

**This determination includes an order
prohibiting publication of confidential
information.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 25
5559723

BETWEEN	TEX ONSITE LIMITED Applicant
A N D	GRAEME BRETT HILL Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Ms Dew and Mr Choi, Counsel for the Applicant Respondent in person
Investigation Meeting:	16 and 17 December 2015 at Auckland
Submissions Received:	9 and 23 December 2015 from the Applicant 9 and 23 December 2015 from the Respondent
Date of Determination:	21 January 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Graeme Hill breached express clauses contained in his individual employment agreement with the applicant, Tex Onsite Limited, including:**
- **Six month non-solicitation of customers clause;**
 - **Confidential information clause; and**
 - **Good faith in employment clause.**
- B. Mr Hill breached his implied duties of fidelity and loyalty to Tex Onsite Limited during the period of his employment.**

- C. As a result of Mr Hill's unlawful solicitation of Tex Onsite's customer, Customer X, Mr Hill is liable to pay three years' projected loss of profits of \$70,736 as special damages to Tex Onsite Limited.**
- D. Mr Hill is liable to pay Tex Onsite Limited special damages of \$2,572 being the costs associated with the forensic analysis of his computer and mobile devices.**
- E. Mr Hill is liable to pay Tex Onsite Limited special damages of \$8,750 for management time incurred in taking steps to mitigate the effect of his breaches.**
- F. Mr Hill is liable to pay Tex Onsite Limited general damages of \$10,000 in respect of his breaches of his express and implied employment obligations.**
- G. Mr Hill is to pay Tex Onsite interest on the entire amount of damages awarded at the rate of 5 percent a year from now until they are paid.**
- H. Mr Hill is liable to pay a penalty of \$8,000 under s.134(1) of the Employment Relations Act 2000 (the Act) for breaching the above terms of his employment agreement.**
- I. Mr Hill is liable to pay a penalty of \$10,000 under s.134A of the Act for obstructing the Authority's investigation.**
- J. Mr Hill must pay the whole of the penalties awarded to Tex Onsite Limited under s.136(2) of the Act.**
- K. Mr Hill is to immediately return any Tex Onsite property in his possession to Tex Onsite.**
- L. Costs are reserved. Mr Hill has 28 days from the date of this determination to file and serve a memorandum of costs in response to the closing submissions on behalf of Tex Onsite dated 23 December 2015 seeking indemnity costs and expenses.**

Employment relationship problem

The parties

[1] The applicant company, Tex Onsite Limited (Tex Onsite) provides a high voltage testing and calibration service for the power industry in New Zealand.

[2] The respondent, Mr Graeme Hill, is a former employee of Tex Onsite. Mr Hill is currently a director and shareholder of Mobile Test'n'Cal New Zealand Limited (Mobile Test'n'Cal NZ).

[3] Mobile Test'n'Cal NZ is a franchisee of Mobile Test'n'Cal International Pty Limited, an international franchisor with a number of franchisees, including in Australia. Mobile Test'n'Cal NZ provides a mobile electrical testing and calibration service throughout New Zealand and is a competitor of Tex Onsite.

Tex Onsite's claims

[4] Tex Onsite says Mr Hill breached express and implied obligations to it arising out of his employment. Following his resignation, Tex Onsite says Mr Hill solicited its customers, including a customer of more than 9 years, Customer X. Mobile Test'n'Cal NZ now services Customer X.

[5] Tex Onsite says Mr Hill's actions in approaching Customer X and its other customers was in breach of an express term in his individual employment agreement (employment agreement) not to solicit its customers for 6 months after he left his employment.

[6] Tex Onsite says Mr Hill misused its confidential information both during and post his employment by it. Tex Onsite says Mr Hill accessed, copied and used its customer database, pricing, sales and other confidential information.

[7] Tex Onsite also says that Mr Hill misused its information, by deleting emails from his work Toshiba laptop just before he left his employment with it.

[8] Tex Onsite says that during his employment, Mr Hill breached his implied duties of fidelity, loyalty and to act in its best interests by assisting its competitor, Design Engineering Limited (Design Engineering), to locate and establish a premises in the North Island of New Zealand.

[9] Tex Onsite seeks general and special damages in respect of the losses it says it has suffered as a result of Mr Hill's breaches of his employment agreement, including the loss of business following the solicitation by Mr Hill of its longstanding customer, Customer X.

Mr Hill's response

[10] Mr Hill says he became increasingly frustrated with the way in which Tex Onsite was operating its business and its "*cavalier attitude*" towards its customers. Mr Hill says this frustration led to his resignation and it was not for some time that he approached some of Tex Onsite's customers to offer services not provided by Tex Onsite and so was not in breach of his employment agreement. Further, Mr Hill says these approaches did not lead to any work being awarded to him or any resulting damage to Tex Onsite for which he can be liable.

[11] Mr Hill says he did approach Customer X but this was after the expiration of the 6 month non-solicitation clause and so there was no breach of his employment agreement.

[12] Mr Hill claims Tex Onsite had a monopoly being the only mobile service provider of high voltage testing in the North Island of New Zealand. Mr Hill says Tex Onsite took advantage of its position in the market by acting in a high handed manner towards its customers and failing to provide a quality service. Mr Hill says it was this conduct and not his actions that led to Tex Onsite's loss of customers.

[13] Mr Hill describes Tex Onsite's action in bringing this claim against him for breach of his employment obligations as anti-competitive designed to put him out of business.

Orders prohibiting publication of certain information

[14] Tex Onsite has produced information relating to its revenue, and its past and projected profits in order to establish losses it claims it has suffered as a result of Mr Hill's alleged breaches. Tex Onsite is seeking total damages of \$140,808 against Mr Hill which include general and special damages. Details of Tex Onsite's customer in respect of which it seeks special damages is suppressed and not to be published. The customer will be referred to as customer X.

[15] Apart from the amounts claimed by Tex Onsite as losses and which are published in this determination, all other financial information including Tex Onsite's revenue figures, its past and projected profits is commercially sensitive.

[16] I order that this commercially sensitive information is not to be published. Further, the revenue and net profit documents produced by Tex Onsite in the common bundle of documents filed in the Authority are commercially sensitive and are to remain confidential and are not to be published or disclosed to any third party.

The Authority's investigation

[17] As permitted by s.174 E of the Act, this determination has not recorded all of the extensive evidence received. Rather, it has stated relevant findings of fact and law and expressed conclusions on the issues requiring determination.

[18] Witness statements were filed for Tex Onsite, by its General Manager, Mr Ross Gamble and by Mr Michael Spence, Digital Forensic Specialist. Mr Graeme Hill filed a witness statement along with Mr Andre Borrell, Chief Executive Officer of the franchise Mobile Test'n'Cal, which operates in Australia. Mr Borrell holds a 90% shareholding in Mobile Test'n'Cal International Pty Limited and a 75% shareholding in Mobile Test'n'Cal NZ.

Issues

[19] The issues for the Authority to determine are as follows:

- (a) Did Mr Hill breach the following express and implied terms of his employment agreement:
 - (i) Duties of fidelity and loyalty during his employment;
 - (ii) Confidentiality obligations during and post-employment;
 - (iii) Six month non solicitation clause post-employment?
- (b) If the answer to any or all of the above questions is "yes", did such breaches cause Tex Onsite losses and if so is Mr Hill liable to pay damages to Tex Onsite?

- (c) If Mr Hill has breached his employment obligations above, is he liable for penalties and if so how much?
- (d) Did Mr Hill obstruct the Authority's investigation? If the answer is "yes", what penalties is he liable to pay?

First Issue

Did Mr Hill breach the following express and implied terms of his employment agreement?

- (a) **Duties of fidelity, loyalty and good faith during his employment;**
- (b) **Confidentiality obligations during and post-employment;**
- (c) **Six month non solicitation clause post-employment?**

First Issue (a): Duties of fidelity, loyalty and good faith

Tex Onsite

[20] Tex Onsite has operated in New Zealand since 2005. Tex Onsite provides electrical testing services to the power industry in New Zealand. Tex Onsite's core services include high and low voltage electrical protective equipment testing, acoustic emission testing, instrument calibration and power industry equipment sales and repairs.

[21] Until 2015, Tex Onsite was the only company in the North Island of New Zealand which provided a mobile high voltage testing service. Design Engineering Limited (Design Engineering) provided this service in the South Island.

[22] The mobile high voltage testing service enables Tex Onsite to take its testing and calibration equipment to its customers and to provide an on-site same day service. Upon completion of testing, customers are able to access their test results on Tex Onsite's database to ensure regulatory compliance. Tex Onsite has developed its own testing practices and procedures around its mobile testing service which are confidential to it.

[23] Testing and calibration is required in cycles by Tex Onsite's customers. Testing typically occurs in cycles every three, six and/or twelve months. Tex Onsite holds a database of customers including their testing schedules and contacts. Customers are contacted by Tex Onsite in advance of their testing cycle to schedule

upcoming testing and are followed up after the completion of the testing to ensure satisfaction with the service received.

[24] A number of Tex Onsite's customers have 3 yearly services supplier contracts with Tex Onsite and many do not. Mr Ross Gamble, a director and the general manager of Tex Onsite, says it is normal in the industry for customers who do not have services supplier contracts to review their service arrangements every three years and this was the norm for Tex Onsite's customers.

Mr Hill's employment by Tex Onsite

[25] Mr Gamble and Mr Hill have known each other for more than 30 years through their respective employment in the electricity industry in New Zealand. Up until his employment by Tex Onsite, Mr Hill had been a communications technician, a project manager and a sales manager in the electricity industry.

[26] In July 2013, Mr Hill was "between jobs" after leaving a position at Cuthbert Stewart Limited. Mr Hill made contact with Mr Gamble about opportunities at Tex Onsite. Mr Hill and Mr Gamble met at Mr Gamble's home on 16 July 2013 to discuss the role of a "Market Manager". Mr Gamble was interested in creating a role of "Market Manager" which could focus on greater customer service for Tex Onsite's growing customer base. Mr Gamble had effectively been doing the customer service/marketing role himself in addition to running the company and felt the time had come for someone to be employed specifically to undertake such a role.

[27] The role was a senior one which would involve contact by Mr Hill with Tex Onsite's existing customers and developing new customers. The role would mean access by Mr Hill to Tex Onsite's customer database, testing practices, procedures, pricing, financial and confidential information.

[28] Mr Gamble felt that although Mr Hill did not have material experience in the high voltage compliance testing market, he did have good knowledge of the power industry in New Zealand and would be a good fit for Tex Onsite. Also of importance to Mr Gamble was that he had known Mr Hill for some 30 years.

[29] Mr Gamble and his fellow director, Mr Michael Kirwan agreed to offer Mr Hill the Market Manager position at a remuneration which reflected the seniority of the position. Mr Hill accepted the role. A package was agreed which included an

annual salary of \$87,000 gross, the use of a company vehicle, a Samsung Galaxy smartphone (Samsung phone) and a Toshiba laptop computer for work purposes. The total package amounted to a value of approximately \$107,000 gross per annum. An iPad for work purposes was subsequently provided to Mr Hill.

Employment Agreement- 17 July 2013

[30] Mr Hill was employed pursuant to a written employment agreement dated 17 July 2013 and started at Tex Onsite on 23 July 2013. Mr Gamble says he ensured the employment agreement included clauses restricting the solicitation of clients and employees and the use of confidential information. The employment agreement also included a clause concerning the use of Tex Onsite's copyright and intellectual property. These clauses were very important to Mr Gamble because Mr Hill was to be employed in a senior role and have access to Tex Onsite's customer data base, its confidential information and would have regular contact with customers and employees.

[31] The employment agreement signed by the parties included the following clauses which are relevant to the matter:

4. Obligations of the Relationship

...

4.2 Obligations of the Employee

The Employee shall:

...

- (iii) *Conduct their duties in the best interests of the Employer and the employment relationship;*
- (iv) *Deal with the Employer in good faith in all aspects of the employment relationship.*

...

11.1 Confidential information

The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to, information about the Employer's business.

11.2 Copyright and other Intellectual Property

All work produced for the Employer by the Employee under this agreement or otherwise and the right to the copyright and all other intellectual property in all such work is to be the sole property of the Employer.

11.4 Use of Internet and Email

The Employee will have access to email and the internet in the course of their employment. The Employee shall ensure that at all times their use of the email and internet facilities at work meets the ethical and social standards of the workplace. Whilst a reasonable level of personal use is acceptable to the Employer, this must not interfere with the Employee's employment duties or obligations, and must not be illegal or contrary to the interests of the Employer. The Employee shall also comply with all email and internet policies issued by the Employer from time to time.

11.6 Non-solicitation of clients

The Employee agrees that for a period of six months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer.

[32] Mr Gamble says when Mr Hill started in his role, he was provided with USB data sticks by Tex Onsite on which to store client testing information. Mr Hill was also provided with a Samsung phone, Toshiba laptop and an iPad which enabled him to work remotely when he was away on trips throughout New Zealand calling on customers. Mr Hill had contact with most, if not all, customers of Tex Onsite.

Market Manager role

[33] The job description for the Market Manager role included to:

- *Visit major customers on a frequent basis,*
- *Identify and deal with new customers,*
- *Price and quote works to customers..*
- *Identify and create Marketing Material to sell the services of Tex Onsite..,*
- *Visit sites and manage/complete works...*
- *Compare existing works from Database to what extras can be done for customers,*
- *Identify Tex Onsite's compliance management system to customers ...*

[34] Mr Hill's role was one in which he had access to, and was aware of, those customers which were of most value to Tex Onsite. Mr Hill also had access to Tex Onsite's confidential pricing information and processes.

Mr Hill's trip to visit customers - December 2013

[35] In late November 2013, following a request by Mr Hill, Mr Gamble agreed to a business trip to the South Island so that Mr Hill could visit Tex Onsite's customers. The following email dated 27 November 2013 and produced to the Authority at the investigation is from Mr Hill to Mr Gamble. Mr Hill says:

Morning Ross, I am thinking about doing a flying visit to the South Island to have some bbq's/goodwill functions for our most loyal customers, to reinforce our position in the event that Design Engineering gets more mobile. Looking in the database it would be Independent Lines, Main Power, Otago Power Services, E.A. Do I have a budget for this type of activity? If so are there any others you would like me to attend? ...

[36] The impression given by Mr Hill in his email is that the trip is to manage any potential competition by Design Engineering by connecting with Tex Onsite customers. Mr Hill agreed at the investigation meeting that this was the purpose of his trip.

[37] Mr Gamble's email response was enthusiastic, agreeing to the South Island trip and to offering some of the customers beer and wine and others a full barbeque at which Mr Hill could develop and build relationships with customers.

[38] During his trip to the South Island, Mr Hill had a planned meeting with Mr Dean van Buuren, the managing director of Design Engineering, a competitor of Tex Onsite.

[39] A copy of a calendar entry in Mr Hill's diary produced to the Authority has an appointment title: "*Graeme Hill staying the night in Timaru so need to meet up and discuss some options*". The date of the meeting was scheduled for 11 December 2013 at 8pm and the organiser of the event was Mr Van Buuren.

[40] Mr Hill accepted meeting Mr Van Buuren when he visited Tex Onsite's customers in the South Island in December 2013. Mr Hill told the Authority that Mr Gamble had spoken with Mr Van Buuren about the possibility of Design Engineering concentrating on heavy duty testing work and leaving the high voltage testing work to Tex Onsite. Mr Hill said he telephoned Mr Van Buuren the day before his trip to the South Island to discuss this further.

[41] I do not accept Mr Hill's explanation. Mr Hill did not tell Mr Gamble about the meeting scheduled with Mr Van Buuren either before or following the South Island trip. This omission is very telling in my view.

[42] Further documentary evidence including email correspondence, calendar appointments and GPS logs for Mr Hill's company vehicle, was produced to the Authority. This evidence, which is undisputed, shows that following the trip in December 2013, Mr Van Buuren and Mr Hill were in regular communication.

[43] Mr Hill's explanation for the ongoing contact was that he was just being friendly, he knew Mr Van Buuren wanted him to work for him and he wished to keep his options open. I do not accept Mr Hill's explanation.

[44] The email correspondence reveals the communication between Mr Hill and Mr Van Buuren concerned locating and establishing a premises for Design Engineering in the North Island and job opportunities for Mr Hill with Design Engineering. Email communication in January and February 2014 between Mr Hill and Mr Van Buuren reveal Mr Hill's efforts to locate a suitable premises for Design Engineering in Hamilton.

[45] The following is an email exchange on 30 April 2014 between Mr Van Buuren and Mr Hill:

*From: Graeme Hill
Date: 30/04/2014 10.39AM ...
To: Dean Van Buuren
Subject: Hamilton
Hi Dean,
Sorry for the lack of contact over the past 2 weeks. Tex Onsite offered me some changes in my contract and salary in an effort to keep me...I had to give this due consideration but have decided to stick with my original decision to move on. So I am very keen to discuss detail if this is suitable to you.*

*From Dean Van Buuren
Date: 30/04/2014 11:26...
To Graeme Hill
Subject Re: Hamilton
Great Graeme things are picking up and we are going good.
5 of us including tony are in Fiji back next week.
I will give you a call asap.
Regards Dean*

*From: Graeme Hill
Date: 30/04/2014 10:01 PM
To: Dean Van Buuren
Subject: Re: Hamilton
Ah that explains why no one was at the Hamilton office when I called in. The way things are at Tex I reckon I could bring 2 or 3 testers with me including the AE specialist. Not a happy ship. Look forward to talking soon.*

*From: Dean Van Buuren
To: Graeme Hill
Date: Wednesday 30 April 2014 10.12 PM
Subject: Re Hamilton
I would be interested in key personal with good skills although need to see what equipment is needed also. The AE is a key area of expertise and good form my Hamilton office. Give me some figures and incentives Graeme.
Cheers Dean*

[46] At the investigation meeting, Mr Hill accepted that he had assisted Mr Van Buuren to find premises in the North Island for Design Engineering, a competitor of Tex Onsite. This activity occurred while Mr Hill was employed by Tex Onsite.

[47] Mr Hill held a senior role at Tex Onsite and was trusted by Mr Gamble. Mr Hill had a duty to inform his employer, Tex Onsite that he was aware of its competitor, Design Engineering's intentions to establish itself in the North Island. Further, Mr Hill actively assisted Design Engineering to establish itself and to locate suitable premises.

[48] Mr Hill owed obligations of loyalty, fidelity and good faith to his employer Tex Onsite. His actions in assisting Tex Onsite's competitor were in breach of these implied and express obligations.

Mr Hill's first resignation- 7 May 2014

[49] Mr Hill says that he began work at Tex Onsite enthusiastically but that he soon became frustrated at what he described as Mr Gamble's "*cavalier attitude*" towards Tex Onsite's customers. Mr Hill claimed that many of the customers that he visited were unhappy with the service they were receiving from Tex Onsite and that despite raising these concerns regularly with Mr Gamble, nothing was done. Mr Hill says that by April 2014 he had become despondent, he didn't think his concerns were ever going to be satisfactorily addressed and decided to resign.

[50] Mr Gamble denies Mr Hill's reason for resignation related to any frustration with the way in which the business was operating. Mr Gamble says Tex Onsite has a process for dealing with complaints from customers and that none were referred to him by Mr Hill during his employment. Mr Gamble says if complaints had been referred to him, they would have been dealt with by him immediately.

[51] A review of the email correspondence between Mr Hill and Mr Gamble at the time of Mr Hill's resignation on 7 May 2014 revealed that Mr Hill resigned immediately following an email from Mr Gamble questioning his use of the company fuel card. Mr Gamble questioned purchases by Mr Hill which did not appear related to the use of his vehicle and questioned whether the fuel card had been used for more than one vehicle.

[52] Mr Hill responded by email with an explanation for the purchases and ended with his resignation as he felt he no longer had the trust and confidence of Mr Gamble and his wife, Mrs Karen Gamble.

[53] Following receipt of Mr Hill's resignation, Mr Gamble immediately emailed him saying that he did not wish to accept his resignation but that he would like to spend some time clarifying expectations and responsibilities. Mr Gamble concluded the email by saying:

... I would like to make it very clear that this is in no way a disciplinary situation. The company and I wish to do everything we can to support you in your role and I would be happy to discuss how we can assist you going forward ...

[54] I do not accept that Mr Hill's resignation was due to frustration over Tex Onsite's treatment of customers. Certainly, this was not given as a reason for his resignation in the email correspondence on 7 May 2014, nor was Mr Gamble told this was the reason.

[55] It is hard to reconcile Mr Hill's claims of frustration with the "*cavalier manner*" in which Tex Onsite dealt with its customers as being the reason for his resignation, with the evidence that, with Mr Gamble's agreement, Mr Hill travelled to the South Island in December 2013, for the purpose of meeting and greeting and talking to Tex Onsite customers. It is also hard to reconcile Mr Hill's claims with the evidence, that unknown to Mr Gamble, Mr Hill was in regular contact with Tex Onsite's competitor, Design Engineering regarding establishment of premises in

Hamilton and job opportunities for himself and possibly another specialist employee from Tex Onsite.

[56] In my view, Mr Hill was planning to leave Tex Onsite to work for its competitor, Design Engineering. At almost exactly the same time as he was discussing premises for, and a job offer with Design Engineering he was called to account by Mr Gamble over his use of the company fuel card. In response, Mr Hill resigned.

[57] Mr Hill was not a credible witness. Mr Hill attempted at the investigation meeting to paint a picture that his resignation in May 2014 was due to his dissatisfaction with Mr Gamble's treatment of customers. This was not the case as the email correspondence at the time and the evidence made clear.

Mr Hill's resignation - 8 September 2014

[58] Mr Gamble did not wish for Mr Hill to resign. After discussions with Mr Gamble, Mr Hill agreed to stay on. Mr Hill says things did not improve at Tex Onsite and he struggled with the same frustrations until September 2014 when he decided to resign. Mr Hill resigned on 8 September 2014, his final day being 3 October 2014.

[59] Mr Hill rang Mr Gamble and gave as his reasons for resigning that he had been travelling extensively in the role which required a lot of time away from home overnight and for days at a time and his wife's illness. Up until this time, Mr Hill had not mentioned to Mr Gamble that his wife was ill.

[60] In an email dated 10 September 2014, Mr Hill confirmed in writing that he had *"decided to move on from Tex Onsite for personal reasons. I would like to make my final day 3rd October if that works for you ..."*.

[61] Mr Gamble's response was *"I could say no I'm not accepting it, yeah that's cool mate. Thanks for everything."*

[62] Mr Hill says that at the time he handed his resignation in to Tex Onsite he did not know what he was going to do beyond the next month or two. I do not accept this.

Design Engineering

[63] Mr Hill's bank statements show he received \$1,197.08 from Design Engineering on 15 October 2014 and every week following until he left Design Engineering to establish his own company, Mobile Test'n'Cal NZ in March 2015. The entries in the bank statements record the payments as "*Hill G Dewages*" and "*Hill G De EngWages*".

[64] Mr Hill says he began working as a contractor for Design Engineering on 13 October 2014 but the arrangement reached with Mr Van Buuren was that he would be paid for a full week's work on 15 October 2014.

[65] My view is that it is more likely than not that Mr Hill had already started working for Design Engineering before leaving Tex Onsite and that the arrangement was more likely one of employment. Even if I am incorrect, Mr Hill began working for Design Engineering less than two weeks after his last day at Tex Onsite. I do not accept that at the time of his resignation from Tex Onsite, Mr Hill "*did not know what he was going to do beyond the next month or two...*"

Breaches by Mr Hill of his employment obligations

[66] On the balance of probabilities, it is my view from the evidence, that from December 2013 until his resignation in September 2014 Mr Hill had been planning to leave Tex Onsite and work for Design Engineering. During this time, and without the knowledge of Tex Onsite, Mr Hill actively assisted Design Engineering to locate and establish premises for its business in the North Island. Mr Hill also discussed work opportunities for himself and possibly another Tex Onsite employee. Mr Hill began working for Design Engineering at least for a short period of time while still employed by Tex Onsite.

[67] As an employee of Tex Onsite, it is my view that these actions amounted to serious breaches by Mr Hill of his implied duties of fidelity and loyalty and his express duty of good faith to Tex Onsite.

[68] The answer to the First Issue (a), is "yes".

First Issue (b): Confidentiality obligations during and post-employment

[69] Following Mr Hill's resignation in September 2014, Mr Gamble arranged for his emails to be forwarded to him. It was after a few weeks that Mr Gamble noticed that Mr Hill had deleted all his "*sent*" emails. Mr Gamble did not think anything of it at the time. At about the same time, Mr Gamble noticed that Mr Hill had "Linked In" with Mr Andre Borrell from Mobile Test'n'Cal, a franchise business in the same line of work as Tex Onsite but based in Australia. Mr Gamble thought this was because both Mr Borrell and Mr Hill were motorsport enthusiasts.

[70] Mr Gamble began hearing rumours that Mr Hill had set up in competition with him and on 21 October 2014 decided to email Mr Hill about the rumours. Mr Hill dispelled the rumours but when Mr Gamble heard them again in January 2015 he made further contact, this time by Linked In email.

[71] The responses by Mr Hill to Mr Gamble, in my view were misleading. Mr Hill's responses suggested that he was not setting up in competition with Tex Onsite as he was going to work in areas that were not in competition. Mr Hill also intimated that he was interviewing for a role at Top Energy, a power company. In other words, the implication was that he was not going into business on his own account.

Mobile Test'n'Cal NZ

[72] On 15 April 2015, Mr Gamble discovered that Customer X had moved its testing work away from Tex Onsite, to Mobile Test'n'Cal NZ, a company which had been set up by Mr Hill on 4 March 2015. Mr Hill is the director and holds 25% of the shares in Mobile Test'n'Cal NZ. Mr Borrell owns the balance of 75% of the shares.

[73] Mr Gamble immediately made contact with Customer X's Sector General Manager to find out why Customer X had moved its business without warning. The Sector Manager was unaware of the situation but after making enquiries informed Mr Gamble that Customer X's business had gone to Mobile Test'n'Cal NZ.

[74] It was at this point that Mr Gamble arranged for Mr Hill's Toshiba laptop and Samsung phone to be forensically examined by Mr Michael Spence, as he was concerned Mr Hill may be in breach of his employment obligations to Tex Onsite.

Digital Forensic Inspection of Mr Hill's Toshiba Laptop

[75] Mr Spence is the Managing Director of, and principal digital forensic specialist at deCipher Limited, a specialist digital forensics and information security company. Mr Spence is both highly qualified and has considerable experience in the information technology industry. Mr Spence is an internationally certified information systems security professional (CISSP) and has provided to various Courts his expert opinion in e-discovery matters. Mr Spence's evidence was extremely useful and I found him to be a credible witness.

[76] Mr Spence conducted an examination as instructed. Mr Spence's investigation identified that an ADATA USB memory device was attached to the Toshiba laptop used by Mr Hill, for the first time on 29 July 2013. The report for the ADATA USB identified that a series of files was present on it. However, Mr Spence was unable to confirm the contents of the ADATA USB memory device unless he was able to undertake a forensic examination of it.

Urgent Proceedings by Tex Onsite filed in the Authority- May 2015

[77] As a result of Mr Spence's report, Tex Onsite issued proceedings in the Authority on 29 May 2015 seeking various urgent orders and a witness summons. The Authority issued a witness summons on the same day, requiring Mr Hill to attend before the Authority on 8 June 2015 to produce relevant documents and information held by him including any computer and mobile devices as specified in the summons. The Authority appointed Mr Spence to analyse documents on Mr Hill's computer and mobile devices¹.

[78] Mr Hill attended the Authority and produced 12 devices. Mr Hill confirmed under oath to the Authority that all relevant information to the proceedings before the Authority held by him and downloaded or retained on his computer or mobile devices had been delivered up and produced to the Authority². Mr Hill did not produce the ADATA USB memory device which had been referred to by Mr Spence in his first report and which was attached to the proceedings filed in the Authority and served on Mr Hill. Mr Hill claimed not to be aware of the existence of the ADATA USB memory device.

¹ *Tex Onsite Ltd v Hill* [2015] NZERA Auckland 161

² Above para.[10]

Mr Spence's second report – 12 June 2015

[79] Mr Spence undertook a forensic examination of Mr Hill's devices and produced a report to the Authority dated 12 June 2015. In para 2.3 of his report, Mr Spence notes that the ADATA USB memory device had been connected to both Mr Hill's Acer laptop and HP laptop. The first connection to the Acer laptop was 20 May 2015.

[80] In para.2.4 of the report, Mr Spence notes while the ADATA USB memory device had been connected to the Acer laptop, files on it had been accessed on 20, 22, 25 and 31 May 2015. Mr Spence says in paragraph 2.5 of his report;

In summary, an ADATA UFD USB flash drive has been connected to the Toshiba Laptop (my Report 1, Mr Hill's Tex Onsite laptop), and the Acer and HP laptops used by Mr Hill. This USB drive is shown to contain documents that appear to be the property of Tex Onsite.

[81] One spreadsheet accessed on 25 May 2015 was named "*Tex Onsite Product Supplies.xls*". This document was written to the ADATA USB memory device on 9 September 2014, one day after Mr Hill's resignation. Mr Gamble's evidence is that this document was one created for "*submission to TENIX Alliance Ltd responding to a Request for Proposal (RFP), to supply equipment and equipment testing...*" and was confidential to Tex Onsite. Mr Gamble says the document had Tex Onsite's purchase prices and margins and was not publically available except to TENIX as part of a confidential RFP.

Mr Spence's third report- 17 August 2015

[82] Mr Hill subsequently produced the ADATA USB memory device to the Authority and it was examined by Mr Spence. Mr Spence produced a third report for the Authority recording the results of his examination. Mr Spence confirmed that the ADATA USB memory device was the same device that had been connected to the Toshiba, Acer and HP laptops previously examined by him and referred to in his two earlier reports.

[83] Mr Spence says in evidence in respect of his examination of the ADATA USB memory device that:

... on 9 August 2015, the USB drive was reformatted and this had the effect of deleting the contents of the USB drive. On 10 August 2015, 3837 files were copied to the USB drive. This had the effect of

overwriting previously deleted files. This was confirmed as Tex Onsite documents previously identified as having been resident on the USB drive could not be found. While care does need to be taken with the date and time stamp of 9 August 2015 as shown on the USB drive, I have no reason to believe this is not accurate.

[84] It is my view that based on Mr Spence's expert evidence of the Tex Onsite property held on the ADATA memory device, it is likely on the balance of probabilities that the ADATA memory device contained other Tex Onsite information.

[85] Further, Mr Hill's explanations - which changed more than once - about the circumstances surrounding the discovery of the ADATA memory device following the Authority's investigation meeting on 8 June 2015 were entirely implausible. Mr Hill could not recall how he sent the ADATA memory device to Australia or whether it was in fact the ADATA USB memory device that was sent to Australia. Mr Borrell could not recall receiving the ADATA USB memory device or how it came into his possession. This evidence differed from Mr Hill's affidavit evidence in August 2015 explaining to the Authority why the ADATA USB memory device had not been provided at the investigation meeting on 8 June 2015.

[86] Mr Spence in his second report dated 12 June 2015, at para.2.8 states "*...I am unable to reconcile the usage pattern of the ADATA USB drive, including the recent usage, with the statement by Mr Hill that all relevant digital devices were presented to the [Authority] on 8 June 2015*". I agree with Mr Spence's observation.

[87] On the balance of probabilities, it is my finding that Mr Hill was in possession of the ADATA USB memory device on 31 May 2015 when it was connected to his Acer laptop. This was just eight days prior to the Authority's investigation meeting on 8 June 2015 and after Mr Hill was aware of the proceedings by Tex Onsite against him.

[88] I am of the view that Mr Hill knew of the ADATA USB memory device and its location at the investigation meeting on 8 June 2015.

[89] On 22 July 2015, Mr Hill posted a message on LinkedIn which in my view was derogatory of Tex Onsite and trivialised the proceedings in the Authority. Mr Hill subsequently retracted the post. This is an example of Mr Hill's lack of insight in to his actions and is relevant to the issue of whether Mr Hill obstructed the

Authority's investigation and whether he is liable for penalties. I will return to this matter later.

[90] Mr Hill and Mr Borrell gave confusing and conflicting evidence about the circumstances in which the ADATA USB memory device was reformatted.

[91] It is most likely that Mr Hill took steps to reformat the ADATA USB memory device on 9 August 2015 to ensure the deletion of its contents. This action of course meant the ADATA USB memory device could not be forensically examined by Mr Spence for the purposes of the Authority's substantive investigation into Tex Onsite's claims against Mr Hill.

[92] After conducting my investigation I am satisfied that Mr Hill did breach his employment obligations to Tex Onsite both during his employment and after his resignation. Mr Hill breached clause 11 of his employment agreement by unlawfully retaining and using Tex Onsite's confidential information.

[93] The answer to the First issue (b) is "Yes".

First Issue (c): Six month non-solicitation clause post-employment

[94] Mr Hill's last day at Tex Onsite was 3 October 2014. Clause 10 of his employment agreement prohibited him for a period of 6 months from soliciting or carrying out work of the same nature for any of Tex Onsite's customers. The non-solicitation period expired on 3 April 2015.

[95] It is evident that on 15 October 2014, less than two weeks after leaving Tex Onsite and whilst employed by Design Engineering, Mr Hill emailed one of Tex Onsite's top five customers, Unison Networks, to solicit business. The services offered by Mr Hill included high voltage and electrical testing inspections. Mr Hill made further attempts in November/December 2014 and in January 2015 to solicit Unison. In his email of 6 January 2015 to Ms Lisa Stevenson of Unison, Mr Hill says:

... I now have Acoustic Emissions equipment and also the capability to do 6 monthly certification of EWPs as well as HV testing....

[96] In his closing submission to the Authority, Mr Hill acknowledges wrong doing in contacting three of Tex Onsite's customers, during the non-solicitation period.

However, Mr Hill says the services being offered were not those offered by Tex Onsite.

[97] I do not accept this to be the case, Mr Hill was offering the services of Design Engineering to Tex Onsite's customers. Design Engineering's services included high voltage and electrical testing inspections, the work performed by Tex Onsite. Mr Hill claimed he did not succeed in obtaining any work and therefore Tex Onsite suffered no damage.

Customer X

[98] Mr Hill accepts making contact with one of Tex Onsite's largest customers, Customer X, but says this contact was made after 3 April 2015. Mr Hill says therefore he was not in breach of the six month non-solicitation clause. In fact this was not the case. From the evidence produced to the Authority, Mr Hill visited Customer X on 25 June 2014. In early December 2014 Mr Hill commenced contacting Customer X to discuss introducing "*Design Engineering compliance and High Voltage Testing*". And on 9 December 2014, Mr Hill had a meeting with Customer X to discuss the services being offered.

[99] Mr Hill's solicitation of Customer X was successful and Tex Onsite did not undertake the six monthly testing cycle in May 2015 as it had expected it would. Tex Onsite says the loss of Customer X's business has caused it significant loss and damage.

[100] Mr Gamble produced to the Authority a number of calendar entries from Mr Hill's electronic calendar and which formed part of Mr Spence's second report of 12 June 2015. In addition to the three Tex Onsite customers that Mr Hill accepts he made contact with, within the 6 month non-solicitation period, Mr Hill contacted a further six Tex Onsite customers. The notes or the titles of the appointments include:

*Introduce Design Engineering compliance and High Voltage Testing
Email.... To discuss testing services
...
re a visit to discuss our services ...
Meet Charle Guthrie, Electrix Hamilton ...*

[101] It is my view that the evidence confirms that Mr Hill intentionally approached a number of Tex Onsite's customers in order to solicit their business. The solicitation

took place within six months of Mr Hill's resignation from Tex Onsite. Mr Hill breached the six month non solicitation clause of his employment agreement.

[102] The answer to the First Issue- (c) is "yes".

Second Issue

Did Mr Hill's breaches of his employment obligations cause Tex Onsite loss and if so is Mr Hill liable to pay damages to Tex Onsite?

[103] Tex Onsite seeks losses associated with the solicitation by Mr Hill of its former customer, Customer X. Mr Gamble's undisputed evidence is that Tex Onsite held Customer X's business continuously for 9 years. Mr Gamble says during the nine years that Tex Onsite provided services to Customer X, it was on a 6 monthly testing cycle. A Tex Onsite scheduler always contacted Customer X approximately one month prior to the six monthly test and confirmed the actual date for the test which would then proceed.

[104] Tex Onsite performed its usual six monthly testing cycle for Customer X in November 2014 and was due to perform the next testing cycle in May 2015. In April 2015, Tex Onsite's scheduler was informed that Customer X had moved its business elsewhere. The business was moved to Mobile Test'n' Cal NZ.

[105] Mr Gamble says Customer X usually reviews its arrangements every three years and this has been its practice over the last 9 years and he had no reason to believe this practice would not continue. Mr Gamble says of Tex Onsite's 500 or more customers, only 12-15 have written service level agreements and that he expected Tex Onsite would continue to service Customer X for a further 3 years.

[106] Mr Hill disputes this arrangement. Mr Hill has referred the Authority to two letters from Customer X provided to the Authority and signed respectively by its General Managers in support of his claim there was no contractual arrangement between Tex Onsite and Customer X.

[107] In one letter, the General Manager says there was no contract in existence between Customer X and Tex Onsite, rather there was an "*annual commercial relationship*" which was "*on a casual/one- off basis*". In the second letter the

statement is made that it is not correct to say arrangements with Tex Onsite were reviewed every three years.

[108] The Authority understood that the authors of the two letters were to be giving evidence for Mr Hill. However, neither provided witness statements nor did they attend the Authority's investigation meeting to give evidence under oath and respond to questions. Accordingly, little weight can be given to their statements.

[109] The undisputed evidence is that Tex Onsite had an ongoing relationship with Customer X over nine years, whereby it provided six monthly cycles of testing. It is my finding that the arrangement was reviewed by the parties every three years. I find that but for Mr Hill's unlawful solicitation of Customer X, Tex Onsite would, on the balance of probabilities have retained Customer X as a customer at least for another three years.

The claims for damages

[110] The jurisdiction of the Authority to address the claims made is set out in s.162 of the Employment Relations Act 2000, in particular:

... the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts,
...

Special damages: Loss of profit 2015-2017

[111] The first head of damages claimed by Tex Onsite is for special damages for its loss of anticipated net profits for the years of 2015, 2016 and 2017. Mr Gamble's evidence is that he had no reason to believe that Tex Onsite would not have Customer X's business for the period 2015 to 2017 as the parties normally reviewed their arrangement on a three yearly basis.

[112] Mr Hill has sought to dispute the arrangement. However, the fact of the matter is that Tex Onsite had a nine year relationship with Customer X and on three occasions over that nine year period the arrangement had been reviewed and continued. I accept Mr Gamble's evidence that but for Mr Hill's unlawful solicitation of Customer X, Tex Onsite would, on the balance of probabilities, have retained it as a customer for at least another three years.

[113] Tex Onsite produced to the Authority details of net profits made in the years 2011-2014 from its arrangement with Customer X. The expected net profit for the years of 2015 to 2017 are expected to be similar and amount to a sum of \$70,736.

Special damages: Forensic costs

[114] Tex Onsite claims the sum of \$2,572 in special damages being the costs associated with the forensic analysis of Mr Hill's various laptops, computers and devices. An invoice from deCipher Limited was produced to the Authority in support of this claim for special damages.

Special damages: Tex Onsite management time lost

[115] Mr Gamble has given evidence that as a result of Tex Onsite having to take proceedings against Mr Hill there has been a loss of management time of 125 hours at an hourly rate of \$140. The total sum being claimed for lost management time amounts to \$17,500.

General damages: Breaches of the employment agreement during the employment relationship

[116] Tex Onsite seeks \$30,000 in general damages for breaches of the employment agreement during the employment relationship.

General damages: Breaches of the employment agreement after the conclusion of the employment relationship

[117] A further sum of \$30,000 is claimed for breaches of the employment agreement after its conclusion.

[118] The total of special and general damages sought by Tex Onsite amounts to \$150,808. In addition, Tex Onsite seeks interest at the rate of 5% per annum from the date proceedings were issued until the date of payment.

The law

[119] In the Employment Court decision of *Medic Corporation Ltd v. Barratt (No 2)*³, Chief Judge Goddard (as he then was) stated:

The purpose of damages is to compensate a plaintiff for the loss it has sustained. ... I recognise, of course, that any sum which [the

³ [1992] 3 ERNZ 977 at 983-984

respondents] are ordered to pay by way of compensation will inevitably act as a punishment and that they will be deprived of it but in law the doing of justice by way of compensation is not regarded as a punishment but as a restoration to a plaintiff with something that was always his and of which he has been wrongfully deprived.

Compensation means an award of a sum of money which will place the plaintiff back in the position in which it can be supposed that it would have been if the defendants had acted correctly towards it. It follows that while the plaintiff is entitled to receive compensation, it is not entitled to a windfall. It may have sustained an injury at the hands of the defendants, but it has not won a lottery. It is entitled to no more than is necessary to compensate it for the injury for which the defendants are responsible but it cannot look to them to make good losses, the result of some unconnected reversal of fortune. But it is still entitled to such an amount as will put it back, so far as money can achieve that result, in substantially the same position financially as it would have been in if the defendants had not injured it by unlawful activity. That is the measure of the loss – no more and no less. ...

[120] The Employment Court, at page 984, sets out its approach to the two categories of compensatory damages, being special and general damages.

It is for the plaintiff to prove, not for the defendants to disprove, that loss has been sustained that is not too remote to be taken into account and the extent of that loss, but only on a balance of probabilities and not beyond reasonable doubt. ... In this context it is relevant to mention two categories into which compensatory damages are sometimes subdivided: general damages and special damages. Both can connote claims to recover actual pecuniary loss but special damages usually consist of items that are capable of being ascertained with great, almost absolute, precision such as loss of wages or of profits or expenses incurred; while general damages, although no less real, tend, by their nature, to be incapable of precise calculation or to tolerate wide variations of opinion in valuations such as general loss of custom, loss of a chance to make a profit or diminution of goodwill.

[121] Tex Onsite has calculated, with reference to previous net profits arising from its relationship with Customer X, a loss of \$70,736. This is calculated for the 3 year period it expected to have Customer X as a customer before a review of the arrangement. This loss is claimed as special damages.

[122] I am satisfied on the balance of probabilities that but for Mr Hill's unlawful solicitation of Customer X, it is likely that Tex Onsite would have retained Customer X as a customer for three years and that a claim for three years' projected loss of profits is appropriate in the circumstances.

[123] I order Mr Hill to pay to Tex Onsite the sum of \$70,736 in special damages.

[124] In *Medic Corporation*, the plaintiff was awarded special damages for loss of profits and expenses incurred in mitigating its loss and executive time attributable to the time spent in mitigation of the losses.

[125] Forensic costs of \$2,572 were incurred by Tex Onsite in having Mr Hill's devices examined prior to the bringing of proceedings. Mr Spence produced the relevant invoices in respect of these costs. I accept there is a causal link between Mr Hill's breaches and the cost of the forensic examination undertaken by Mr Spence. I am satisfied that the forensic costs of \$2,572 should be awarded as special damages⁴.

[126] I order Mr Hill to pay Tex Onsite the sum of \$2,572 in special damages.

[127] Mr Gamble claims a loss of management time and disruption to Tex Onsite's business as a result of Mr Hill's breaches of his employment agreement. Mr Gamble estimated 100 to 150 hours of his management time being spent on the matter since April 2015. Mr Gamble has claimed 125 hours of management time at the rate of \$140 per hour. The total management time claimed as special damages is \$17,500.

[128] Mr Gamble has not provided a detailed analysis of his management time and it is difficult for the Authority to assess how much management time was spent by Mr Gamble on mitigating losses to Tex Onsite and how much of the time claimed was in preparing for and participating in the Authority's investigation.

[129] In my view Tex Onsite is entitled to management time spent in mitigating Tex Onsite's losses. Mr Gamble spent time restoring relationships with customers approached by Mr Hill. In my view a reasonable amount of management time would be half of the number of hours claimed in order to mitigate losses. This amounts to \$8,750.

[130] I order Mr Hill to pay Tex Onsite special damages of \$8,750 in respect of management time.

General Damages

[131] Tex Onsite seeks general damages of \$30,000 for breaches by Mr Hill of his employment agreement during the employment relationship and a further amount of

⁴ *Auckland Regional Council v. Tiliaro* AA368/09

\$30,000 in general damages for breaches after the conclusion of the employment relationship. A total sum of \$60,000 is sought.

[132] I am satisfied that an award of general damages is appropriate in respect of the serious breaches by Mr Hill of the express terms of his employment agreement regarding Tex Onsite's confidential information and to act in good faith. Mr Hill accessed and removed confidential information, deleted Tex Onsite's emails before his resignation and assisted a competitor, Design Engineering, to establish itself in the North Island thereby losing the chance to plan for this occurrence. Mr Hill took these steps while still an employee of Tex Onsite.

[133] I am also satisfied general damages are payable in respect of Mr Hill's breaches of his implied duties of loyalty and fidelity to Tex Onsite. Mr Hill's breaches commenced within a few months of commencing employment at Tex Onsite when he made contact with Design Engineering. I am satisfied that these breaches have caused damage to Tex Onsite. Taking into account the special damages awarded above and the penalties to be awarded, I consider total general damages of \$10,000 appropriate in the circumstances.

[134] I order Mr Hill to pay Tex Onsite the sum of \$10,000 in general damages.

Interest

[135] By order under clause 11 of Schedule 2 of the Act, Mr Hill must also pay Tex Onsite interest at the annual rate of five percent on the total amount now due as general and special damages from the date of this determination until payment is made⁵.

Return of property

[136] Mr Hill accessed and retained Tex Onsite's property while employed. I order Mr Hill to immediately return any of its property in his possession to Tex Onsite.

Penalties

[137] Tex Onsite seeks a penalty of \$10,000 under s.134 of the Act, for breaches by Mr Hill of his express and implied obligations under his employment agreement.

⁵ Judicature (Prescribed Rate of Interest) Order 2011, cl 4

[138] Tex Onsite seeks a penalty of \$10,000 under s134A of the Act for obstructing the Authority's investigation without sufficient cause.

[139] In *Xu v McIntosh*⁶, the Employment Court said of penalties in general:

[47] ... *A penalty is imposed for the purpose of punishment of wrong doing which will consist of breaching ... an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it.*

[48] *The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate. In deciding whether any party of the penalty should be paid to the victim of the breach regard must be had to the degree of harm that the victim suffered as a result of the breach ...*

Penalty under s.134

[140] Mr Hill admitted approaching Tex Onsite's customers in breach of the non-solicitation clause in his employment agreement but sought to justify his actions by arguing the solicitation was not successful. It is clear that in addition to the breach of the non-solicitation clause Mr Hill breached other express obligations of confidentiality and to act in good faith by accessing and removing confidential information and by deleting Tex Onsite's emails. Mr Hill also breached his implied duties of fidelity and loyalty to Tex Onsite. These breaches were not technical or made inadvertently, they were deliberate and a penalty is appropriate.

[141] Compensation in the form of general damages has been awarded in order to restore Tex Onsite as best as possible to the position it would otherwise have been in. A penalty is to punish wrong doing. In assessing the appropriate level of the penalty, consideration has been given to the level of special and general damages awards made in favour of Tex Onsite⁷.

[142] I consider a penalty of \$8,000 under s.134(1) of the Act for breaches by Mr Hill of his employment agreement, both during and following its conclusion, to be appropriate.

⁶ [2004] 2 ERNZ 448

⁷ *Nova Energy Ltd v Mitchell and Anor* [2015] NZERA Auckland 337 at para.[73]

Penalty under s.134A

[143] Tex Onsite seeks a further penalty of \$10,000 under s.134A of the Act for Mr Hill's obstruction of the Authority investigation.

[144] It is my view that Mr Hill:

- Failed (despite an Authority direction to do so) to produce the ADATA USB memory device at the Authority's initial investigation meeting on 8 June 2015 despite his use of it on 31 May 2015, after he was aware of the proceeding;
- Reformatted the ADATA USB memory device on 9 August 2015 following the Authority's direction on 5 August 2015, that he produce it. The result of the reformat was that the contents of the ADATA USB memory device were deleted.

[145] I consider Mr Hill's above actions and his action in posting inappropriate comments on LinkedIn while matters were being investigated by the Authority, as contemptuous of the Authority's process.

[146] I consider Mr Hill's actions to be serious, deliberate and obstructed the Authority's investigation. I consider an award of \$10,000 to be appropriate in the circumstances.

[147] Tex Onsite has requested that payment of the penalties be made to it rather than the Crown pursuant to s.136(2) of the Act. I consider that in the circumstances the whole of the penalties of \$18,000 be paid by Mr Hill to Tex Onsite.

Costs

[148] Counsel for Tex Onsite has provided detailed submissions in relation to costs. Counsel seeks indemnity costs together with disbursements and forensic costs incurred after the issuing of proceedings against Mr Hill. The total of costs sought amounts to \$83,633 and detailed invoices have been produced in support.

[149] Mr Hill has not addressed the issue of costs in his closing submissions. In the circumstances, costs are reserved. Mr Hill has 28 days from the date of this determination to file and serve a memorandum of costs in response to the closing submissions on behalf of Tex Onsite dated 23 December 2015.

Anna Fitzgibbon
Member of the Employment Relations Authority