NOTE: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 67
3028353

	BETWEEN	SAM WARD Applicant
	AND	CONCRETE STRUCTURES (NZ) LIMITED First Respondent
		PERPETUAL GUARDIAN TRUST Second Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Gregory Bennett, Advocate for the Applicant Kevin Badcock, Counsel for the First Respondent Fraser Wood, Counsel for the Second Respondent
Investigation Meeting:	On the papers
Submissions and further Information Received:	27 November 2018 & 14 December 2018 from Applicant 7, 10 & 21 December from Respondent
Determination:	12 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 14 November 2018 I issued a determination in which I found Sam Ward was unjustifiably dismissed from his employment with Concrete Structures (NZ)

Limited (CSL). CSL was ordered to pay Mr Ward remedies totalling more than $14,000.[1]

[2] Two issues were reserved for determination. Firstly, costs were reserved with the parties being encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions. Secondly, further investigation was required in terms of a penalty against Mr Ward and/or his Advocate Gregory Bennett for actions or omissions that delayed or obstructed the Authority's investigation of Mr Ward's application.

[3] Submissions were filed on behalf of Mr Ward on 27 November 2018 (costs) and on behalf of Mr Ward and Mr Bennett on 14 December 2018 (penalty). Submissions were filed on behalf of CSL on 10 December 2018 (costs) and 7 December and 21 December 2018 (penalty). The parties were afforded an opportunity to be orally heard on penalties which neither party elected to do.

Issues

[4] The issues requiring investigation and determination are:

a) Did Mr Bennett and/or Mr Ward delay or obstruct the Authority's investigation?

b) If so, was there sufficient cause?

c) If not, what penalty should the Authority order Mr Bennett and/or Mr Ward to pay?

d) What costs should be awarded to Mr Ward as the successful party in the substantive claim?

e) What disbursements should be awarded to Mr Ward as the successful party in the substantive claim?

Relevant background

[5] On 29 May 2018 an Authority case management conference was convened with the representatives by telephone. During that telephone conference the

[1] *Ward v Concrete Structures (NZ) Ltd & Anor* [2018] NZERA 350.

progression of Mr Ward's claim against CSL was discussed and timetable directions were agreed. The matters discussed were set out in a minute of the same date. Material to the current determination was the following:

a) Mr Ward's witness statements and the common bundle of documents were directed to be filed and served by 29 June 2018.

b) Mr Ward's witnesses were himself, his partner, and Anthony Harris. These witnesses had been identified as relevant to the Authority's investigation in a Memorandum filed ahead of the conference by Mr Bennett.

c) The minute stated "Witnesses are expected to attend the investigation meeting at the commencement of the investigation and, under oath or affirmation, answer questions about their evidence."

d) The parties were provided with a copy of the Authority's Practice Note as to the required conduct of representatives and were encouraged to familiarise or remind themselves of the obligations contained therein. Paragraph 2 of that Practice Note provides that in carrying out their duties representatives are expected to comply strictly with timetables or other orders issued by the Authority and to fairly and fully disclose to their clients the Authority's directions in the client's matter. At paragraph 3 the Practice Note records that where representatives fail in their duties the Authority may impose a penalty on the representative personally.

[6] Following this conference Mr Ward filed an amended statement of problem that named the Second Respondent. This triggered a memorandum from the Second Respondent raising concerns that the Authority did not have jurisdiction to hear the claim against it as there was no employment relationship between it and Mr Ward (the preliminary issue).

[7] On 19 June 2018 I issued a note to the parties proposing a timetable for the hearing of the preliminary issue prior to the substantive investigation. This proposal retained the original date of 29 June 2018 for the filing of Mr Ward's witness statements but required these to be filed in affidavit form. The parties were asked to advise the Authority of their views on this proposal by 4 pm that day. The Second

Respondent replied asking for a short extension on the proposed timetable for the filing of its evidence.

[8] On 26 June 2018 I reviewed the file and noted that the Authority had not received a response from Mr Ward to the proposal. The parties were advised that it was assumed that the proposed timetable was satisfactory save for the change to the date for the Second Respondent to file its affidavits. The timetable in place was reiterated. In addition, the note stated:

> The parties must ensure they strictly adhere to this timetable. Any slippage will result in the preliminary issue being unable to heard as a preliminary matter and/or the investigation meeting being adjourned. This may sound in costs.

Failure to provide affidavits and the common bundle by the due date

[9] On 29 June 2018, being the date Mr Ward's witness statements and the common bundle were due, Mr Bennett emailed the Authority advising he was having technical difficulties with his printer. The Authority responded advising Mr Bennett to ensure an electronic version of the documents was sent as per the timetable directions. He responded:

> The problem is that the printer is not communicating with any computer and we need to scan the loose leaf bundle into the printer to send it to you.
>
> The hard copies are waiting to be uplifted by a courier to go to the Authority.

[10] On 2 July 2018 the Authority received the common bundle of documents by email. On that same day it asked Mr Bennett why the Authority had not received Mr Ward's affidavits.

[11] At 10.24 am on 3 July 2018 Mr Bennett filed a witness statement from Mr Ward. At that time, he advised as to the other two witnesses "it is clear the applicant is able to respond with the evidence available to any issue that might have arisen from their witness statements."

On-going failure to provide sworn affidavits

[12] Following receipt of this correspondence the Authority attempted to organise an urgent telephone conference with the parties. This was unable to be achieved that day and Mr Bennett advised he was unavailable the following day. As there was only

a short timeframe to hear the preliminary issue before the substantive investigation, I considered it appropriate to issue a minute without first hearing from the parties. This minute was issued on 3 July 2018 and recorded:

> **Breach of timetable directions**
>
> 1. The Applicant is in breach of the timetable directions made by the Authority.
>
> 2. The Applicant was directed to file sworn affidavits from his witnesses by 4 pm 29 June 2018. These witnesses were Mr Ward, Mrs Ward and Anthony Harris.
>
> 3. Sworn affidavits were required due to a preliminary matter being addressed on the papers. The parties were advised they must strictly adhere to the timetable set by the Authority in order to enable sufficient time for the preliminary matter to be heard before the substantive meeting on 20 August 2018.
>
> 4. The Authority received a witness statement from the Applicant today. This was not sworn as directed. No affidavits have been received from Mrs Ward and Anthony Harris as directed.
>
> 5. The Applicant's breach is obstructing the Authority's investigation. It is putting at risk the Authority's ability to deal with the preliminary matter prior to the substantive hearing set down for 20 August 2018. This may result in the substantive investigation meeting being adjourned and may sound in costs and the imposition of a penalty.
>
> 6. Mr Bennett is to provide an explanation as to why his client has breached the Authority's directions. This must be received by the Authority by 4 pm today. At this time he must also indicate when sworn affidavits from Mrs Ward and Mr Harris will be received by the Authority.
>
> 7. After receipt of Mr Bennett's explanation and timetable for compliance, the Respondents are to advise the Authority whether they require an extension to the current timetable.
>
> **Applicant's contact details**
>
> 8. In accordance with the minute of the Chief of the Authority dated 6 September 2016, Mr Bennett is also directed to provide the Applicant's contact details to the Authority. This must be done by midday on 4 July 2018. This is to enable the Authority to copy the Applicant into all communications.

[13] Mr Bennett responded at 12.39 pm to advise that he had read the Authority's minute. He indicated that [redacted as per non-publication order] had been rushed to hospital at 10 am that morning and he would respond when he was able.

Delays result in the need for timetable extensions

[14] At 5.00pm on 4 July 2018 CSL wrote to the Authority. CSL advised the Authority that as a result of the delay it was unknown whether it would be able to provide all its reply statements in time, due to the possible unavailability of some witnesses. It also pointed out that these delays would ultimately cause both Respondents to incur further and unnecessary costs and would likely mean the investigation meeting date would need to be vacated.

[15] At 8:54pm on 4 July 2018 Mr Bennett provided a sworn affidavit from Mr Ward and indicated he would file a memorandum the following day. That memorandum was received the next morning. Mr Bennett provided the following explanations for his delays.

a) His printer went off line and it was not until the weekend that they were able to reconnect the printer to their network.

b) The filing of evidence from Mr Harris and Mr Ward's partner would not advance the preliminary issue.

[16] Mr Bennett indicated that he could file any further affidavits by 4 pm on 20 July 2018.

[17] On 5 July 2018 CSL filed a lengthy memorandum that questioned the veracity of Mr Bennett's explanation. It referred to an email that Mr Bennett sent to the Authority at 3.26 pm on 30 June 2018. That email attached a PDF document that Mr Bennett asked the Authority to consider. A review of the pdf shows that the first two pages were printed on 30 June 2018. This suggested that Mr Bennett had the ability to print and scan by the afternoon of 30 June 2018. There was therefore no reason that Mr Bennett could not have sent the bundle of documents and witness statements to the Authority on that date.

[18] The First Respondent's memorandum also pointed out:

a) That due to the late filing of Mr Ward's affidavit, and his failure to provide witness statements from his partner and Mr Harris, CSL would be unable to file its witness statements on time.

b) The additional witnesses were relevant to the investigation due to the matters pleaded in the Statement of Problem with reference to the particular paragraphs.

c) Mr Bennett and Mr Ward were obstructing the Authority's investigation without sufficient cause and failing to comply with directions. A request was made for the Authority to determine whether a penalty should be imposed.

On-going failure to provide sworn affidavits and the Applicant's contact details

[19] On 6 July 2018 I issued a third minute. This minute recorded that Mr Ward remained in breach of the timetable orders made by the Authority and this had affected the Respondents' ability to comply with the existing timetable. The minute went on to record:

> 2. In his memorandum of 5 July 2018 Mr Bennett submitted he will file affidavits from Mrs Ward and Mr Harris on 20 July 2018. This was the previous date set for filing reply affidavits on the preliminary issue. Mr Bennett has ignored that these witnesses are also relevant to the substantive issue. Their evidence should therefore have been filed on 29 June 2018.
>
> 3. The Applicant's breach means the timetable for the filing of the First and Second Respondent's evidence must be extended. Taking this into account, and allowing for the preliminary matter to be investigated, the investigation meeting set down for 20 August 2018 must be vacated.

[20] The minute further recorded that Mr Bennett had failed to comply with my direction to provide Mr Ward's contact details. It also addressed Mr Bennett's criticisms regarding the Authority's request for this information. It is helpful to set this out in full:

> 11. Firstly, the reasons for the Authority requiring Mr Bennett to provide his client's contact details have previously been addressed at length by me with Mr Bennett on another file. At that time, Mr Bennett was afforded with an opportunity to respond before directions were made. In the present case, the Authority attempted to organise a telephone conference to address this issue and the Applicant's breaches of the timetable directions. That telephone conference was unable to be arranged. However Mr Bennett indicated to the Support Officer that he would abide by any direction that was made.
>
> 12. Secondly, Mr Bennett has a history of breaching the Authority's timetable orders. This has resulted in the issue of a Minute by the Chief of the Authority and the imposition of penalties against him by other

Members. The Employment Court has also had similar issues with Mr Bennett (references excluded).

13. In these circumstances, and taking into account the current breaches in this case, it is appropriate that I ensure that Mr Bennett's client is informed of the consequences of his and his representative's breaches of directions made by the Authority. This is especially so where I have indicated that these breaches may lead to a penalty and/or sound in costs.

14. Mr Bennett is directed to provide his client's contact details by 9 am, 9 July 2018. By this time he must also confirm a copy of this minute has been provided to his client. Failure to comply will result in this file being stayed pending compliance with my directions.

[21] Lastly, the minute addressed CSL's request for the Authority to consider a penalty against Mr Bennett and/or Mr Ward for the breaches of my timetable orders. I reiterated that I intended to address this issue after I had dealt with the substantive matter. I advised that at this time the parties would be afforded with an opportunity to provide submissions.

[22] On 9 July 2018 Mr Bennett filed a memorandum in which he requested that Mr Ward's partner and Mr Harris be excused from providing evidence. He also indicated that Mr Ward sought "to be excluded from been (sic) included in correspondence with the Authority." On this same day he provided Mr Ward's contact details. He did not provide confirmation that he had provided a copy of my third minute to him.

Breach of direction to provide a copy of the Authority's minute to the Applicant

[23] Following receipt of Mr Bennett's memorandum a fourth minute was issued on 12 July 2018. The material parts of that minute were these:

3. By Memorandum of Counsel for the First Respondent dated 6 June 2018, Counsel sets out the relevance of Mrs Ward's evidence to the Authority's investigation. Having considered this Memorandum I am satisfied that the evidence of Mrs Ward remains relevant to the Authority's investigation. In addition, it would appear that Mr Harris may also be able to provide evidence to assist the Authority with its investigation.

4. For this reason, if the Applicant does not file and serve witness statements from Mrs Ward and Mr Harris addressing the substantive matters by 4 pm 20 July 2018 then these witnesses will be summoned by the Authority. If this is necessary, the Applicant is directed to provide the physical addresses for these parties to the Authority by 4 pm 20 July 2018.

Ongoing breach of directions

5. Mr Bennett has failed to comply with my directions to confirm a copy of my minute of 6 July 2018 has been provided to his client.

6. As indicated in my minute of 6 July 2018, I intend to address Mr Bennett and his client's breaches after I have dealt with the substantive matter. At this time the parties will be afforded with an opportunity to provide submissions.

Progression of this matter

7. The timetable set out in my minute of 6 July 2018 remains in place save that, if the Applicant does not file and serve witness statements from Mrs Ward and Mr Harris addressing the substantive matters by 4 pm 20 July 2018 then these witnesses will be summoned by the Authority.

Failure to file submissions on the preliminary issue by the due date

[24] On 6 August 2018 the Authority wrote to Mr Bennett pointing out that Mr Ward was to file submissions in relation to the preliminary issue by Friday 3 August 2018 and had not done so. Mr Bennett was requested to explain why the Authority had not received these.

[25] Mr Bennett responded asking for an extension until 8 August 2018 because "I have been out of NZ working and I returned Wednesday last week and then dealing with other matters including over the weekend".

[26] The Authority requested a copy of Mr Bennett's airline tickets showing his date of departure and return to NZ. On 7 August 2018, having not received a response, I issued a minute in email form notifying the parties that Mr Ward's ongoing breaches of the Authority's timetable directions were leading to further delays in progression of the file. Mr Bennett was directed to immediately respond to the Authority's request for a copy of his airline tickets showing his date of departure and return to NZ.

[27] In the afternoon of 7 August 2018 Mr Bennett provided Mr Ward's submissions on the preliminary issue. He also provided a redacted "Airpoints Activity Detail" report along with the following comment:

> I returned to NZ on late Tuesday night.
>
> As to hearings, I had a mediation in Christchurch on Friday and was also finalising one in respect of [redacted as per non-publication order] that was done privately. On Sunday I had a final meeting prior to submissions to the

> [redacted as per non-publication order], Monday I had a mediation in Manukau.
>
> Further on my return, I had clients that I had to see, in respect of impending disciplinary meetings, and deal with other clients (both employer and employee). I had a disciplinary hearing in Mt Wellington on Thursday afternoon. On Monday morning I had a client to attend to in respect of an Authority matter.
>
> In regards to Saturday, I finalised a costs submissions and finalising an Employment Court matter against the ERA for a client, that also covered Sunday morning.

[28] That same day I issued a minute in email form. I noted that Mr Bennett must prioritise directions of the Authority or face the consequences of failing to do so. I pointed out that if Mr Bennett was unable to comply with the Authority's directions then he must seek the leave of the Authority for an extension rather than defaulting and then, following enquiry from the Authority, seeking leave. I recorded that this failure to comply with directions would be addressed alongside the other breaches when the Authority addressed the issue of penalty following the conclusion of the substantive investigation.

Failure to provide costs submissions on time in relation to the claim against the Second Respondent

[29] On 23 August 2018 I issued a determination in relation to the preliminary issue. The issue of costs was reserved with a timetable for the provision of submissions. The Second Respondent, as the successful party, applied for costs on 6 September 2018. Mr Ward's reply costs submissions were due on 20 September but on 7 September 2018 Mr Bennett applied for a one-week extension. This was granted with Mr Bennett directed to file submissions by 27 September 2018.

[30] On 3 October 2018 the Authority wrote to Mr Bennett reminding him that Mr Ward had been granted an extension until 27 September 2018 to file costs submissions, and asking why the Authority had not received these.

[31] Mr Ward's cost submissions were received on 5 October 2018.

Issue One: Did Mr Bennett and/or Mr Ward delay or obstruct the Authority's investigation?

The Law

[32] The Authority derives its jurisdiction to order Mr Bennett and/or the Applicant to pay a penalty by virtue of s 134A of the Act. This section deals with penalties which may be imposed if a person obstructs or delays an Authority investigation without sufficient cause. The standard of proof applying is the civil standard of proof on the balance of probabilities.

[33] Section 134 A provides:

> 134A Penalty for obstructing or delaying Authority investigation
>
> (1) Every person is liable to a penalty under this Act who, without sufficient cause, obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation (if required).
>
> (2) The power to award a penalty under subsection (1) may be exercised by the Authority—
>
> (a) of its own motion; or
>
> (b) on the application of any party to the investigation.

[34] Two elements must be satisfied to warrant a penalty under s 134A. Firstly, there must have been a delay or an obstruction of the Authority's investigation. Secondly, the lateness, postponement or hindering must have occurred "without sufficient cause". There is no requirement that the obstruction or delay be deliberate.

[35] In *Ahunja v Labour Inspector Ministry Business Innovation and Employment* Judge Perkins made a number of observations regarding the word "obstruct" in the context of s 134A.[2] These included that:[3]

a) Section 134A applies to actions causing actual obstruction and not those with the potential to obstruct;

b) obstruction occurs at the point where the Authority's ability to conduct a just and fair investigation is undermined and impeded;

---

[2] In *Ahunja v Labour Inspector Ministry Business Innovation and Employment* [2018] NZEmpC 31.
[3] At [28]-[30].

c) it is the act of obstructing, not whether it is ultimately successful, that determines whether obstruction has occurred;

> "Obstruction"is defined as: "The action or an act of obstructing something or someone; the condition of being obstructed." It would be enough under that definition that the investigation process becomes more difficult for either the Authority itself or for one of the parties. More time, effort and expense would be used to continue the process as a result of the actions taken by the person committing the breach. This in turn affects the unimpeded course of justice.

d) interpretation of obstruction in other areas of the law, such as in criminal law where it is considered as to impede or to make more difficult, assists in interpreting the meaning under 134A.

[36] Judge Perkins distinguished between obstruction and delay on the basis that "obstruction refers to the act of obstructing while delay refers to a possible effect of the obstruction".[4]

Analysis

[37] I find the Authority's investigation was delayed and obstructed by Mr Bennett's failure to provide the following by the due date as directed by the Authority:

a) Mr Ward's witness affidavits and the common bundle.

b) Mr Ward's contact details and confirmation that a copy of the Authority's minute had been provided to him.

c) Mr Ward's submissions on the preliminary issue.

d) Mr Ward's costs submissions.

[38] These obstructions undermined and impeded the Authority's ability to conduct a just and fair investigation and led to delay. More time, effort and expense was required by the Authority and the Respondents as a result of this.

[39] As will be evident from the background facts, the Authority was put to significant time in managing this file, addressing the multiple breaches, reviewing

[4] At [34].

memoranda and issuing minutes. The hearing of the preliminary matter had to be delayed and the investigation meeting adjourned.

[40] I am satisfied that Mr Bennett, and not Mr Ward, was responsible for these delays and obstructions. There is no evidence that Mr Ward was involved in the breaches. Mr Bennett did not provide confirmation to the Authority that Mr Ward received my first minute, or any other documentation from the Authority, that set out the timetable for filing the affidavits and the common bundle. The late filing of submissions on the preliminary issue and costs were due to Mr Bennett's commitments.

Issue Two: Was there "sufficient cause" for the obstruction and delay?

[41] For the following reasons I conclude that the delays and obstructions that resulted from Mr Bennett's actions and inactions were without sufficient cause.

The Applicant's witness affidavits and the common bundle

[42] The witness affidavits and the common bundle were directed to be filed by Friday 29 June 2018. There were two reasons cited by Mr Bennett for the breach of this timetable. Firstly, Mr Bennett's printer was said to be off line and it was not until the weekend that the printer was able to be reconnected to their network. Secondly, Mr Bennett considered Mr Harris and Mr Ward's partner's evidence would not advance the preliminary issue. I find neither were sufficient cause for the obstruction and delay.

[43] In terms of the alleged printer issues, an email received by the Authority on 30 June 2018 showed that, at least by that time, Mr Bennett's printer connection was fixed or he had alternative means of printing and scanning. Notwithstanding this he did not file and serve Mr Ward's statement and the common bundle of documents until 2 July 2018.

[44] Mr Harris and Mr Ward's partner's evidence was not relevant to the preliminary issue. However, their evidence was at all material times directly relevant to the substantive issue. This was confirmed by Mr Bennett in a memorandum filed ahead of the case management conference. He also agreed during the case management conference that he would provide their evidence to the Authority by 29

June 2018. CSL's witness statements relating to the substantive matter were due 2 weeks thereafter.

[45] For completeness, I also considered whether [redacted as per non-publication order] admission to hospital on 3 July 2018 was sufficient cause for his obstruction. I have no information as to whether or not this had any real effect on his ability to meet the timetable set by the Authority. It is more likely than not that it did not. By the time [redacted as per non-publication order] was admitted to hospital Mr Bennett had filed a witness statement for Mr Ward, had filed the common bundle, and had advised that he did not intend to file witness statements from the other two witnesses.

The Applicant's contact details and confirmation of supply of minute

[46] No explanation was provided by Mr Bennett for the delay in providing Mr Ward's contact details. Nor did he provide any explanation for failing to confirm to the Authority that a copy of the Authority's minute had been provided to Mr Ward.

The Applicant's submissions on the preliminary issue

[47] Mr Bennett was to provide Mr Ward's submissions on the preliminary issue by 3 August 2018. He did not provide these until 7 August 2018. His explanation was that he was "out of NZ". I was given no evidence to support this position despite requesting Mr Bennett to provide me with a copy of his airline tickets. That said, even if Mr Bennett was overseas, I know of no reason why he could not have prepared the submissions before he left. The Second Respondent filed and served its affidavits and submissions on the preliminary issue on 20 July 2018.

[48] Mr Bennett also pointed to other commitments as a reason for his obstruction and delay. I am not satisfied that these commitments were sufficient cause for his obstructing the Authority's investigation. Mr Bennett could have, but did not, seek the leave of the Authority to extend the timetable despite being advised on multiple occasions during the course of the investigation and by the Authority on other files, that this is what is expected. I agree with the Authority Member in *Davidson v Great Barrier Airlines Ltd*, another case where Mr Bennett was ordered to pay a penalty where the Member noted:[5]

[5] [2016] NZERA Auckland at [26].

> Taking on (and trading on) the status of a representative in an employment law matter comes with considerable responsibility to the person or business being represented. Whether that is a worker upset and desperate at the loss of a job or an employer and its managers anxious over the disruption and potential cost to its enterprise, each relies and depends on their representative acting conscientiously on their behalf. Where a representative cannot do so, from an abundance of other commitments or due to illness, the client should be able to expect to be told the true state of affairs and helped to find assistance elsewhere. There were other representatives, whether lawyers or other skilled advocates, to whom Ms Davidson could readily have been referred if Mr Bennett had advised her of his difficulty.

Issue Three: Quantum of Penalty

[49] Having found the delay and obstruction was without sufficient cause, I turn to consider whether a penalty ought to be imposed on Mr Bennett under s 134A of the Act.

[50] Penalties are at the discretion of the Authority and are generally imposed for the purpose of punishment as well as discouragement to others. The maximum penalty for a single breach for an individual is $10,000.[6]

[51] In determining an applicable penalty the Authority must have regard to all relevant matters including those set out in s133A of the Act. In doing so it is helpful to follow the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited.*[7]

Step 1: Nature and number of breaches

[52] Mr Bennett obstructed and/or delayed the Authority's investigation on 5 occasions. However, I consider it appropriate to globalise the breaches. The maximum penalty is $10,000.

Step 2: Severity of the Breach

[53] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[6] Employment Relations Act 2000, s 135(2)(b).
[7] [2016] NZEmpC 143.

[54] In *Ahunja* the Court said the maximum penalty must be reserved for the most serious cases involving heinous and repeated breaches.[8] I consider this to be such a case.

[55] Firstly, Mr Bennett's breaches in this case were either intentional or, at the very least, amount to significant negligence. Mr Bennett trades as an "employment law specialist". He is well aware of the requirements to comply with directions. He regularly appears in the Authority and was reminded of these obligations at the commencement of this case and at multiple times throughout the course of the investigation.

[56] Secondly, Mr Bennett's obstructions and delays form a pattern of behaviour. For example:

a) In *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment*, costs were increased against Mr Bennett's client due to conduct that included failing to comply with timetable directions and failing to provide information prior to the investigation meeting that the Authority had identified as relevant to its investigation.[9] The Authority declined to order a penalty against Mr Bennett however observed:

> The Authority records its concern about the manner in which Mr Bennett conducted this matter. However, I am also mindful that, largely due to the co-operation of [the respondent], the original [investigation meeting] date for this matter was not adjourned. That was notwithstanding [the applicant's] repeated timetable breaches and Mr Bennett's ongoing failure to respond in a timely manner to the Authority's and [the respondent's] attempts to contact him about these proceedings.

b) In a determination on costs for an investigation carried out in July 2015, the Authority reduced the level of costs awarded to Mr Bennett's client because of what was described as "inadequate service" by him as someone trading as an employment law specialist.[10] The determination included the following observations:[11]

> There is a question as to whether Mr McCormick could reasonably have been charged fees (and therefore incurred costs) for all the

[8] At [45].
[9] [2012] NZERA Auckland 289 at [10].
[10] *McCormick v Compass Communications Limited* [2015] NZERA Auckland 293 at [16].
[11] At [4], [14] and [15].

> preparation work in light of the apparent failure to lodge lost wages evidence (which Mr McCormick's evidence said was in part because Mr Bennett had forgotten to bring material provided).
>
> …
>
> What was clear from Mr Bennett's own account was that he did receive some documentary information from Mr McCormick about job inquiries. It was not provided to the Authority either before or at the investigation meeting. If what Mr Bennett got from Mr McCormick on 16 July was, as he said, inadequate, it was not then sufficiently followed up to marshal better evidence in time for the 27 July investigation meeting.
>
> The result of the failure to provide the mitigation evidence was that Mr McCormick missed out on a lost wages award that he might otherwise have got ...

c) In May 2016, the Chief of the Authority issued a minute in which he recorded that he had met with Mr Bennett on 25 May 2016 to "discuss concerns regarding files on which you were acting and delays being experienced by the Authority." One of the outcomes of that meeting was a direction by the Chief that Mr Bennett must:

> As a matter of course and to ensure matters are progressed in a timely fashion in the Authority without undue delays you have been required to provide contact details on all files on which you act as the official representative on the record. This is so that your client can be copied on all communications to ensure they are kept up to date with all matters concerning their proceedings.

d) In *Davidson*, a determination issued by the Authority in December 2016, Mr Bennett was ordered to pay a penalty of $4,000 in circumstances where:[12]

> As already noted the failures to provide Ms Davidson with information about progress on her case, culminating in postponement of the first scheduled investigation meeting, occurred over a number of months. They were not 'intentional' but amounted to significant negligence by someone trading as an "employment law specialist". Harm caused included the further anxiety and delay for Ms Davidson, left in the dark for five months over progress in her application, and the additional cost and worry for GBAL while participating in an Authority investigation that was then longer than expected. While the relationship between Ms Davidson and Mr Bennett was commercial, as client and advocate, she relied on his expertise and advice while she sought to address an employment relationship problem, including when she resigned and raised a personal grievance for constructive dismissal. It was Ms Ryder who sent Ms Davidson's notice of resignation to GBAL.

[12] *Davidson*, above n 5, at [33] and [34].

> While Mr Bennett accepted "responsibility" for the failures that hindered the Authority's investigation, it could not be said he demonstrated any real remorse. Rather he thought it "unjust" that his responsibility should result in any real consequence. There were strong public interest factors favouring a penalty that deterred representatives from failing to make sensible, prompt alternative arrangements if they could not properly attend to the needs of clients who relied on them.

e) In *Moskal & Anor v Manor House Cuisine (2015) Limited*, a determination issued by the Authority in September 2017, the Authority noted a failure by Mr Bennett to provide his client's contact details despite multiple demands. His breaches, and other delays, resulted in the Authority ordering Mr Bennett to pay $500 in costs to the Respondent.[13]

[57] Thirdly, Mr Bennett's obstructions and delays caused each of the Respondents to incur significant additional costs. In addition, Mr Ward himself incurred additional costs. In terms of the Second Respondent the Authority awarded an uplift to the daily costs tariff of $500 to take into account unnecessary additional costs incurred by the Second Respondent due to the delays in that claim.[14] I shall address the consequences in terms of costs as between Mr Ward and CSL later in this determination.

[58] Lastly, Mr Bennett has not expressed any remorse to the Authority for his conduct. I am unaware whether his accounts to Mr Ward have been reduced to take into account the additional costs that Mr Ward was ordered to pay the Second Respondent. There are strong public interest factors favouring a penalty that deters representatives from obstructing and delaying an Authority's investigation.

Step 3: Ability to pay penalty

[59] I am aware of no inability of Mr Bennett to pay a penalty. I accordingly make no reduction under this step.

Step 4: Proportionality of penalty

[60] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances.

---

[13] [2017] NZERA Auckland 236.
[14] *Ward v Concrete Structures (NZ) Ltd & Anor* [2018] NZERA 351 at [11].

[61] The determination in *Davidson* sets out relevant determinations of the Authority that have awarded penalties.[15] I have considered these cases as well as the recent decision of the Court in *Ahuja.* In that case the Court ordered penalties totalling $12,000. $6,000 was payable to each of the two employees involved. These sums took into account that "there is no evidence of any previous actions of this kind on Chirag Ahuja's part."[16]

[62] This case can be distinguished from *Ahuja* by the significant history of similar previous conduct by Mr Bennett. The previous penalty of $4,000 imposed by the Authority has not deterred his behaviour.

[63] I assess the degree of severity at 80 per cent.

[64] I consider it appropriate that part of this penalty be paid to CSL and Mr Ward as they have each suffered the impact of Mr Bennett's conduct.

Finding on Issue One

[65] Mr Bennett is ordered to pay $8,000 by way of penalty under s134A of the Act. I direct that $1000 of that sum is to be paid to Mr Ward, I direct $3,000 of that sum is to be paid to CSL. The remaining $4,000 is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[66] Payment of the penalty is to be paid within 28 days of the date of this determination.

Issue Two: Costs

The Authority's power to award costs

[67] The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority considers reasonable. [17]

[68] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs. [18] These costs were

[15] At [36] to [40].
[16] At [45].
[17] Employment Relations Act 2000, Schedule 2 clause 14.
[18] *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.[19] The principles include:

a) There is a discretion as to whether costs would be awarded and in what amount.

b) The discretion is to be exercised in accordance with principle and not arbitrarily.

c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d) Equity and good conscience is to be considered on a case by case basis.

e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g) Costs generally follow the event.

h) Without prejudice offers can be taken into account.

i) Awards will be modest.

j) Frequently costs are judged against notional daily rates.

k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[69] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is $4,500.00 for the first day of an investigation meeting.[20] The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

---

[19] *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].
[20] *Hines v Eastlight Port Limited* [2018] NZEmpC 111 at [25]; *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].

The Claim

[70] The investigation meeting took place over 1 day. Using the normal daily tariff the starting point for an award of costs is $4,500.

[71] Mr Ward asks the Authority to order an uplift in the daily tariff to $7,500.

[72] In support of his application Mr Ward has produced an invoice dated 27 November 2018 from Mr Bennett's firm, Abbey Employment Law Specialists Limited, that totals $19,976.65 including GST. Under the heading "Description" the invoice lists 13 broad activities. No dates when these activities were undertaken are recorded. Of the 13 activities one is for a claim for accommodation at Novotel, two are for expenses relating to Anthony Harris, and one is for the preparation of Mr Ward's costs memorandum.

[73] Mr Ward's application is opposed by CSL. It submits no uplift is justified. Rather, in its submission, the daily tariff should be reduced to $1,350 taking into account a reduction for the contribution the Authority found Mr Ward had made to his grievance as well as the additional and unnecessary costs it has incurred due to the manner in which Mr Ward's case was conducted.

Should the daily tariff be adjusted upwards?

[74] Submissions filed on behalf of Mr Ward claim an uplift of the daily tariff on the ground that:

> the uplift of the daily tariff is warranted and reflects the additional costs incurred by the applicant when dealing with Mr Badcock at the initial stages of Mr Harris attempting to resolve the issues and when proceedings where (sic) commenced.

[75] It was submitted that Mr Badcock, CSL's representative, was

> obstructive and would engage in a pointless email exchange, such as requesting to know what Mr Harris's standing was. This also was exhibited by Mr Badcock when I took over from Mr Harris.

[76] No detail as to the email exchanges, or the additional time taken to respond to these emails, was provided with the costs submissions. However, in its response, CSL provided a copy of email exchanges between Mr Badcock and Mr Harris and Mr Bennett that appear to be the emails being relied upon by Mr Ward.

[77] These emails show Mr Badcock requesting Mr Harris, and later Mr Bennett, to advise in what capacity they were acting. I am satisfied these requests were reasonable. Section 236(3) of the Act provides that any person purporting to represent any employee or employer must establish that person's authority for that representation. Mr Harris and Mr Bennett could have avoided any unnecessary costs by answering that question.

[78] I am satisfied no uplift to the daily tariff is warranted.

Should the daily tariff be adjusted downwards?

[79] CSL submits that it has been put to increased cost as a result of:

a) Mr Ward failing to attend the first mediation where CSL incurred the costs of a half day of Counsel's time;

b) The failure to comply with the Authority's directions resulting in the original scheduled investigation meeting being adjourned.

c) The non-appearance of Mr Ward's wife at the investigation meeting. Despite filing a witness statement, she failed to attend. CSL was put to additional time preparing cross-examination of this witness.

[80] I shall consider each of these in turn.

Mediation

a) CSL submits that Mr Ward failed to attend the first mediation. I have no evidence before me to support this submission. I therefore do not take this into account in my consideration.

Conduct increasing costs

b) For the reasons I have previously outlined, I am satisfied that the manner in which Mr Ward's case was conducted unnecessarily increased CSL's legal costs.

c) The work required to be undertaken by CSL as a result of these breaches was outside that ordinarily required during an investigation. In the absence

of any evidence on the costs CSL has incurred in attending to these matters I consider a reasonable contribution towards these costs is $500.

Non-appearance by witness

d) Two witnesses filed witness statements but did not appear. The first was a witness for Mr Ward. The second was a witness for CSL. I consider any costs expended by either party in preparing questioning of each others witnesses was offset against the others. I do pause to note however, that in the case of CSL, it did provide advance warning to the Authority and Mr Ward that this witness, who was unwell, was unable to attend the investigation. No such warning was provided by Mr Ward.

Finding on Issue Three

[81] CSL is ordered to pay to Mr Ward the sum of $4,000 as a contribution towards his costs within 14 days of the date of this determination.

Issue Four: Disbursements

[82] Mr Ward requests the Authority to award him disbursements in the sum of $2,480.80 plus GST calculated as follows:

a) The costs of having Mr Harris attend the investigation meeting and give evidence in the sum of $2,360 plus GST.

b) Mr Harris' costs of travelling by vehicle to the investigation meeting. A sum of $100.80 plus GST is claimed that represents a round trip of 144 km from Tauranga to Rotorua.

[83] Reimbursement of disbursements may be recovered if they are necessary to the conduct of the proceeding, and reasonable.[21]

[84] I do not consider Mr Ward's claim for recovery of Mr Harris' fees to be a disbursement reasonably recoverable from CSL. Firstly, Mr Harris was a factual witness. He did not provide any expert evidence. Based on the time breakdown that was supplied by Mr Bennett, Mr Harris' time was limited to matters prior to the filing

[21] *Performance Cleaners All Property Services Limited v Chinan* [2018] NZEmpC 45 at [70]; *Baker v St John Central Regional Trust Board*[2013] NZEmpC 109 at [43].

of the Applicant's statement of problem and to his appearance at the investigation meeting.

[85] Secondly, no invoices were produced showing a charge by Mr Harris for his time or his travel costs. All that was provided was a tax invoice from Abbey Employment Law Specialists Limited dated 27 November 2018. This included an amount of $2,360 for "witness expenses for Anthony Harris for the day". The date of this attendance is not stated although the invoice records the sum is based on an 8 hour day and an hourly rate of $295. The invoice also included an amount of $6,000 for "Anthony Harris costs from mediations and other related issues". No detail as to how this sum was calculated was provided.

[86] Thirdly, it is not standard for the costs of travel for witnesses to be allowed.

Finding

[87] CSL must reimburse Mr Ward the sum of $71.56 for the filing fee that he paid to the Authority when filing his Statement of Problem. This must be paid within 14 days of the date of this determination.

Outcome

[88] The following orders are made:

A. Gregory Bennett is ordered to pay $8,000 by way of penalty under s 134A of the Act for obstructing and delaying an Authority investigation. I direct that $1000 of that sum is to be paid to Sam Ward, I direct $3,000 of that sum is to be paid to Concrete Structures (NZ) Limited. The remaining $4,000 is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

B. Payment of the penalty is to be paid within 28 days of the date of this determination.

C. Concrete Structures (NZ) Limited must pay to Sam Ward the following sums within 14 days of the date of the determination:

a. A sum of $4,000 by way of contribution towards his legal costs of bringing these proceedings; and

b. The Authority filing fee of $71.56.

Jenni-Maree Trotman
Member of the Employment Relations Authority