Silver Fern Farms Limited v Norton* [2017] NZERA Christchurch 54.
65 *Free v Shelf Company No. 5 Limited* [2017] NZERA Auckland 232.

was reduced because Shelf Company had not traded for some years, had no assets and had to be reinstated to the Company Register so the Authority matter could be determined. The Authority ordered $3,750 (75 per cent of the penalty imposed) to be paid to Ms Free. H's and C's breaches are far more serious than the one disparaging letter in *Free*.

(f) In *Western Institute of Technology at Taranaki v Parr* the Authority imposed a global penalty of $6,000 on the employee for sending two letters containing disparaging comments about WITT to Members of Parliament.[66] Aggravating factors included that the disparagement was "*very much at the upper end of the scale*," there had been previous breaches that had not been pursued as penalty claims, there was no remorse, and Ms Parr had attempted to hide her involvement in the breaches. The Authority ordered that the entire penalty was to be paid to WITT. The breaches by H and C are far more extensive and the nature of the disparagement is far more serious than in *Parr*.

(g) In *X v Z* the Authority imposed a $6,000 penalty on Z, $2,000 of which was payable to each applicant, for one Facebook post and five emails that disparaged the applicants.[67] The emails were sent to professionals involved in the proceedings between the parties. The reach of the Facebook post was very limited. The breaches had a personal element because they occurred within the context of an acrimonious marriage breakup. The former employee (Z) wanted to harm Y because he (Z) blamed Y for his (Z's) relationship and personal problems. There was no remorse, Z didn't understand the seriousness of his breaches, and Z had a desire to "*expose*" the applicants in a public manner. The breaches by H and C are far more serious than Z's.

(h) In *Vice-Chancellor of the Victoria University of Wellington v Sawyer* the Authority imposed a global penalty of $8,500 for five breaches arising from emails the former employee sent. These emails were seen by no more than ten people in total (one email was seen by eight people) who were already aware of the issues between the parties.[68] Two individuals who were specifically named in the non-disparagement clause were disparaged in the emails. The Authority

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66 *Western Institute of Technology at Taranaki v Parr* [2017] NZERA Auckland 73.

67 *X v Z* [2017] NZERA Wellington 244.

68 *Vice-Chancellor of the Victoria University of Wellington v Sawyer* [2017] NZERA Wellington 106.

ordered that $3,750 of the penalty imposed was paid to each of the two people who were disparaged (i.e. $7,500 of the $8,500 penalty). The breaches were intentional, there was no remorse or understanding of the seriousness of the breaches. H's and C's breaches were far more serious than the breaches in *Sawyer*.

(i) In *Lumsden v Skycity Management Limited* the Employment Court imposed a globalised penalty of $7,500, arising from three breaches, on an employer.[69] The Court ordered that 75 per cent of the penalty imposed was to be paid to the employee. The breaches consisted of SkyCity failing to treat the settlement as having finally resolved the parties' issues, because it noted in its human resources computer system that it would not re-employ the applicant, and made disparaging comments about him, despite the certified settlement recording he could apply for future positions. SkyCity had entered the agreement then immediately cynically breached it. The Court increased the penalty from $6,000 to $7,500 (a $1,500 uplift) on SkyCity for attempting to mask the full extent of its breach from the Court.

(j) In *Turuki Healthcare Services v Makea-Ruawhare* the Authority imposed a $30,000 penalty on three employment advocates (two of whom were H and C, the third worked for C) for sending a letter to a Minister of Parliament that breached a certified settlement C had signed.[70] Because the challenge has not yet been heard by the Court the level of the penalty imposed in *Turuki* is not treated in this case as a precedent penalty. However the Authority does note that H's and C's breaches in the present case represent a significant escalation in the seriousness and extent of the breaches that occurred in *Turuki*, so obviously that determination did not act as a deterrent to H and C;

(k) In *Bain v Smart Environmental Limited* the Authority imposed a penalty of $8,000 on a company that sent an email to 200 of its employees/contractors which stated that "*several employees*" had left "*under a cloud*" and that "*irregularities*" had been uncovered that could be reported to the Police. The Authority ordered that all of the penalty imposed to be paid to the applicant. Although the former employee was not named there were only four employees

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69 *Lumsden v SkyCity Management Limited*, above n52.

70 *Turuki Healthcare Services v Makea-Ruawhare*, above n48.

who had left the company around the time the email was sent. The Authority held the email breached the non-disparagement clause in the certified mediated settlement because it painted a picture of serious wrongdoing and the applicant was the most senior employee who had left the company over the relevant period.[71]

Previous penalties imposed under s 134A of the Act for obstructing or delaying an Authority investigation

[204] The Authority identified nine cases in which penalties were imposed under s 134A of the Act for obstructing or delaying an Authority investigation:

(a) In *Keung v Future Print and Design Limited* the Authority imposed a penalty of $1,000 on Future Print, all of which was to be paid to the employee, for its failure to participate in the investigation process or comply with a mediator's recommendations.[72] *Keung* is not comparable.

(b) In *Manoharan v The Chief Executive of Waiariki Institute of Technology (No 2)* the Authority imposed a penalty of $6,000 on the employer for instructing employees not to provide support to the applicant.[73] That instruction was retracted, so the breach was remedied within 16 days. The Authority viewed that breach as an attempt to block the applicant's path to settlement or determination of her personal grievance. H and C engaged in multiple breaches that were more serious than occurred in *Manoharan.*

(c) In *Wano v Skellerup Rubber Services Limited* the Authority imposed a penalty of $3,000 on the applicant, all of which was paid to the employer, for not adhering to timetable directions which resulted in the investigation meeting being deferred, failing to adhere to further deadlines and unilaterally ending a directions conference with the Authority, failing to respond to communications from the Authority and failing to attend the investigation meeting.[74] The breaches by H and C are far more serious than in *Wano.*

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71 *Bain v Smart Environmental Limited* [2019] NZERA 91.

72 *Keung v Future Print and Design Limited* [2013] NZERA Auckland 142.

73 *Manoharan v The Chief Executive of Waiariki Institute of Technology (No 2)* [2011] NZERA Auckland 497.

74 *Wano v Skellerup Rubber Services Limited* [2011] NZERA Auckland 514.

(d) In *Tex Onsite Limited v Hill* the Authority imposed a $10,000 penalty on the employee for failing to produce a memory stick at the Authority's initial investigation meeting and then, following a direction to produce it, reformatting it, making the information on it unrecoverable.[75] Inappropriate comments were also made on LinkedIn that were contemptuous of the Authority's process. The Authority ordered all of the penalty imposed to be paid to the employer. Although this determination was challenged, the challenge was discontinued. H's and C's breaches didn't involve destruction of relevant evidence, so they are different in nature.

(e) In *Ahuja v A Labour Inspector, Ministry of Business Innovation and Employment* the Employment Court imposed a $12,000 penalty on an individual for getting a gang member to intimidate two witnesses to prevent them from attending the Authority's investigation.[76] The Court ordered $3,000 of the penalty imposed to be paid to each of the two witnesses who were intimidated (i.e. $6,000 of the $12,000 penalty imposed). H's and C's obstruction involved public intimidation predominantly (but not limited to) via social media, of a party, its witness(es) and counsel, and of the three Authority Members involved in this case, it was more public, was repeated multiple times, and had a lasting impact in terms of reputational damage on the individuals involved that cannot be fully remedied.

(f) In *Mayston v Automotive Wholesale Limited* the Authority imposed a $3,000 penalty on the employer for recklessly and inaccurately advising the Authority it had been placed in liquidation, which delayed the investigation meeting by three months.[77] The Authority ordered $1,500 of the penalty to be paid to the employee. H's and C's breaches were materially different, and far more serious, than in *Mayston*.

(g) In *Davidson v Great Barrier Airlines Limited* the Authority imposed a $4,000 penalty on an employment advocate who had failed to advise his client of the arrangements that had been made to investigate her claims.[78] The advocate lodged a witness statement on behalf of his client that the client had not seen or

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75 *Tex Onsite Limited v Hill* [2016] NZERA Auckland 25.
76 *Ahuja v A Labour Inspector, Ministry of Business Innovation and Employment* [2018] NZEmpC 31.
77 *Mayston v Automotive Wholesale Limited* [2017] NZERA Auckland 204.
78 *Davidson v Great Barrier Airlines Limited* [2016] NZERA Auckland 403.

approved and the client was not told of the date of the investigation meeting or that the advocate was seeking to postpone it. The Authority ordered $2,000 of the penalty was to be paid to the advocate's client (the employee) and $2,000 to be paid to the employer. Although *Davidson* also involved a penalty being imposed on an advocate who had acted inappropriately, the breaches were materially different than H's and C's, so it is not comparable.

(h) In *Woods v United Cleaning Services Limited* the Authority imposed an $8,000 penalty on the employer for repeatedly refusing to comply with its directions to provide relevant information.[79] The Authority ordered that $4,000 of the penalty imposed was to be paid to the employee. The breaches in *Woods* are materially different from H's and C's breaches so are not comparable.

(i) In *Ward v Concrete Structures (NZ) Limited* the Authority imposed one globalised penalty of $8,000 on an employment advocate for five breaches of timetable and other Authority directions.[80] The Authority ordered $1,000 of the penalty to be paid to the advocate's client Mr Ward and $3,000 of the penalty to be paid to the employer, because they had been adversely affected by the advocate's breaches. The advocate had previously been subject to a $4,000 penalty for negligence that had resulted in an Authority investigation being delayed. The harm in *Ward* was delay so it is not comparable to H's and C's breaches, which involved obstruction of the Authority's investigation.

Other potentially relevant cases

[205] *ITE v ALA* is an Employment Court decision relating to (among other issues) an unsuccessful challenge to a penalty imposed by the Authority for breaches of the confidentiality obligations in a certified settlement.[81] *ITE* appears to share some common elements with this matter, in terms of the wrongdoer's attitude and beliefs.

[206] The Court upheld the $6,000 penalty the Authority had imposed on a former employee who set up a webpage, posted videos online, and sent emails with a link to the video to his former employer and others, explaining his perception of his employment issues, in breach of confidentiality obligations in the certified settlement.

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79 *Woods v United Cleaning Services Limited* [2014] NZERA Auckland 177.
80 *Ward v Concrete Structures (NZ) Limited* [2019] NZERA Auckland 67.
81 *ITE v ALA* [2016] NZEmpC 42.

[207] The Court said the penalty needed to send a strong message to the plaintiff of his need to comply with the obligations in the certified settlement and to deter others from similar breaches.

[208] The Court noted that the breaches were deliberate, sustained and had a significant negative impact on others. The employee had not shown any remorse or insight into the seriousness of his behaviour. The explanation given for the breaches did not mitigate them.

[209] The Court noted that the plaintiff had doggedly breached his obligations and had an appetite to continue doing so, because he had a keen sense of grievance and was determined to right the perceived wrongs that had been committed by the defendants and its various employees. These factors also motivated H's and C's breaches.

[210] However H's and C's breaches are more serious. They were more public because H used C's public Facebook page to attract maximum attention to their breaches. H's and C's breaches did not just put them at risk of penalties but also put C's clients at risk of severe adverse consequences.

[211] In *Solicitor General v Miss Alice* the High Court imposed a penalty of $5,000 on a lawyer for contempt of court.[82] The contempt consisted of the lawyer infringing an undertaking not to use an accident report of a New Zealand Army Court of Inquiry into the collapse of an army designed bridge for purposes not related to the litigation.

[212] The lawyer released the report to the media and made arrangements to release it on the internet. The lawyer considered they were "*exposing corrupted justice*" by what the lawyer viewed as "*whistleblowing*" on wrongdoing the lawyer believed the Army had covered up, to the detriment of the lawyer's clients.

[213] The High Court suspended the lawyer from legal practice for three months, thereby depriving the lawyer of the ability to earn income over that period, and it fined him $5,000.

[214] The High Court in *Miss Alice* observed that disputes are to be resolved by the courts and tribunals that have been established by Parliament to do justice. Whistle blowing or other

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82 *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 (HC).

self-help remedies will not be justified where there are available legal remedies that can be pursued because "*self-help is the very antithesis of the rule of law*".[83]

[215] The High Court's observations in *Miss Alice* about the rule of law also apply to H's and C's actions in this matter.

[216] The High Court in *Solicitor General v Krieger* imposed a $5,000 fine on an individual who had breached an injunction restraining disclosure of a spread sheet he had inadvertently received from the Earthquake Commission.[84] Mr Kreiger facilitated internet access to the spread sheet, in breach of the High Court's injunction, because he "*felt justified*" in doing so.

[217] The High Court did not agree. It observed that "*citizens may not ignore Court orders because they disagree with them. The appropriate response is to challenge the orders, not disobey them*."[85] That reasoning also applies to this matter.

***Preet* Step 2 - establish a starting point by assessing the severity of the breaches**

[218] The breaches of the certified settlement and of s 134A of the Act in this case are far more serious than any of the cases that have previously been considered by the employment institutions, perhaps with the exception of *Ahuja*, which involved witness intimidation by a gang member of two witnesses who were due to appear in an Authority investigation meeting.[86]

Mitigating factors

[219] The mitigating factors regarding H's and C's breaches are that:

(a) Four Facebook posts that breached the certified settlement were removed from public view on 31 July 2018; and

(b) The remaining Facebook posts that breached the certified settlement and s 134A of the Act were removed from public view on 2 October 2018.

[220] The removal of the disparaging Facebook posts on 31 July 2018 is of limited mitigating value because:

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83 *Solicitor-General v Miss Alice*, above n82 at [36] and [64].
84 *Solicitor-General v Krieger* [2014] NZHC 172.
85 At [37].
86 *Ahuja v A Labour Inspector, Minister of Innovation Business and Employment*, above n76.

(a) By then H and C had widely publicised this information, knowing it was in breach of the certified settlement; and

(b) H and C deliberately engaged in other, even more serious, breaches after 31 July 2018.

[221] Likewise, the removal by H and C of the disparaging information and of the information that breached s134A of the Act from C's public Facebook page was not a genuine attempt to 'right their proven wrongs,' as evident by their subsequent communications with the Authority.

[222] H's and C's subjective belief that the breaches were necessary to prevent harm to C's clients was objectively unreasonable for the reasons identified in the substantive determination, so that is not viewed as a mitigating factor.[87]

[223] The Employment Court's judgments in the three *RPW v H* cases also show that the Court did not accept that H's and C's actions were necessary, reasonable or appropriate.[88]

Aggravating factors

[224] Aggravating factors included:

(a) H and C were in a position of responsibility regarding C's clients yet engaged in breaches that put those clients at unnecessary risk of severe adverse consequences;

(b) The breaches were contrary to the object of the Act and to the standards of behaviour expected from parties and representatives involved in employment relations;

(c) The breaches occurred within the good faith environment of employment relations yet were the antithesis of good faith;

(d) H and C lacked remorse. They failed to acknowledge any wrongdoing or to accept responsibility for their actions. They have showed no regard for the potentially serious and adverse impact their serious breaches have had on others;

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87 *RPW v H*, above n2, at [294].

88 Above n4.

(e) H and C have not retracted their disparaging and negative remarks about RPW.

(f) H and C have not corrected the false, misleading and deceptive information they have put into the public domain about:

(i) Mr Hood;

(ii) RPW's law firm;

(iii) The Authority as an institution;

(iv) The Authority's investigation process into this matter;

(v) The three Authority Members who have had to exercise their statutory duties and responsibilities in connection with the investigation of the claims against H and C.

(g) H and C have demonstrated a defiant and irresponsible attitude. For example, subsequent to the substantive determination being issued on 1 November 2018, in communications with the Authority H and C have:

(i) Claimed the proven breaches are "*stupid frivolous vexatious allegations*;

(ii) Disparaged RPW and its Board Chair and further stated "[the Board members'] *personal reputations have sadly not been negatively impacted*";

(iii) Disparaged Authority Members and repeated the view that by investigating and determining RPW's claims the Authority is acting outside its jurisdiction by "*attacking*" H and C.

Benchmarking this matter against penalties imposed in previous cases for breaches of a non-disparagement clause in a certified mediated settlement

[225] The level of penalties imposed in previous cases for the same or similar breaches can provide a useful guide when assessing penalties because there is a need to ensure broad consistency in the exercise of the Authority's penalty discretion.

[226] The disparagement of RPW that has occurred has been far more extreme in terms of its nature, reach, permanence than has occurred in previous cases. In particular the:

(a) $2,000 penalty on an individual in *Kea* for posting a negative 500 word article about Kea's operations and management on the employee's Facebook page, which was removed after three months;[89]

(b) $2,000 penalty on an individual in *Silver Fern Farms* for one email that was seen by five people that made serious allegations and encouraged a boycott of Silver Fern Farms;[90]

(c) $5,000 penalty on a company in *Free* for a letter that called the applicant's competency into question, which was to be used by another party in a negligence claim against her;[91]

(d) $6,000 penalty on an individual in *Parr* for two letters to Ministers of Parliament that disparaged the applicant;[92]

(e) $5,000 penalty on an individual in *Sawyer* for five emails that disparaged the applicant that were seen by no more than ten people, all of whom were already aware of the issues between the parties;[93]

(f) A penalty of $7,500 on a company in *SkyCity* for disparaging a former employee when recording that it would not re-employ him immediately after SkyCity had agreed in the certified settlement that he could reapply for jobs;[94]

(g) $6,000 penalty on an individual in *X v Z* for one Facebook post with very limited reach and five emails that were sent to people involved with the proceedings;[95]

(h) $8,000 penalty on a company in *Bain* for one email, sent to approximately 200 employees/contractors, that implied criminal wrongdoing by a former employee, but did not identify the applicant by name.[96]

Setting provisional penalties for H's and C's breaches of the certified settlement

[227] Provisional penalties for the nine breaches of the certified settlement will be grouped into three categories to reflect the escalating seriousness of the breaches:

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89 *Kea v Petroleum Holdings Limited v McLeod*, above n61.
90 *Silver Fern Farms Limited v Norton*, above n64.
91 *Free v The Shelf Company (No 5) Limited*, above n65.
92 *Western Institute of Technology of Taranaki v Parr*, above n66.
93 *Vice-Chancellor of Victoria University of Wellington v Sawyer*, above n68.
94 *Lumsden v SkyCity Management Limited*, above n52.
95 *X v Z*, above n67.
96 *Bain v Smart Environmental Limited*, above n71.

(a) Breaches that occurred before these Authority proceedings were filed (category 1);

(b) The one breach that occurred after the Authority had issued the third non-publication order, and while the compliance order determination was imminent (category 2);

(c) Breaches that occurred after non-publication orders were in place and after first compliance order had been issued to the parties, but before it had taken effect, because of the time delay condition it contained (category 3).

[228] The category 1 breaches ("*the original post*", "*the first post*", "*the fourth post*" and "*the first ERA post*") should each attract provisional penalties of $3,000 on H and $6,000 on C.

[229] Although these four breaches all initially occurred before the first non-publication order was issued, they still remained on C's public Facebook page for 11 days after non-publication orders had been issued.

[230] H and C also defiantly refused to remove or redact the disparaging material from public view despite the Authority advising them verbally and in writing that should occur.

[231] These breaches also occurred after the Authority had served the *Turuki* determination on H and C. That meant H and C were aware when these breaches occurred that the non-disparagement obligation they had agreed to in a previous certified mediated settlement had been held to be enforceable by the Authority.

[232] These factors show a deliberate flouting by H and C of their legal obligations, that the Authority had already determined they had to adhere to, which means a penalty at the low end of the range is not appropriate.

[233] The single category 2 breach ("*the first DHB email*") breached not just the certified settlement but also the non-publication order that was in place. That breach would not have occurred if H and C had complied with the terms of the Authority's non-publication order that was in place at the time this breach of the certified settlement occurred.

[234] It also occurred when H and C knew a compliance order determination was imminent. These aggravating features mean this breach should attract a slightly increased provisional penalty of $4,000 for H and $8,000 for C.

[235] The remaining four category 3 breaches ("*the sixth ERA post",* "*the seventh ERA post*", "*the eighth ERA post*", and "*the second DHB email"*) all occurred after H and C had been sent a copy of the Authority's first compliance order determination but before it had taken effect. A non-publication order also was in place at the time the category 3 breaches occurred.

[236] The category 3 breaches were blatant breaches of the certified settlement, the non-publication order and of the compliance order, which had made it clear to H and C that they were not to continue disparaging RPW. Provisional penalties for the category 3 breaches should be increased to reflect these aggravating features of the breaches H and C engaged in.

[237] These four category 3 breaches should each attract a provisional penalty of $5,000 for H and $10,000 for C.

[238] The total provisional penalty for H's nine breaches of the certified settlement is therefore $36,000 ($12,000 category 1, + $4,000 category 2, + $20,000 category 3), or 40 per cent of the potential maximum total penalty of $90,000.

[239] The total provisional penalty for C's nine breaches of the certified settlement is therefore $72,000 ($24,000 + $8,000 + $40,000), or 40 per cent of the total potential maximum total penalty of $180,000.

Apportionment of s 149(4) provisional penalties between H and C for breaches of the certified settlement

[240] Having identified provisional penalties for H and C, consideration is given to apportioning provisional liability between them to avoid any possible 'double punishment' concerns.

[241] H and C should therefore each only bear individual responsibility for half of their provisional penalties. That reduces their individual provisional penalty liability to:

(a) $18,000 for H for his nine breaches of the certified settlement, reflecting an average provisional penalty of $2,000 per breach of the certified settlement; and

(b) $36,000 for C for its nine breaches of the certified settlement, reflecting an average provisional penalty of $4,000 per breach of the certified settlement.

Benchmarking this matter against the penalties imposed in previous cases for obstructing an investigation under s134A of the Act

[242] When setting provisional penalties in this matter consistency should be achieved with the following cases in which penalties have been imposed for breaches of s 134A of the Act. These cases involved obstructing an investigation, instead of simply delaying an investigation:

(a) $10,000 penalty (approximately 33 per cent of potential $30,000 maximum penalty) imposed on an individual in *Tex Onsite* for destroying evidence and posting contemptuous comments about the Authority on LinkedIn;[97]

(b) $12,000 penalty (60 per cent of the potential maximum penalty) in *Ahuja v Labour Inspector* on an individual for getting a gang member to intimidate two witnesses in an Authority investigation;[98]

(c) $8,000 penalty (40 per cent of maximum globalised penalty of $20,000) on a company in *United Cleaning Services Ltd* for repeatedly breaching the Authority's directions by failing to provide relevant information to the investigation. On-going failures to comply with directions were treated as one breach;[99]

(d) $6,000 penalty (30 per cent of maximum), on a company in *Manoharan* for a breach that was fully remedied but which had lasted 16 days, and involved an instruction to staff not to support the former employee's claim;[100]

(e) $8,000 penalty in *Ward* (five breaches were globalised into one breach for penalty purposes) on an individual for breaching Authority directions. The

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97 *Tex Onsite Limited v Hill*, above n75.
98 *Ahuja v A Labour Inspector, Ministry of Business Innovation and Employment*, above n76.
99 *Woods v United Cleaning Limited*, above n79.
100 *Monoharan v Chief Executive of Waiariki Institute of Technology (No 2),* above n73.

individual was an employment advocate who had previously had a $4,000 penalty imposed on him by the Authority.[101]

Setting provisional penalties for H's and C's breaches of s 134A of the Act in this matter

[243] As already explained earlier in this determination, H's and C's breaches of s 134A of the Act have been extensively globalised, meaning their maximum potential penalty has already been significantly reduced.

[244] Each of the five breaches of s 134A of the Act that will be separately penalised are discussed below.

(a) Repeated breaches of Authority directions and orders[102]

[245] H and C defiantly recorded the Authority's telephone conference in breach of written and oral directions. They then put false, misleading and deceptive information about that on Facebook to call the Authority's integrity into question.

[246] H and C deliberately breached the Authority's non-publication orders 24 times. H and C also breached the Authority's compliance orders 23 times.

[247] None of H's and C's breaches of the Authority's orders were reasonable or necessary.

[248] Employers, employees and their representatives need to be able to have confidence that non-publication orders issued by the Authority will be effective. H's and C's actions undercut that, so there is a strong public interest to protect when weighing the imposition of penalties on H and C. The provisional penalty needs to be at the very top of the range to punish and deter H and C.

[249] The deliberate breaches of Authority's non-publication orders H and C engaged in were calculated to effectively render nugatory;

(a) The civil obligations they had voluntarily agreed to in the certified settlement; and

(b) The Authority's non publication orders;

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101 *Ward v Concrete Structures Limited*, above n80.

102 *RPW v H*, above n2, at [247]-[254].

(c) The Authority's compliance orders.

[250] H and C publicised their breaches of the Authority's non-publication orders as widely as possible by posting on social media. They both publicly made it clear that they were deliberately defying the Authority's orders.

[251] That cynically meant that even though H and C, after the Court's intervention, removed this material from C's public Facebook page the disparaging and negative remarks about RWP and others were indelibly in the public domain as a result of the social media likes and shares that had already occurred.

[252] Maximum penalties are to be reserved for the very worst breaches, and this is a clear example of that. H is to pay $10,000 for his multiple breaches of the Authority's orders and C is to pay $20,000 for its breaches of the Authority orders. Anything less than that would be unlikely to deter H and C from deliberately breaching Authority orders in future.

(b) Repeated public disparagement of individuals and organisations involved in these proceedings[103]

[253] H and C have engaged in repeated, extreme, extensive disparagement of individuals and organisations involved in these proceedings. This goes beyond mere criticism or legitimate public comment or debate.

[254] These breaches are contemptuous in nature. They appear designed to intimidate, and damage the public reputations of, those involved in these proceedings and undermine public confidence in the employment institutions.

[255] The Employment Court in *RPW v H* recognised that the personalised attacks H and C had engaged in "*could be viewed as abusive*" and that their social media posts "*could only be described as despicable and reprehensible*."[104]

[256] H and C both publicly disparaged RPW's lawyers 10 times; RPW's Board and Chair of the Board 8 times; the Authority 11 times; this Member 28 times; and two other Authority Members who were involved in this matter 9 times.

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103 *RPW v H*, above n2, at [184]-[218], [229]-[246], [255]-[261] and [268]-[291].

104 *RPW v H*, above n1, at [19] and [23].

[257] There were many more instances of disparagement of RPW by H and C in their communications with the employment institutions, but those instances were not pursued by RPW as breaches of the certified settlement. RPW also publicly disparaged Mediation Services, the Employment Court and others.

[258] The sort of extreme public disparagement by H and C engaged in is insidious. It could:

(a) Intimidate other representatives from acting for parties who are involved in litigation with H and C, and/or witnesses or other professionals, from participating in Authority proceedings if they believe that by doing so H and C will publicly attack and abuse them to damage their reputations, if H disagrees with them; and

(b) Lead others to believe there is no avenue available to them to resolve employment relationships problems in a balanced and objective way.

[259] H's and C's multiple breaches of the Authority orders have been globalised into one breach for penalty purposes. The penalty has to be at the top of the range to punish H and C and deter them from attacking and abusing others who are involved in employment litigation they (H and C) are involved with.

[260] H is to pay a provisional penalty of $8,000 for this breach and C is to pay a provisional penalty of $16,000 for public disparagement of others that breaches s 134A of the Act by undermining the overall administration of justice.

(c) Attacks on RPW's counsel [105]

[261] H and C have subjected Mr Hood to disgraceful on-going personalised attacks, because he has acted as counsel for RPW. There is no objective justification for this to have occurred.

[262] H's and C's repeated disparagement of Mr Hood could reasonably be described as abusive. H and C have disparaged Mr Hood in communications with the employment institutions, to other organisations, and on social media. This disparagement has been at the extreme end of the scale because it involves spurious claims of serious wrongdoing.

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105 *RPWv H*, above n2, at [208]-[209], [223]-[226], [229]-[240] and [262]-[267].

[263] There is no objectively reasonable basis for H and C to have personally targeted Mr Hood in this way. H's and C's claims about Mr Hood are therefore more likely than not self-serving attempts by H and C to avoid being held legally accountable for their own actions, by blaming others for the legal problems they have themselves created.

[264] The Authority saw no evidence of wrongdoing by Mr Hood. The available evidence shows he has acted consistently with his professional obligations as counsel. The Authority notes that Mr Hood has taken a calm measured approach to this matter, notwithstanding H's and C's many provocations.

[265] H and C repeatedly accused Mr Hood of serious wrongdoing. H and C subjected Mr Hood to bad faith blackmail complaints that they (H and C) made to the Police and Law Society. H and C publicised these spurious blackmail complaints on C's public Facebook page, presumably to maximise the reputational harm inflicted on Mr Hood.

[266] The malicious "*blackmail*" claim involved Mr Hood sending a "*without prejudice except as to costs*" settlement offer to H and C, in an attempt by RPW to limit its on-going legal costs in these proceedings. This normal litigation practice was disgracefully publicly described by H and C as an example of criminal activity.

[267] The penalty has to be set at a level that appropriately punishes H and C for their unacceptable attacks on, and attempted intimidation of, Mr Hood.

[268] The nature of H's and C's role as employment advocates means they have a high level of on-going interactions with other parties' representatives. The penalty must be set at a level that deters them from continuing to personally attack and abuse not just Mr Hood, but other employment representatives, in future.

[269] H is to pay a provisional penalty of $8,000 to reflect his multiples breaches of s 134A of the Act as they related to Mr Hood. C is ordered to pay a provisional penalty of $16,000 for its multiple breaches of s 134A of the Act as they related to Mr Hood.

(d) Misuse of confidential/sensitive information they obtained as advocates[106]

[270] H and C posted RPW's confidential notes on C's public Facebook page. These notes were marked as confidential and comments posted by H show he knew they were private notes that should not be shared publicly. The notes named one of RPW's employees, identified her position and included private and personal information about her.

[271] H only obtained access to these notes because he was representing RPW employees. H and C kept this information up on Facebook from 20-31 July 2018 in defiance of the Authority's non-publication order.

[272] H's and C's breach could be viewed as a way of intimidating a RPW employee, who had provided information about concerns involving C's clients that H disagreed with, and who was likely to be a witness to matters involving some of C's clients.

[273] H and C disclosed RPW's "*without prejudice except as to costs settlement offer*" on C's public Facebook page. H then used the confidential settlement offer to further attack RPW and its counsel, by falsely claiming the settlement offer was "*blackmail*" and "*bullying*" of him.

[274] H and C also publicly claimed that this Member had been "*implicated in blackmail*" in the (bad faith) criminal complaint H made to the Police, because the without prejudice offer had been withheld from me by another Member.

[275] This settlement offer should have been kept confidential because it related to these on-going proceedings. Instead information about it had to be produced to the Authority as evidence of H's and C's breaches. This undermines normal accepted litigation practice, which encourages settlement to avoid or end litigation.

[276] H and C also repeatedly threatened to post documents/information that should have remained confidential to the parties and Authority on social media.

[277] H is to pay a provisional penalty of $2,500 and C is to pay a provisional penalty of $5,000 for these breaches.

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106 *RPW v H,* above n2, at [219]-[228], [241]-[246] and [281]-[283].

(e) Interfering with RPW's ability to pursue these proceedings[107]

[278] H and C asked the Prime Minister's Office to intervene in these proceedings, seeking to stop the Authority from investigating the claims against them, suggesting there would be negative publicity damaging for the Labour Party if that did not occur.

[279] H and C tried to undermine RPW's ability to pursue these proceedings by emailing its primary funder suggesting the funding DHB would be subject to negative publicity if it didn't prevent RPW from continuing these proceedings. H told the Authority he had wanted the DHB to stop funding RPW and to sack its Board.

[280] H and C also attempted to interfere with RPW's finances by publicly making extremely serious claims that RPW, and its lawyers were misusing public healthcare money and taxpayer funds by pursuing these proceedings. H's and C's breaches are likely to have an adverse impact on RPW's fund raising efforts as it is partly funded by public donations.

[281] H is to pay a provisional penalty of $1,500 and C is to pay a provisional penalty of $3,000 for these globalised breaches involving attempted interference with these proceedings.

Apportionment of provisional penalties between H and C for their breaches of s 134A of the Act

[282] Total provisional s 134A penalties for H are $30,000 ($10,000 + $8,000 + $8,000 + $2,500 + $1,500) being 60 per cent of potential maximum.

[283] Total provisional s 134A penalties for C are $60,000 ($20,000 + $16,000 + $16,000 + $5,000 + $3,000) being 60 per cent of potential maximum.

[284] The provisional penalties should be equally proportioned between H and C, to avoid double punishment. That means:

(a) H is to pay $15,000, being half of what he would otherwise have paid; and

(b) C is to pay $30,000, being half what it would otherwise have paid in penalties.

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107 *RPW v H*, above n2, at [189]-[228].

[285] This apportionment of liability ensures there is no duplication of penalties or double punishment between H and C, given how closely they are related, arising out of the fact that they both engaged in all of the breaches. This represents a significant reduction in their individual liability.

Preet additional consideration 4: means and ability to pay penalty (*Preet* - Step 3)

[286] At this point provisional penalties have been identified as:

(a) $33,000 for H (being $18,000 under s 149(4) and $15,000 under s 134A of the Act), which is less than 24 per cent of the potential maximum penalties that could be imposed; and

(b) $66,000 for C (being $36,000 under s 149(4) and $30,000 under s 134A of the Act), which is less than 24 per cent of the potential maximum penalties that could be imposed.

[287] The Authority now has to consider H's and C's ability to pay penalties at this provisional level.

[288] The Employment Court in *Labour Inspector v Daleson Investments Limited* warned against placing too much weight on financial circumstances of the party being penalised, to avoid "*skewering the underlying statutory scheme*".[108]

[289] The Court observed that s 133A of the Act did not identify 'ability to pay' as a mandatory consideration, thereby suggesting that was not a pivotal factor from Parliament's perspective when penalty setting.[109]

[290] In *Daleson* the company was registered but not trading. It was accepted that Daleson had no ability to pay penalties via its own resources. However two directors had previously provided the company with the financial means to meet its obligations.

[291] The Court in *Daleson* made it clear that liability to pay a penalty is different from subsequent enforcement of it.[110]

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108 *Labour Inspector v Daleson Investments Limited*, above n15, at [44]-[46].
109 Above n108.
110 *Labour Inspector v Daleson Investments Limited*, above n15, at [45].

[292] In *Labour Inspector v Prahb Ltd*, although the defaulting company had a limited ability to pay, the Employment Court imposed significant penalties of $100,000 against the company to reflect the aggravating factors that were present.[111] Additional penalties were imposed against each director. The company's final penalty was reduced by 20 per cent to account for its inability to pay.

[293] A party that wants its financial ability to pay a penalty considered by the employment institutions bears the onus of providing evidence of their financial circumstances.

[294] The Authority identified to H and C that their ability to pay penalties was a relevant factor and invited them to provide evidence about that. They were also offered a non-publication order to ensure their financial information remained confidential.

[295] No financial information or evidence has been provided. Instead H has repeatedly told the Authority that he and C "*will not pay a cent*" that they may be ordered to pay. That appeared to be based on H's misconceived principle – namely that he and C did not accept they had done anything wrong - rather than on their financial circumstances.

[296] There is evidence before the Authority of C's supporters suggesting on Facebook they could contribute to any penalties that are imposed on H and C. H also recently raised thousands of dollars in donations for other employment related litigation, so they appear to have the ability to raise money when required.

[297] It is therefore difficult in the absence of financial information to reduce penalties on the grounds there is inability to pay them. If H and/or C, as the Authority suggested, provided evidence about their financial position as it related to any inability to pay penalties, then that factor could have been more fully assessed.

[298] Evidence by H and C establishing real financial or other hardship that would result from the imposition of penalties could have resulted in a reduction in the provisional penalties to be imposed.

[299] However in the absence of any evidence about H's and C's financial ability to pay penalties the only the information the Authority has is the Employment Court's comment in *RPW v H* that, although H and C had not properly placed evidence about their financial

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111 *Labour Inspector v Prahb Ltd* [2018] NZEmpC 113.

circumstances before the Court, the Court accepted H's statement that C was running at a loss.[112]

[300] However there are simply no specific details, or evidence, about that loss for the Authority to rely on. The Employment Court in *Daleson* commented that it was not uncommon for a company's fortunes to ebb and flow.[113]

[301] Because C was effectively H's private company, he may have taken money out of C in terms of director drawings or shareholder dividends, or H could have received loans from C or dispersed loans from C to others, that if necessary could be called up to meet C's financial obligations. Without evidence the reality of H's and C's financial circumstances remains unclear.

[302] However, out of an abundance of caution regarding the ability to pay factor, the Authority has decided to further reduce the total penalties payable by H and C by another 20 per cent to nevertheless reflect some reduction on financial grounds.

[303] That extra reduction is to account for the Employment Court's comments in *RPW v H* that C was running at a loss and in recognition of the important principle that penalties imposed need to be at a level that is payable.[114]

[304] The 20 per cent reduction is at the same level that was applied by the Employment Court in *Daleson* where the company being penalised was not trading and in *Prabh* where the defaulting company was said to have "*a very limited ability to pay*".[115]

[305] This 20 per cent reduction on the grounds of ability to pay would reduce provisional penalties for H to:

(a) $14,400 (being $18,000 less $3,600 being 20% reduction) for his breaches of the certified settlement;

(b) $12,000 (being $15,000 less $3,000 being the 20% reduction) for the breaches of s 134A of the Act.

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112 *RPW v H*, above n20, at [15].
113 *Labour Inspector v Daleson Investments Limited*, above n15, at [45].
114 *RPW v H*, above n20, at [15].
115 *Labour Inspector v Prabh Limited*, aboven111; and *Labour Inspector v Daleson Investments Limited*, above n15, at [44].

[306] This 20 per cent reduction on the grounds of ability to pay would reduce provisional penalties for C to:

(a) $28,800 (being $36,000 less $7,200 being 20% reduction) for its breaches of the certified settlement;

(b) $24,000 (being $30,000 less $6,000 being the 20% reduction) for its breaches of s 134A of the Act.

[307] This 20 per cent reduction reduces provisional penalties to less than 20 per cent of the total potential maximum penalties that could be imposed.

Preet additional consideration 5: is the anticipated outcome proportionate to the breaches that are being penalised? (_Preet_ - Step 4)

[308] Step 4 of the *Preet* penalty assessment process requires the Authority to apply the proportionality or totality test to ensure the amount of each final penalty imposed is just in all the circumstances.[116]

[309] The Employment Court in *Preet* and *Daleson* stated that when standing back and assessing proportionality the Authority also needed to consider whether the final penalty was likely to be paid.[117]

[310] However the Court also recognised that liability to pay a penalty was different from subsequent enforcement of it and that the instalment regime in s 135(4A) of the Act would address any issues of real financial incapacity.[118]

Proportionality of H's final penalties

[311] H's provisional penalty of $14,400 for his nine breaches of the certified settlement works out at an average penalty of $1,600 per breach. That seems on the low end of the proportionate scale when compared to the severity and extensive nature of the breaches.

[312] H's provisional penalty of $12,000 for his five significantly globalised breaches of s 134A of the Act works out at an average penalty of $2,400 per breach. That also seems on the low end of the proportionate scale especially considering that each separate s 134A breach

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116 *Borsboom v Preet PVT Limited*, above n13, at [151].

117 *Borsboom v Preet PVT Ltd,* above n13, at [191]; and *Labour Inspector v Daleson Investments Limited,* above n15, at [19].

118 *Labour Inspector v Daleson Investments Limited,* above n15, at [45] and [46].

penalty imposed actually covers multiple deliberate obstructions of the Authority's investigation.

[313] H's total provisional total penalties of $26,400 ($14,000 + $12,000) for his 14 breaches (9 of s 149 + 5 of s 134A) under the Act is less than 19% of the total maximum penalties for all of the breaches, many of which had already been significantly globalised.

[314] Standing back and looking at the overall penalties in comparison to the seriousness of the breaches being punished, the strong need for deterrence both particularly and generally, the need for public protection, a total final penalty of $26,400 for an individual seems to appropriately reflect the overall interest of justice in this particular case.

[315] Although the overall penalties imposed on H may seem low in light of the breaches that have occurred, the Authority considers that the total penalty is likely to be significant for an individual who runs a small provincial business that is apparently running at a loss. The imposition of penalties on C is likely to also affect H because he is so closely entwined with C.

[316] The Authority is therefore satisfied that H's final penalties are proportionate when all of the factors to be assessed are weighed, so are set at a level that reflects the overall interests of justice.

Proportionality of C's final penalties

[317] C's provisional penalty of $28,800 for its nine breaches of the certified settlement works out at an average penalty of $3,200 per breach.

[318] C's provisional penalty of $24,000 for its five significantly globalised breaches of s 134A of the Act works out at an average penalty of $4,800 per breach.

[319] C's total provisional total penalties of $52,800 ($28,800 + $24,000) for its 14 breaches (9 of s 149 + 5 of s 134A) under the Act is less than 19% of the total maximum penalised for all of the breaches, many of which had already been significantly globalised.

[320] C's total provisional penalty seems high given the extremely close connection H and C have and the fact that C is a small business which, according to the Employment Court, is apparently running at a loss.

[321] The Authority's task at this stage is to weigh the competing considerations between the need to:

(a) Strongly denounce H's and C's conduct;

(b) Punish H and C for behaviour that is an affront to the good faith principles that underpin employment relations;

(c) Deter H and C from repeatedly engaging in conduct that breach their civil obligations in a certified settlement and their statutory obligations under the Act;

(d) Have a general deterrent effect on the wider community;

(e) Ensure penalties are not set at a level that H and C cannot at some stage pay, even if that needs to be paid by way of instalments.

[322] The Authority is mindful of:

(a) Not setting an artificially low threshold for breaches of this nature because that would affect penalties in future cases due to the need for consistency of penalties to be maintained;

(b) Giving parties who enter into certified settlements confidence that breaches of agreed terms of settlement will be dealt with firmly by the employment institutions;

(c) Setting penalties at a level that can and will actually be paid.

Further reduction of C's final penalties is required

[323] The total provisional penalties imposed on C should be further reduced to reflect that although H and C are separate legal personalities, they are nevertheless effectively one and the same.

[324] A further 50 per cent reduction in the penalties to be paid by C would be appropriate. This generous additional discount:

(a) Takes into account the penalties imposed on H because these are likely to affect C also, due to the close relationship between H and C;

(b) Addresses the general principle that the Authority should not impose penalties at a level that could not ever be paid or which would encourage a party to structure their affairs to avoid liability to pay the penalty;[119]

(c) Accounts for the Employment Court's comment in *RPW v H* that it accepted that C was running at a loss.[120]

[325] Standing back and reflecting on the totality of the adjusted final penalties to be imposed on C of $26,400 seems proportionate to the deliberate and defiant wrongdoing that has occurred.

Final penalties imposed on H and C

[326] The application of the proportionality and/or totality test has resulted in final penalties being imposed on H and C that require each of them to pay an individual total overall penalty of $26,400 for the multiple serious breaches that occurred which were a serious affront to:

(a) The objects of the Act; and

(b) The overall effective administration of justice by the employment institutions.

[327] The combined total penalties to be paid by H ($26,400) and C ($26,400) together would be $52,800.

[328] Total penalties of $52,800 divided by the 28 breaches that are being penalised (14 each for H and C) is on average $1,885 per breach. That is less than 13% of the total potential maximum penalties of $420,000 combined for H ($140,000) and C ($280,000) that could be imposed.

[329] The Authority notes that a ratio-based approach to penalties is not, as the Employment Court in *Daleson* observed, "*anything other than the loosest possible cross check*" because the penalties imposed will always be "*intensely dependent*" on the particular circumstances of each case.[121]

[330] The Authority is satisfied that the final overall penalties imposed on H and C were not inconsistent with other penalty cases, namely:

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119 *Borsboom v Preet PVT Limited*, above n13, at [191]; and *Labour Inspector v Daleson Investments Limited*, above n15, at [45].

120 *RPW v H*, above n20, at [15].

121 *Labour Inspector v Daleson Investments Limited*, above n15, at [62].

(a) The $5,000 imposed on *Free* for one disparaging letter;[122]

(b) The $7,500 imposed on *SkyCity* for disparaging information relating to the former employee's unsuitability for re-employment;[123]

(c) The $8,000 penalty imposed on an individual in *Sawyer* for 5 emails seen by 10 people who were aware of the issues between the parties;[124]

(d) The $6,000 imposed on an individual, *Z* for one Facebook post with minimal reach and five disparaging emails to people involved in the proceedings;[125]

(e) The $8,000 imposed on a company in *Smart Environmental* for sending one email to approximately 200 of its employees/contractors that did not name the former employee, but which suggested a Police complaint could be made about irregularities it had discovered.[126]

(f) The $6,000 penalty approved by the Employment Court imposed for multiple breaches of the confidentiality clause in the certified mediated settlement that occurred in *ITE v ALA.* The breaches involved emails with links to a website with videos about the former employee's employment problem.[127]

(g) The $12,000 penalty imposed by the Employment Court in *Ahuja* on an individual for arranging for a gang member to intimidate two witnesses so they would not appear at the Authority's investigation into claims by a Labour Inspector.[128]

[331] Although the two High Court cases that involved fines being imposed on individuals for contempt of court are outside of the employment jurisdiction, so are not directly comparable, the obstruction of an Authority's investigation is similar in nature to (although admittedly not the same as) the obstruction of justice that underlies a contempt of court charge.[129]

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122 *Free v Shelf Company No 5 Limited,* above n65.
123 *Lumsden v SkyCity Management Limited,* above n52.
124 *Vice-Chancellor of Victoria University of Wellington v Sawyer,* above n68.
125 *X v Z,* above n67.
126 *Bain v Smart Environmental Limited,* above n71.
127 *P v Q* [2015] NZERA Auckland 181; and *ITE v ALA,* above n81.
128 *Ahuja v A Labour Inspector, Ministry Business Innovation and Employment*, above n76.
129 *Solicitor General v Miss Alice,* above n82; and *Solicitor-General v Krieger* above n84.

[332] These two High Court cases reflect the general principle that a party is not to take the laws into their own hands just because the party thinks that the Court in those cases (or the Authority in this case) was wrong.

[333] The penalties imposed in this case for multiple serious breaches do not appear to be out of line with the $5,000 fine imposed by the High Court in:

(a) *Mi*ss *Alice* for the breach of a solicitor's undertaking by disclosing a report to the media, which also included a three month bar from legal practice which had serious financial consequences;[130] or

(b) *Krieger* for disobeying an injunction by linking to a website that published the report that was not to be published.[131]

Who should the penalties that have been imposed be paid to?

[334] Section 136(1) of the Act, subject to s 136(2) of the Act, requires penalties to be paid into the Authority, to then pay into the Crown bank account.

[335] Section 136(2) of the Act provides that the Authority may order some or all of any penalty recovered be paid to "*any person*". This reference to "*any person*" is wider than just the parties.

[336] The Employment Court and Authority have previously ordered part of penalties imposed to be paid to those affected by the wrongdoing that has been penalised. That has included witnesses,[132] an advocate's client,[133] an affected party,[134] and non-parties who had been disparaged.[135]

[337] The penalties imposed in this case have required a response from the Authority to reflect the broader public interest in punishing and deterring the actions that H and C have engaged in in respect of this matter.

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130 *Solicitor General v Miss Alice*, above n82.
131 *Solicitor-General v Krieger* above n84.
132 *Ahuja v A Labour Inspector, Ministry Business Innovation and Employment*, above n76.
133 *Ward v Concrete Structures (NZ) Limited*, above n80.
134 *Free v Shelf Company No 5 Limited*, above n65; *X v Z*, above n67; and *Bain v Smart Environmental Limited*, above n71.
135 *Vice-Chancellor v Victoria University of Wellington v Sawyer*, above n68.

[338] However, RPW has had to go to considerable trouble and expense in bringing these multiple breaches to the Authority's attention to enable it to be addressed, both for its benefit and for the broader public good.

[339] RPW is not able to be compensated for the loss or damage H's and C's breaches have caused it through the multiple breaches of the Act that have occurred. Nor will RPW be able to fully recover by way of costs the expense it has had to go to, in furtherance of the wider public interests that apply to this matter, to ensure H and C meet their civil obligations.

[340] It is therefore appropriate to order H and C to pay part of the penalties imposed on them under sections 149(4) and 134A of the Act to RPW and not just the Crown.

[341] Mr Hood has also been subjected to disgraceful personalised attacks for continuing to exercise his professional responsibilities as RPW's counsel. It is therefore appropriate to apportion some of the s 134A penalty to be paid to Mr Hood personally to recognise the harm he has suffered, that cannot be compensated.

[342] The Employment Court in *Stormont v Peddle Thorp Atkin Limited; Lumsden v SkyCity Management Limited* and *Nicholson v Ford* adopted a ratio of 75% to the wronged person and 25% to the Crown.[136] The Employment Court in *Ahuja v A Labour Inspector, Ministry of Business Innovation and Employment* directed that half of the imposed penalty be split between the two witnesses who had been intimidated.[137]

Apportionment of the penalties imposed on H and C

[343] Some of the penalties H and C have been ordered to pay should be paid to RPW and Mr Hood, to recognise the harm they have suffered as a result of H's and C's breaches.

[344] The Authority orders, under s 136(2) of the Act that, of the total $14,400 penalty recovered under s 149(4) of the Act, H is to pay:

(a) $10,000 to RPW; and

(b) $4,400 to the Crown.

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136 *Stormont v Peddle Thorp Atkin Limited* [2017] NZEmpC 71; *Lumsden v Sktcity Management Limited*, above n52; and *Nicholson v Ford*, above n15.

137 *Ahuja v A Labour Inspector, Ministry Business Innovation and Employment*, above n76.

[345] The Authority orders under s 136(2) of the Act that, of the total $12,000 penalty recovered for the breaches of s 134A of the Act, H is to pay:

(a) $3,000 to Mr Hood;

(b) $5,000 to RPW;

(c) $4,000 to the Crown.

[346] The Authority orders under s 136(2) of the Act that, of the total $14,400 penalty recovered for breaches of s 149(4) of the Act, C is to pay:

(a) $10,000 to RPW; and

(b) $4,400 to the Crown.

[347] The Authority orders under s 136(2) of the Act that, of the total $12,000 penalty recovered for breaches of s 134A of the Act, C is to pay:

(a) $3,000 to Mr Hood;

(b) $5,000 to RPW;

(c) $4,000 to the Crown.

Should penalties be paid by instalments?

[348] Section 149(4) of the Act allows the Authority to order the payment by instalments of penalties it imposes "*but only if the financial position of the person paying the penalty requires it.*"

[349] H and C elected not to provide the Authority with any information or evidence about their ability to pay penalties. They made that choice despite the Authority expressly advising H and C that an inability to pay penalties was a relevant factor it would consider when assessing penalties, if they provided evidence about their financial position.

[350] The failure by H and C to provide any information or evidence about their financial position means that the requirements of s 149(4) of the Act have not been met. Accordingly, no order for payment by instalments can be made at this point.

Costs

[351] RPW as the successful party is entitled to a contribution towards its actual legal costs. It seeks indemnity costs so there is no prospect of the parties resolving costs by agreement.

[352] In addition to addressing indemnity costs, RPW is invited to provide costs submissions on how the application of the Authority's usual daily tariff-based approach to costs should be applied in this case, if its indemnity costs application does not succeed.

[353] RPW is invited in its costs submissions to include:

(a) The number of days costs should notionally be awarded for;

(b) Any factors that warrant adjustments being made to the notional daily tariff, and

(c) Comparable cases, in which adjustments to the notional daily tariff have been made by the Authority.

[354] The following timetable applies to the Authority's assessment of costs:

(a) RPW has 14 days within which to file its cost submissions;

(b) H and C both have 14 days within which to respond. They are encouraged to provide affidavit evidence about their ability to pay costs - if that is a factor they want the Authority to consider when it is assessing costs. The Authority has previously identified to H and C what relevant financial information it would expect to see if inability to pay if a factor to be considered.

(c) RPW then has a further seven days from receipt of H's and C's costs submissions within which to file any reply submissions.

[355] Any departures from this timetable require the prior written authorisation of the Authority.

Summary outcome of each of the issues that have been determined

[356] The Authority's findings on each of the issues to be determined are:[138]

(a) H is ordered to pay a penalty of $14,400 under s 149(4) of the Act for his nine breaches of the certified settlement;

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[138] See the list of issues to be determined at paragraph [17] of this penalties determination.

(b) C is ordered to pay a penalty of $14,400 under s 149(4) of the Act for its nine breaches of the certified settlement;

(c) H is ordered to pay a penalty of $12,000 under s 134A(1) of the Act for his five significantly globalised breaches of s 134A of the Act;

(d) C is ordered to pay a penalty of $12,000 under s 134A(1) of the Act for its five significantly globalised breaches of s 134A of the Act;

(e) Total penalties of $26,400 under the Act have therefore been imposed on H for his 14 breaches (being 11 breaches of the certified settlement and five breaches of s 134A) of the Act.

(f) H is ordered to pay part of the recovered penalties imposed under s 149(4) of the Act as follows:

  (i) $10,000 to RPW;

  (ii) $4,400 to the Crown.

(g) H is ordered to pay part of the recovered penalties imposed under s 134A of the Act as follows:

  (i) $3,000 to Mr Hood;

  (ii) $5,000 to RPW;

  (iii) $4,000 to the Crown.

(h) Total penalties of $26,400 under the Act have therefore been imposed on C for its 14 breaches (being 11 breaches of the certified settlement and five breaches of s 134A) of the Act.

(i) C is ordered to pay part of the recovered penalties imposed under s 149(4) of the Act as follows:

  (i) $10,000 to RPW;

  (ii) $4,400 to the Crown.

(j) C is ordered to pay part of the recovered penalties imposed under s 134A of the Act as follows:

  (i) $3,000 to Mr Hood;

  (ii) $5,000 to RPW;

(iii) $4,000 to the Crown.

(k) Costs will be determined in accordance with the timetable advised to the parties.

Reminder to H, C and C's clients

[357] These proceedings are on-going so H, C, and C's clients are reminded of the risk of penalties being imposed for any further breaches of s 134A of the Act that occur.[139]

Rachel Larmer
Member of the Employment Relations Authority

[139] *RPW v H,* above n2, at [324].