

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 679  
3079975

BETWEEN	CAROL SUSANNE BAKER Applicant
AND	HAURAKI RAIL TRAIL LIMITED First Respondent
AND	PETER FOSTER MAYNARD Second Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Allan Halse, Advocate for the Applicant  
Maurice Barnett, for the First Respondent  
Peter Foster Maynard in person

Investigation Meeting: 22 November 2019

Submissions and further  
Information Received: 22 November 2019 from the Second Respondent

Date of Determination: 27 November 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination follows the granting of an application for re-opening made by the Applicant, Carol Baker.<sup>1</sup> It considers whether the level of compensation that

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<sup>1</sup> *Baker v Hauraki Rail Trail Limited* [2018] NZERA Auckland 266.

was awarded under s 123(1)(c) of the Employment Relations Act 2000 (the Act) by the Authority in its original determination on 26 August 2015 was appropriate at the time the determination was made.<sup>2</sup>

[2] In addition, this determination addresses whether the Second Respondent, Peter Maynard, obstructed or delayed the Authority's investigation and/or is in contempt of the Authority. The investigation of these issues arises as a result of events that took place during the investigation of Ms Baker's claim in August 2015.

### **Procedural background**

[3] In 2015 the Authority issued a determination pursuant to which Ms Baker was found to have a personal grievance against the First Respondent, Hauraki Rail Trail Ltd (HRT), as her employer. Compensation was awarded in her favour in the sum of \$17,500 together with costs and disbursements amounting to \$1,821.56 (the 2015 determination). Following the issue of that determination, Ms Baker had difficulty enforcing payment of the amount ordered to be paid by HRT.

[4] In August 2017 Ms Baker applied to the Authority to re-open its investigation to join Maurice Barnett and Peter Maynard, both of whom were directors of HRT during her employment, as respondents. She also requested the Authority to investigate and increase the level of compensation that had been awarded to her under s 123(1)(c) of the Employment Relations Act 2000 (the Act).

[5] On 22 August 2018, in a determination issued by the then Chief of the Authority Member Crichton, Ms Baker's application for reopening was granted but her application to join Mr Barnett and Mr Maynard to the proceedings was declined. The decision to decline joinder was the subject of a non-de novo challenge by Ms Baker to the Court. Pending the outcome of that challenge the Authority held its proceedings in abeyance.

[6] On 17 October 2019 the Court dismissed Ms Baker's challenge. In its judgment it concluded:

[28] In summary, therefore, Ms Baker cannot rely upon the decision in the *Northern Clerical* case to have Mr Barnett and Mr Maynard joined to the Authority proceedings for the purposes of compliance and enforcement. This is an unfortunate consequence of the way in which the powers formerly vested

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<sup>2</sup> *Baker v Hauraki Rail Trail Limited* [2015] NZERA Auckland 259.

in the Labour Court under s 207 of the Labour Relations Act were diverted in different ways to the Court and the Authority, upon enactment of the Employment Relations Act. However, Mr Maynard is in breach of the undertaking that he gave to the Authority and is in contempt. He could be joined as a party to the proceedings in the Authority when it re-opens its investigation as it has decided to do and as recorded in the determination which is the subject of this challenge. That decision, however, is one for the Authority to make and not this Court. Ms Baker's challenge is dismissed.

### **The Authority's process upon re-opening**

[7] In light of the Court's concerns that Mr Maynard had engaged in behaviour that could be considered as contempt, I determined that it was appropriate that the Authority investigate this issue. For that reason I directed that Mr Maynard be joined to the investigation, pursuant to the Authority's powers under s 221 of the Act, so that the Authority could fully and fairly investigate the issue of contempt. I also summonsed Mr Barnett to appear at the investigation. Subsequently I notified the parties that the Authority would also investigate whether Mr Maynard had obstructed or delayed the Authority's investigation, without sufficient cause, such that a penalty should be ordered against him.

[8] No witness statements were required however I was provided with a copy of the affidavits Ms Baker filed with the Court supporting her challenge. In addition, Ms Baker, Mr Barnett (by Skype) and Mr Maynard were present at the investigation meeting and answered questions put to them by the Authority and Mr Halse, who represented Ms Baker.

[9] For the avoidance of doubt, I record that due to a protection order being in place that prohibited Mr Maynard from having contact with Ms Baker, the Authority put in place arrangements to avoid contact between these parties. A security guard was also present at all material times to ensure the safety of the parties.

[10] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The Issues**

[11] The issues identified for determination and investigation are:

- a. Was the level of compensation awarded under s 123(1)(c) of the Act appropriate at the time the 2015 determination was made?
- b. Did Mr Maynard obstruct or delay the Authority's 2015 investigation without sufficient cause?
- c. If so, should the Authority order Mr Maynard to pay a penalty?
- d. Is Mr Maynard in contempt of the Authority?

[12] For completeness, I record that no application for a compliance order was made by Ms Baker despite the Authority making timetable directions to enable any such application to be made.

**Issue one: The adequacy of the award of compensation**

[13] Ms Baker maintains that the award of compensation that was made by the Authority in its 2015 determination was inadequate and ought to be uplifted. In answer to questions put to her by the Authority she said that this was because the Authority had not been aware of important evidence at the time of making its determination that had an impact on her distress and anxiety.

*Death threat*

[14] First, Ms Baker said the Authority was unaware that Mr Maynard had made a death threat. She said this threat resulted in her having to leave her home and become reliant on her friends and family to support her. This led to a loss of wages.

[15] In terms of this allegation, although Ms Baker may not have raised it directly with the Authority, it is more likely than not that Member Crichton was aware of this evidence at the time he made his determination and took it into account in reaching the figure he awarded for compensation.

[16] In the 2015 determination Member Crichton records that he had read and taken notice of the matters contained in the District Court's protection order judgment.<sup>3</sup> This determination expressly referred to the facts upon which the Court relied in making that determination including the death threat:

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<sup>3</sup> At paragraphs [5], [12] and [23].

[19] In her second affidavit Ms Baker said that her last contact with Mr Maynard before she applied for the order was a telephone conversation on 9 July 2012 (after the dinner which had ended with a hug). In it, she said, Mr Maynard had asked her “What the variable of me walking out onto my front doorstep and getting shot was.” This statement, she said, haunted and chilled her particularly because she was aware that there had been a shooting somewhere around Mr Maynard’s earlier life when he had been involved with and convicted of cultivation of cannabis.

[17] It is apparent from his determination, that Member Crichton also considered Ms Baker’s ill health and lost wages, and took into account that this may have been caused or contributed to by the employer’s conduct, when determining the level of compensation to be awarded.<sup>4</sup>

#### *Assault by Mr Barnett*

[18] Second, Ms Baker said that Member Crichton was unaware that she had also been assaulted by Mr Barnett. She said this assault occurred around two weeks before she was assaulted by Mr Maynard. She said she reported this to the Police but they found there was no evidence of any assault occurring. Apparently a witness to the event had also downplayed the seriousness to her lawyer when the lawyer had spoken to him prior to the investigation meeting in 2015.

[19] There is no mention of this assault in Member Crichton’s determination or the District Court’s judgment where it granted a protection order in Ms Baker’s favour. Nor is there any mention of it in Member Crichton’s determination relating to the re-opening. It is likely therefore that Member Crichton was unaware of the assault, if indeed it occurred, and did not take this into account when reaching the quantum he awarded under s 123(1)(c)(i).

[20] Having considered the evidence provided by Ms Baker, I am satisfied that a revision of the quantum awarded by the Authority is not warranted. Even if the assault occurred, and I note that I make no finding that it did, there is no evidence as to the impact this assault had on Ms Baker. As she did not raise this incident with Member Crichton it is more likely than not that any effects were minimal and that her distress was caused predominantly by the matters addressed in the 2015 determination.

[21] Even if I am wrong, a review of awards made by the Authority show the amount awarded by Member Crichton was at the high end of awards made by the Authority at

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<sup>4</sup> At paragraphs [40] and [43].

the time so as to sufficiently cover any additional distress suffered. In the period from April 2015 to February 2016 the Authority only made six awards of compensation above \$15,000, one of which was this case. The majority of awards for this period were between \$5,000 and \$6,000.

#### *Other matters*

[22] For completeness, and as noted to Ms Baker during the investigation meeting, I acknowledge that she has endured distress trying to recover the debt. However, this is not a matter that can be taken into account by the Authority when considering compensation under s 123(1)(c)(i) of the Act. That is because any distress she has suffered is not attributable to her personal grievances.

#### *Finding on issue one*

[23] I am satisfied in all the circumstances that the award of compensation made by the Authority in the 2015 determination was fair and reasonable.

[24] I make no change to the amount ordered for compensation.

### **Issue two: Did Mr Maynard delay or obstruct the Authority's investigation?**

#### *The Law*

[25] The Authority derives its jurisdiction to order Mr Maynard 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.

[26] Section 134A 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.

[27] 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.

[28] In *Ahuja 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.<sup>5</sup> These included that:<sup>6</sup>

- b) Section 134A applies to actions causing actual obstruction and not those with the potential to obstruct;
- c) Obstruction occurs at the point where the Authority's ability to conduct a just and fair investigation is undermined and impeded;
- d) 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.

- e) 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.

### *Analysis*

[29] Having heard from the parties I am satisfied, on balance that Mr Maynard obstructed and delayed the Authority's investigation without sufficient cause.

[30] First, as the following facts show, Mr Maynard acted in a manner that resulted in a delay of the Authority's investigation for a period of some 8 months without sufficient cause.

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<sup>5</sup> *Ahuja v Labour Inspector Ministry Business Innovation and Employment* [2018] NZEmpC 31.

<sup>6</sup> At [28]-[30].

- a. On 29 October 2014 Mr Maynard made an offer on HRT's behalf to settle Ms Baker's claim by HRT paying her a sum of \$25,000. The offer was later accepted and a record of settlement was prepared and sent to Mr Maynard for execution. The anticipated settlement led to an adjournment of the Authority's investigation meeting set down for 4 December 2014.
- b. Following the adjournment Mr Maynard stopped all communication with Ms Baker and her Solicitor. Then, unbeknown to Ms Baker, HRT entered into an agreement for the sale of its tangible and intangible assets, and the sale of its stock. Mr Maynard was one of the signatories to this agreement.
- c. The purchaser of HRT's assets was an investor who Mr Barnett had arranged to fund the purchase on behalf of Great Rides New Zealand Limited. This was a company owned and operated by Mr Barnett and at material times contracted HRT to operate the cycle trail from Kopu to the Gorge.
- d. Settlement of the sale of the assets and stock of HRT took place on or about 28 January 2015. The transaction had the result of leaving HRT with no assets and unable to trade due to the sale proceeds paid by the purchaser being disbursed to Mr Maynard.

[31] Second, Mr Maynard gave false or misleading evidence to the Authority during the 2015 investigation meeting. This conduct undermined and impeded the Authority's ability to conduct a just and fair investigation and ultimately led to the Authority having to re-open its investigation causing unnecessary delay. I am fortified in this finding by the following evidence:

- a. As a settlement was not achieved, Ms Baker requested the Authority to continue its investigation of her claim.
- b. At the Authority's investigation meeting in August 2015, the Authority queried why settlement had not been achieved. The determination records Mr Maynard as advising that this was because HRT had "limited resources" and the offer that he had made was to be "funded by another company which he is involved with".
- c. This evidence was false or misleading. HRT did not sell its assets until late January 2015, around 3 months after HRT made the offer to settle. At this

time it disbursed payment to Mr Maynard. In addition, Mr Maynard told the Authority during the current investigation that he never sought to source funds for payment from any other source and gave little consideration to payment.

#### *Findings on issue two*

[32] Mr Maynard's obstructions impeded the Authority's ability to conduct a just and fair investigation and led to significant delay. Had the Authority known in 2015 what it now knows, it is likely that he would have been found in breach of s 134A of the Act at that time.

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

#### **Issue three: Penalty**

[34] Penalties are at the discretion of the Authority and are generally imposed for the purpose of punishment as well as discouragement to others. In determining an applicable penalty the Authority must have regard to all relevant matters including those set out in s 133A of the Act and the additional considerations set out in the full Court's judgment in *Borsboom v Preet*.<sup>7</sup>

#### *Nature and number of breaches*

[35] Mr Maynard obstructed and delayed the Authority's investigation on two occasions. However, I consider it appropriate to globalise the breaches. The maximum penalty for a single breach for an individual is \$10,000.<sup>8</sup>

#### *Whether the breach was intentional, inadvertent, or negligent*

[36] Mr Maynard's actions in obstructing the Authority were self-serving. It is difficult to view his obstructions as being for any reason other than to gain him time to divert funds to himself in preference to other creditors of HRT. His breaches were intentional.

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<sup>7</sup> *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

<sup>8</sup> Employment Relations Act 2000, s 135(2)(b).

[37] During the current investigation Mr Maynard acknowledged that he was an unsecured creditor of HRT and was aware at material times that the funds he was paid by HRT (approximately \$370,000) could be recalled if the company went into liquidation. But for Mr Maynard's unconscionable conduct it is more likely than not that Ms Baker would have received payment from HRT either directly, had he not disbursed the sale proceeds to himself, or under the provisions of s 292 of the Companies Act 1993.

*The nature and extent of any loss or gain*

[38] Mr Maynard's actions in delaying the Authority's investigation to enable the transfer of funds out of HRT, and then misrepresenting HRT's financial position, resulted in him receiving and retaining monies that, on balance, he was not entitled to. He has had the benefit of those monies for over four years during which time Ms Baker has been put to considerable expense and stress trying to recover the award made by the Authority in its 2015 determination.

*Steps to mitigate effects of the breach/payment of amount due*

[39] No action was taking by Mr Maynard to mitigate the effects of his breach until the Authority set this matter down for the hearing of the matters identified in this determination.

[40] Mr Maynard explained he did not understand until he was joined, and received a copy of the Authority's 2015 and August 2018 determinations, that he had made the representations that were recorded by Member Crichton. He said upon realising he held some responsibility for payment of the amount ordered by the Authority in its 2015 determination, he offered to make payment to Ms Baker. This was not accepted by Ms Baker however; during the investigation meeting on 22 November 2019 Mr Maynard made full payment of the amount due to Ms Baker (\$19,321.56).

*Circumstances of the breach*

[41] Mr Maynard could not explain why he obstructed the Authority other than to point to a brain injury that he had suffered in 2009. He explained that his brain didn't function properly and he "locked up". He requested the Authority to review two psychiatric reports that he produced during the investigation meeting that contained the

history of his brain injuries. One was dated 6 October 2010 and another dated 16 May 2019. I have read these reports.

[42] It is sufficient to say that the first of the psychiatric reports indicates that Mr Maynard was, for insurance purposes, “totally disabled” at the time the report was written in 2010 due to suffering major concussion in or about October 2009. However, it appears from the second report, that Mr Maynard had improved function by at least July 2016 when he suffered a second brain injury. This second injury led to him suffering “significant deterioration” due to an aggravation of his prior symptoms that appears to have continued to at least the time the second report was written, namely May 2019.

[43] As I do not know Mr Maynard’s mental state at times relevant to the alleged obstructions, the reports do not assist me with establishing whether Mr Maynard was impaired in some way at the time he appeared before Member Crichton.

*Vulnerability, deterrence, culpability*

[44] I take note that the obstructions occurred at a time when Ms Baker had been granted a protection order against Mr Maynard.

[45] There are strong public interest factors favouring a penalty that deters those who appear before the Authority from obstructing and delaying an Authority’s investigation through the provision of false or misleading evidence or otherwise.

[46] In *Ahuja* the Court said the maximum penalty must be reserved for the most serious cases involving heinous and repeated breaches.<sup>9</sup> I do not consider this case to be at the extreme end.

*Ability to pay penalty*

[47] I am not aware of any inability to pay a penalty. Under questioning Mr Maynard told the Authority that he owned a home and operated a company that was trading and solvent. Mr Maynard advised he will respect and pay any penalty the Authority orders him to pay.

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<sup>9</sup> *Ahuja v Labour Inspector, Ministry of Business, Innovation and Employment* [2018] NZEmpC 31, at [45].

### *Proportionality of penalty*

[48] The Authority's determination in *Davidson v Great Barrier Airlines Ltd* sets out relevant determinations of the Authority that have previously imposed penalties under s 134A.<sup>10</sup> I have considered these cases as well as the Court's decision 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."<sup>11</sup>

[49] I assess the degree of severity at 50 per cent.

[50] I consider it appropriate that part of this penalty be paid to Ms Baker as she has predominantly suffered the impact of Mr Maynard's conduct.

### *Finding on issue three*

[51] Mr Maynard is ordered to pay \$5,000 by way of penalty for his breach of s134A of the Act. This sum is to be paid to the Employment Relations Authority who is then directed to pay \$3,500 of this sum to Ms Baker with the remainder being paid into a Crown Bank Account. Payment of the penalty is to be paid within 28 days of the date of this determination.

### **Issue four: Is Mr Maynard in contempt?**

#### *The law*

[52] Section 196 of the Act sets out the grounds upon which a person can be held in contempt. In terms of the Authority these grounds are where a person insults a member of the Authority or any witness during his or her sitting, wilfully interrupts the proceedings of the Authority or otherwise misbehaves in an investigation meeting or a hearing of the Authority, or wilfully and without lawful excuse disobeys any order or direction of the Authority in the course of an investigation meeting.

[53] The allegation that Mr Maynard is in contempt derives from the evidence that he gave to the Authority during its investigation in 2015.

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<sup>10</sup> *Davidson v Great Barrier Airlines Ltd* [2016] NZERA Auckland at [36] to [40].

<sup>11</sup> At [45].

[54] I have already found, on balance, that Mr Maynard gave false or misleading evidence to the Authority. This is an issue of perjury. While I acknowledge the Court's comments that Mr Maynard maybe in contempt of the Authority, having heard Mr Maynard and Ms Baker's evidence and on the balance of probabilities, I find no contempt occurred.

*Finding on issue four*

[55] Mr Maynard is not in contempt of the Authority.

**Non-publication order**

[56] Following completion of the Authority's investigation meeting Mr Maynard wrote to the Authority. Contained within that correspondence was notification that he had recorded the Authority's investigation. This was done without the knowledge or the permission of the Authority or Ms Baker.

[57] In light of the protection order in place, I make a permanent non-publication order in respect of the recording taken by Peter Maynard during the Authority's investigation meeting on 22 November 2019 and any transcripts of that recording. This order is made by virtue of the Authority's powers under Clause 10(1) of Schedule 2 of the Act.

**Costs**

[58] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[59] If they are not able to do so and an Authority determination on costs is needed Ms Baker may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondents will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[60] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>12</sup>

## **Outcome**

[61] The overall outcome that I have reached is:

- a. A permanent non-publication order is made in respect of the recording taken by Peter Maynard during the Authority's investigation meeting on 22 November 2019 and any transcripts of that recording.
- b. There is no change to the quantum awarded by the Authority in *Baker v Hauraki Rail Trail Limited* [2018] NZERA Auckland 266 for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.
- c. Peter Maynard obstructed and delayed the Authority's 2015 investigation without sufficient cause.
- d. Peter Maynard is ordered to pay \$5,000 by way of penalty for his breach of s134A of the Act. This sum is to be paid to the Employment Relations Authority who is then directed to pay \$3,500 of this sum to Carol Baker with the remainder being paid into a Crown Bank Account. Payment of the penalty is to be paid within 28 days of the date of this determination.
- e. Peter Maynard is not in contempt of the Authority
- f. Costs are reserved.

Jenni-Maree Trotman  
Member of the Employment Relations Authority

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<sup>12</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].