

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 95
3074594

BETWEEN	HUTTON RICHARD POWDRELL First Applicant
AND	JOANNE MARGARET POWDRELL Second Applicant
AND	THE PARTNERS OF THE BAYLY PARTNERSHIP Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Ali Bendall, counsel for the Applicants Libby Brown, counsel for the Respondent Adam Simperingham, counsel for the Respondent in the Authority's first meeting
Investigation Meeting:	29 November 2019 & 4 to 6 March 2020 at Gisborne
Submissions Received:	24 March and 30 April 2020 from the Applicants 15 April 2020 from the Respondent
Date of Determination:	17 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Hutton Powdrell and Joanne Powdrell entered into separate settlement agreements with their employer, the Bayly Partnership trading as Cricklewood Station (the Partnership), on 8 May 2019. That was the last day of their employment with the Partnership. They claim the Partnership and its Operations Manager, Tom Hamilton, have repeatedly breached provisions

of the settlement agreements over a sustained period of time. Mr and Mrs Powdrell seek compliance orders and penalties in respect of the breaches.

[2] The Partnership at the time of the Authority's investigation comprised Mr John Bayly Mr Humphry Bayly, and Ms Diana Rogers. The proceedings lodged in the Authority cited the Mr Hamilton as Second Respondent. However, in submissions following the completion of the Authority's investigation, Mr and Mrs Powdrell accepted that Mr Hamilton was an employee of the Partnership and was not personally liable for penalties. They nonetheless submitted it was appropriate for Mr Hamilton to remain as Second Respondent in the matter. I disagree and accept counsel for the Partnership's submission that it is proper in the circumstances to remove Mr Hamilton as Second Respondent. I have accordingly done so.

[3] The breaches alleged by Mr Powdrell and Mrs Powdrell relate to the late payment of their final pay, disparagement of them, and failing to abide by the full and final nature of their respective settlements. They also seek the imposition of a penalty against the Partnership for obstructing the Authority's investigation.

[4] The Partnership acknowledges the delay in payment of final wages but says the delay was of a minor nature warranting no penalty. It denies making any disparaging comments in relation to Mr Powdrell and/or Mrs Powdrell, and denies obstructing the Authority's investigation. If the Authority finds that any officers or employees of the Partnership have made disparaging comments the Partnership says the settlement agreements should be construed in the context of the circumstances in which they were made.

The Authority's investigation

[5] The substantive investigation took place over three days in March 2020 in Gisborne. Evidence was heard from sixteen witnesses, five under summons. In accordance with s 174E of the Employment Relations Act 2000 (the Act), I have carefully considered, but not set out in this determination, all the evidence heard, and submissions received, from the parties. I have instead stated relevant findings on facts and law; expressed conclusions on issues requiring determination to dispose of the matter; and made orders where necessary.

[6] Some months before the substantive investigation meeting took place, I summonsed four persons to attend a preliminary meeting in an attempt to resolve an issue that had arisen between the parties over the disclosure of information and documents sought by Mr and Mrs

Powdrell. I will refer to that meeting later in this determination when considering the issue of whether the Partnership obstructed my investigation.

[7] Mr and Mrs Powdrell initially sought a non-publication order over the names of the parties and details of witnesses, but withdrew this on the first day of the substantive investigation meeting on 4 March 2020. The Respondent sought a non-publication order over the name of the private investigator it engaged. I will return to this shortly.

[8] This determination has been issued outside the timeframe set out at s 174C(3) of the Act in circumstances the Chief of the Authority has decided, in accordance with s 174C(4), are exceptional.

Issues

[9] The issues for the Authority to determine are:

- (a) Whether a non-publication order is appropriate.
- (b) Whether the Partnership breached a term or terms of the mediated settlement agreements; and, if so, whether
 - (i) A compliance order or orders should be made; and/or
 - (ii) A penalty or penalties should be imposed.
- (c) Whether the Partnership obstructed the Authority's investigation; and, if so
- (d) Whether a penalty should be imposed.

Non-Publication order appropriate?

[10] The Partnership submits a non-publication order should be made over the name and details of the private investigator it engaged, and over the name and details of that person's business. The Partnership engaged the investigator several weeks after entering into the settlement agreements with Mr Powdrell and Mrs Powdrell.

[11] In the Partnership's submission, the investigator was a commercially engaged agent who was carrying out the instructions of the Partnership at all times. It says the investigator faces potential reputational and business damage if a non-publication order is not made. The Partnership suggests Mr and Mrs Powdrell are seeking personal retribution as an outcome of their proceedings, including doing damage to the investigator's reputation because of "bad blood" between them.

[12] Mr and Mrs Powdrell deny that suggestion. They submit there are no grounds for a non-publication order and say such an order would not serve the principle of open justice, and nor are there any compelling reasons for it. In their submission, it has not been established that there would be any prejudicial impact or detrimental consequences on the investigator or the investigator's business if their names were published. They deny any bad blood between them and the investigator.

[13] In *Erceg v Erceg* the Supreme Court described the principle of open justice as "fundamental to the common law system of civil and criminal justice" and as a "principle of constitutional importance".¹ It recognised there are circumstances in which the interests of justice require the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. The Court referred to a high standard being required for a departure from the principle of open justice and stated that "...the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule...".²

[14] I am not satisfied the reasons put forward by the Partnership meet that high standard. There is little to support its suggestion that Mr and Mrs Powdrell's opposition to the non-publication order is motivated by a desire for retribution. The evidence the Partnership referred to comprised two sentences in Mrs Powdrell's written evidence to the Authority in which she expressed surprise that the investigator claimed not to know her, as they had attended school together.

[15] I do not consider that observation indicated malice by Mrs Powdrell towards the investigator or the existence of bad blood between them. It may have indicated disappointment and incredulity that the investigator did not recall her from school days but I am not willing to attribute any motive more sinister than wounded pride to Mrs Powdrell's comment.

[16] I accept the investigator was engaged by the Partnership to carry out an investigation and received instructions from the Partnership's Operations Manager. I do not accept this justifies suppression of the investigator's personal and business identity or that such suppression would serve the interests of justice.

¹ *Erceg v Erceg* [2016] NZSC 135 at [2].

² N1 at [13].

[17] The Partnership's submission regarding the possibility of reputational damage to the investigator and a damaging effect on the investigator's business lacks any detail. The general assertion that damage could be suffered by the person and/or the person's business is insufficient to persuade me that an exception to the fundamental principle of open justice is justified.

[18] I decline the application for an order for non-publication of the investigator's name and the name and details of the investigator's business.

Relevant background

[19] Mr Powdrell was, for approximately 14 years, the station manager at Cricklewood Station, a farm property owned by the Partnership. For the first four years he reported to Andrew Tweedie, and then to Mr John Bayly until February 2019 when Mr Humphry Bayly assumed the supervision role. I will refer in this determination to Mr Humphry Bayly as Mr Bayly.

[20] Mrs Powdrell was also employed by the Partnership, providing some general services at Cricklewood Station.

[21] In early May 2019 Mr Powdrell was invited to a meeting by his employer. This followed the disestablishment of his position as station manager and his successful application for the role of stock manager following a restructure undertaken by the Partnership. He attended the meeting on 8 May 2019 with Mrs Powdrell.

[22] Mr Bayly attended the meeting on behalf of the Partnership and was accompanied by Mr Hamilton and a Human Resources consultant who was advising the Partnership. Mr Powdrell was unrepresented but contacted his accountant for advice in the course of the meeting. The meeting ended in agreement to make that day the last day of Mr and Mrs Powdrell's respective employment relationships with the Partnership. They both signed separate settlement agreements with their employer on the day.

[23] The settlement agreements were signed off by a mediator employed by the Ministry of Business, Innovation and Employment on 13 May 2019 pursuant to s 149(3) of the Act. The mediator certified that, before he signed the settlement agreements, he had explained to the

parties the effect of s 149(3) and was satisfied they understood the effect of that subsection and had affirmed their request for him to sign the agreed terms of settlements.

[24] The effect of s 149(3) of the Act is that agreed terms of settlement, once signed by a mediator, are final and binding, may not be cancelled under s 37 of the Contract and Commercial Law Act 2017, and may be brought before the Authority or court only for enforcement purposes.

[25] The relevant terms of the settlement agreements that were common to Mr Powdrell and Mrs Powdrell are:³

1. These terms of settlement and all matters discussed shall remain, so far as the law allows, confidential to the parties.
- 3 ... All outstanding wages and holiday pay shall be paid on the next available pay date.
- 5 The parties agree not to make disparaging comments about the other (including of officers of the Partnership and to prospective employers) in the future.
- 16 This is a full and final settlement of all matters between the parties arising out of their employment relationship.

[26] It was undisputed between the parties that the “next available pay day” was 22 May 2019.

[27] Mr Powdrell's settlement agreement included a number of terms unique to his situation, one of which was that he was to:

...return all Partnership Property including any passwords, all farm information held electronically on his computers, telephone (within 28 days and includes passwords), fuel cards, farmlands card, new world card.

[28] Another term unique to Mr Powdrell's settlement agreement, but applicable also to Mrs Powdrell and their children, was that:

For house (sic) and safety reasons Hutton and his family shall limit their movements to the house and garden during the 28 day period.

³ As the numbering and wording of each of the settlement agreements differs slightly, I have cited Mr Powdrell's settlement agreement.

[29] While Mr Powdrell's settlement agreement referred to a 28 day period, there was an agreed change to the date he and his family could remain in the house. The change, initialled by Mr Powdrell and Mr Bayly, specified 7 June 2019 as the date by which Mr Powdrell would vacate the property.

[30] On 22 May 2019, Mr Bayly emailed a letter to Mr Powdrell, attaching a list of station property that had not been located in the course of a stocktake/audit of the Station Asset Register. Mr Bayly notified Mr Powdrell that the cost value of that property would be deducted from his final pay, unless he returned the property or satisfactorily explained its whereabouts.

[31] Mr Bayly's letter also reminded Mr Powdrell that he was required, under the settlement agreement, to advise his employer of all passwords and pin numbers, and requested him to do so as soon as possible. Mr Bayly observed the Partnership had calculated it would cost a minimum of \$1,500 plus GST to reset passwords and advised Mr Powdrell that \$1,500 would be deducted from his outstanding wages and holiday pay.

[32] Mr Bayly's letter concluded by informing Mr Powdrell that his final pay had been put on hold until such time as all the property was returned or its whereabouts was satisfactorily explained.

[33] Mr Powdrell was paid his final pay including outstanding wages and holiday pay on 24 May 2019.

Were there breaches of the settlement agreement?

A First alleged breach – withholding of pay

[34] The Partnership acknowledged it had withheld Mr Powdrell's wages for two days, thereby breaching his settlement agreement. As there are no wages outstanding, no compliance orders are necessary in respect of this breach of Mr Powdrell's settlement agreement.

An issue remains, however, as to whether the Partnership's acknowledged breach of the settlement agreement warrants the imposition of a penalty on the employer. I will return to that issue later in this determination.

B Second alleged breach - non-disparagement

[35] The settlement agreements reflected the parties' agreement about the way in which they would conduct themselves towards each other in the future. It set their respective obligations to each other including that they would not make disparaging comments about the other in the future. The obligation included not making disparaging comments about officers of the Partnership, or to prospective employers of Mr Powdrell and Mrs Powdrell.

[36] The Partnership maintains there were no allegations of theft or fraud against Mr Powdrell at the time the parties entered into the 8 May 2019 settlement agreements and therefore, the prohibition on disparaging comments in the settlement agreements could not apply to the subsequent allegations. I will return to this after considering whether there was any disparagement of Mr Powdrell and Mrs Powdrell.

[37] The Employment Court, in *Lumsden v Skycity Management Ltd*, adopted the Shorter Oxford Dictionary definition of “*disparage*” which is to:

- a. bring discredit or reproach upon; dishonour; lower in esteem;
- b. degrade, lower in position or dignity; cast down in spirit; and
- c. speak of or treat slightly or critically; vilify; undervalue, depreciate.⁴

[38] The court observed that, as the definitions made clear, there was “*no additional requirement for untruthfulness or fabrication.*”

[39] Mr and Mrs Powdrell's statement of problem referred to numerous and sustained breaches of their settlement agreements which included but were not limited to:

- (a) Mr Hamilton telling Cricklewood Station employees in May 2019 not to associate with them, implying the end of their employment was due to their misconduct;
- (b) Mr Hamilton, in late June or early July 2019, arranging for trespass notices to be served on them by the Police;
- (c) The Partnership and/or its agent conducting a private and ongoing investigation into their activities, and particularly into Mr Powdrell's conduct as station

⁴ *Lumsden v Skycity Management Ltd* [2017] NZEmpC 30 at [36].

manager at Cricklewood, in the course of which allegations or implications of fraudulent behaviour and/or misappropriation of money or stock were made against Mr Powdrell.

[40] In evidence to the Authority Mr Powdrell expanded on these matters and said his concerns over breaches of the non-disparagement provisions of the settlement agreements began in late May or early June 2019. He referred to specific situations where:

- (a) Two of the shepherds on Cricklewood Station told him that Mr Hamilton had told staff they were not to associate with him and that it would be bad for them if they did;
- (b) He became aware there were stories circulating in Wairoa for which, at the time, he thought a particular employee at Cricklewood Station was responsible;
- (c) He and Mrs Powdrell were served trespass notices by a local constable in respect of Partnership farm properties;
- (d) The manner in which Mr Hamilton and the private investigator carried out an investigation into him, including the investigator making accusations against him to others of stealing stock and/or money, and Mr Hamilton telling local businesses that if they worked with Mr Powdrell they would lose Bayly Partnership business.

Ban on visiting

[41] One of the shepherds referred to by Mr Powdrell gave evidence to the Authority under summons. The shepherd said Mr Hamilton told employees at breakfast one morning that if they were at Mr and Mrs Powdrell's house it would look bad for them. .

[42] Mr Hamilton denied the shepherd's account of what he had said at the breakfast and said he had told the employees they could visit Mr and Mrs Powdrell but the couple could not visit them.

[43] As earlier noted, Mr Powdrell's settlement agreement contained a provision that his movement and the movements of his family would be limited to the house and garden they occupied on Cricklewood Station until they vacated the property. Mr Hamilton's account of what he said at the staff breakfast is plausible in light of that provision. I do not find the

shepherd's evidence to be sufficiently strong to support Mr Powdrell's allegation of this particular breach.

Circulation of stories and trespass notices

[44] By June 2019 Mr Powdrell was aware there were stories circulating in the Wairoa community about him and Mrs Powdrell. He believed a particular employee of the Partnership, who worked at Cricklewood Station, was responsible for this and on 27 June 2019 texted Mr Hamilton about it.

[45] In his text, Mr Powdrell described the stories as "very untrue and quite laughable" and said he had been told they came from the Cricklewood employee, whom he described in unflattering terms. Mr Powdrell's text ended by suggesting that Mr Hamilton talk to the employee "explaining the situation and what the consequences might be if this continues."

[46] Mr Hamilton did not respond to Mr Powdrell's text but shortly thereafter attended the Wairoa Police Station to request that trespass notices be served on Mr Powdrell and Mrs Powdrell. Evidence was given to the Authority by a Police constable that she explained to Mr Hamilton the Police did not normally serve trespass notices unless there had been threats of violence.

[47] The constable said Mr Hamilton informed her Mr Powdrell had made threats of violence against an employee at Cricklewood Station. The constable said she was not shown any evidence of such threats but nonetheless a Police Officer served the trespass notices on Mr Powdrell and Mrs Powdrell in July 2019. They were each trespassed from Cricklewood Station, and other Partnership farm properties.

[48] Mr Hamilton, when questioned about the threats of violence Mr Powdrell had purportedly made to the Cricklewood Station employee, referred to Mr Powdrell's text of 27 June 2019 with its suggestion that he explain what "consequences" there might be for that employee if the stories continued. When asked why Mrs Powdrell had been trespassed, Mr Hamilton acknowledged there was no suggestion she had threatened violence against the Cricklewood Station employee but said she had been mentioned in Mr Powdrell's text. He also said there had not been good relations between that employee and Mrs Powdrell during the Powdrells' employment at Cricklewood Station. No evidence was provided to the

Authority to support that assertion and the employee in question did not attend the Authority's investigation meeting.

[49] Mr Powdrell's evidence was that the consequences he was referring to in his text were legal consequences. Mr Bayly had accused him by email on 23 May 2019 of breaching his settlement agreement by making a disparaging remark about the same Cricklewood Station employee, whom Mr Bayly considered to be covered by the non-disparagement provisions of the settlement agreements. Mr Bayly had advised Mr Powdrell that the Partnership took this very seriously and would seek enforcement and penalty action if it continued.

[50] Mr Powdrell told the Authority he wished to let the Partnership know he too took the non-disparagement terms of the settlement agreement seriously. That was why he suggested to Mr Hamilton that he explain to the Cricklewood Station employee he suspected of being the source of stories about him and Mrs Powdrell exactly what the consequences of spreading those stories might be.

[51] Mr and Mrs Powdrell, through their counsel, Ms Bendall, submit the non-disparagement provisions of the settlement agreements were breached when the Partnership, through Mr Hamilton, asked the Police to serve trespass notices on them. The Partnership disagrees and submits through counsel, Ms Brown, that while Mr Powdrell and Mrs Powdrell might not have liked having their rights of access to private property curtailed, it was the right of the property owner to decide who could come onto its property.

[52] In Ms Brown's submission, the Partnership exercised that right and lawfully issued trespass notices, in a situation where it perceived staff safety to be paramount. In counsel's view the trespass notices were outside the employment relationship and did not arise out of Mr Powdrell or Mrs Powdrell's employment.

[53] I am not persuaded by that submission or by the Partnership's reliance on health and safety grounds to justify its actions. I consider its reaction to Mr Powdrell's text of 27 June 2019 to have been disproportionate and unreasonable. Mr Powdrell's suggestion that Mr Hamilton talk to the individual he believed to be the source of the stories circulating about him and Mrs Powdrell could not reasonably have been construed as a threat of violence to that individual. Mr Powdrell may have described the employee in unflattering terms, but there was nothing in his text to indicate he intended violence towards her.

[54] In requesting the Police to serve trespass orders against Mr Powdrell and Mrs Powdrell because of alleged violence threatened by Mr Powdrell against a Cricklewood Station employee, I consider the Partnership disparaged each of them. In terms of the Shorter Oxford Dictionary definition, both were brought into discredit in the eyes of the Police and of any employees of the farm stations to which the trespass notices applied who had been informed of those notices.

[55] Mrs Powdrell appears to have been trespassed because of her marital relationship and because she was mentioned in Mr Powdrell's text to Mr Hamilton as also being the subject of the stories circulating around Wairoa. I accept Mr and Mrs Powdrell's submission that there was a negative connotation attached to being trespassed from Partnership properties for them both. The subtext for those who knew about the trespass notices, including employees on the Partnership properties and the police officers, was that Mr and Mrs Powdrell had behaved badly to warrant being trespassed not just from Cricklewood Station but also from other Partnership properties. That brought them into disrepute and would have lowered their standing in the eyes of those persons.

[56] I find the Partnership breached the non-disparagement provisions of the settlement agreements in respect of its trespass notice requests which resulted in the service of trespass notices by Police.

Investigation

[57] The Partnership claims that the stocktake/audit it had carried out after the May 2019 settlement agreements had been signed with Mr Powdrell and Mrs Powdrell disclosed concerns that led them to believe there had been probable fraud and theft by Mr Powdrell. This resulted in Mr Hamilton engaging, on behalf of the Partnership, private investigator Katherine Wallingford on 1 July 2019 to investigate its concerns.⁵

[58] In evidence to the Authority, Mr Hamilton said it was the stock audit carried out on 22 May 2019, which showed 734 more sheep on Crickleton Station than had been declared in Mr Powdrell's farm records, that was the reason for engaging Ms Wallingford.

[59] Initially, the Partnership asserted that Ms Wallingford was an independent contractor and not its employee or agent. Accordingly, in its submission, even if she had disparaged Mr

⁵ Paragraphs 2.5 and 2.6 of the statement in reply filed in the Authority on 7 October 2019.

and/or Mrs Powdrell, this could not be a breach of the settlement agreements. The Partnership acknowledged at the commencement of the Authority's substantive investigation meeting that Ms Wallingford had conducted her enquiries as its agent. It denied, however, that she had been disparaging in any of the interviews she conducted in the course of her investigation.

[60] Ms Wallingford's evidence was that Mr Hamilton asked her to investigate "*potential fraudulent criminal activity by one of the Bayly Partnership's former employees, Hutton Powdrell*". Mr Hamilton had told her the organisation had recently been through a restructure and Mr Powdrell had been made redundant approximately two months earlier.

[61] Ms Wallingford confirmed her instructions from Mr Hamilton in a letter to him dated 31 July 2019 under the heading "*Re: Fraudulent Activity at Cricklewood Station*". After thanking Mr Hamilton for his instructions, Ms Wallingford wrote:

You have requested us to:

- ▶ Conduct interviews/inquiries with 36 persons of interest, but not limited to
- ▶ Obtain and review all documentation relevant to fraudulent activity by Hutton Powdrell whilst managing Cricklewood Station.
- ▶ Obtain sufficient evidence to action a criminal investigation.
- ▶ Report on findings.

[62] The rest of the 31 July 2019 letter set out administrative details regarding Ms Wallingford's engagement. Her first progress report covering the month of July was attached to the letter.

[63] Mr Hamilton denied in oral evidence that he had asked Ms Wallingford to investigate fraud and theft by Mr Powdrell, saying he had engaged her to investigate stock movement and stock discrepancies arising from the post-settlements audit that showed the additional 734 sheep on Cricklewood Station. He acknowledged he had not corrected her wording at the time.

[64] In oral evidence Ms Wallingford blamed "relaxed wording" on her part for the way in which she reflected Mr Hamilton's instructions to her in her letter and report of 31 July 2019. However, she also said Mr Hamilton had used those, or similar, words to indicate to her his belief that Mr Powdrell had conducted fraudulent activity while he was at Cricklewood and that he had instructed her to obtain evidence to action a criminal investigation.

[65] I consider it highly likely Ms Wallingford accurately represented the instructions she had received from Mr Hamilton when she formally reflected them in her letter to him of 31 July 2019. The parties' agreed bundle of documents contains email correspondence from Mr Hamilton to Ms Wallingford in the week beginning 21 July 2019 which is consistent with his having instructed her to investigate wrong doing by Mr Powdrell rather than just stock movement and stock discrepancies.

[66] One example is an email to Ms Wallingford dated 24 July 2019 in which Mr Hamilton referred to his visit to a person or business (whose name was redacted) in relation to purchases made through Cricklewood Station. After setting out the process they would follow from there, Mr Hamilton said, clearly referring to Mr Powdrell in the context of the email:

Then we will see what he has stolen.

[67] Mr Hamilton's reaction to the stock audit report also suggests Mr Hamilton was unlikely to have given neutral instructions to Ms Wallingford. His immediate response to the presence of several hundred more sheep on Cricklewood Station than expected from Mr Powdrell's farm records was one of suspicion. Mr Hamilton said in his written evidence that it was incumbent on the Partnership to "find out why and how, for example, was Cricklewood being used as a holding pen for stock that had been stolen." He said he was concerned about the Partnership being implicated in stock rustling.

[68] Mr Hamilton did not ask Mr Powdrell, who was still residing on Cricklewood Station at the time, if he had an explanation for the additional stock. Instead he perceived the extra sheep to be linked to criminal activity by the former station manager. That, and emails Mr Hamilton sent Ms Wallingford after engaging her on 1 July 2019, persuades me that Ms Wallingford accurately reflected in her letter of 31 July 2019 the instructions Mr Hamilton had given her.

[69] It was Ms Wallingford's evidence, which I accept, that she had not known of the existence of the settlement agreements when she undertook her investigation and that she became aware of them only after Mr and Mrs Powdrell had commenced proceedings in the Authority. I also accept Ms Wallingford's evidence that she had not been given any instructions about taking care in how she referred to Mr Powdrell or Mrs Powdrell when interviewing potential persons of interest in the course of carrying out the investigation.

[70] Ms Wallingford said she introduced herself to interviewees as an investigator for the Bayly Partnership who was looking into potential criminal activity at Cricklewood Station while it was under Mr Powdrell's management. Ms Wallingford acknowledged she linked Mr Powdrell to that potential criminal activity in her 40-plus interviews with employees and business owners in the Wairoa/Gisborne area but she denied having disparaged him.

[71] Mr Hamilton confirmed he had not given Ms Wallingford any guidance about how to refer to Mr Powdrell while conducting her investigation. He said he trusted her to be careful in what she said to the people she interviewed and he asked her to keep investigating "on the lowdown" after she had given her first report on 31 July 2019. Mr Hamilton also said that his concern about Ms Wallingford essentially "cold calling" on some of the interviewees led him to contact them first to give them a heads up and some context into why she would be contacting them.

[72] One of the business owners Mr Hamilton contacted for that purpose was Andy Keefe. Mr Keefe is a director and the manager of a carrying company in Wairoa that provides cartage to the rural sector. He said Mr Hamilton, whom he had not previously met, visited him in or around the last two weeks of August 2019 and explained he was working for Mr Bayly. Mr Hamilton asked about the work Mr Keefe's company had undertaken for Mr Powdrell and whether there was any documentation relating to that work.

[73] Mr Keefe who, with his partners, had bought the carrying company in 2017 said they had not done much work for Mr Powdrell or for Cricklewood Station since then. There was no paperwork relating to work carried out by the previous owner of the company. Mr Keefe said Mr Hamilton told him Mr Powdrell was under investigation and there had been livestock going missing, including 40-50 cattle. He said Mr Hamilton made it clear he believed Mr Powdrell was responsible for this and had also made other statements about Mr Powdrell using Cricklewood Station resources for work on his own farm property.

[74] According to Mr Keefe, Mr Hamilton had told him Mr Powdrell was a thief and that, while Baylys were loyal and wanted to support local businesses, they would not continue to work with those businesses that were seen to work for Mr Powdrell. Mr Hamilton denied making any statement about Mr Powdrell being a thief and said it was Mr Keefe who raised the issue of missing cattle.

[75] Mr Keefe confirmed his evidence after reading Mr Hamilton's denials in his written statement. He also denied Mr Hamilton had told him that, when he had said the Partnership did not wish to use the same trucking company as Mr Powdrell, he had stated it was just for the duration of the investigation into Mr Powdrell's activities.

[76] Ian Risetto, a stock agent based in Wairoa, gave evidence of a phone message Mr Hamilton had left on his phone on 9 August 2019. The message made it clear that if Mr Risetto chose to continue doing work for Mr Powdrell, the Bayly Partnership would not deal with him.

[77] Mr Risetto said Mr Hamilton gave no reason for the Partnership's stance and made it clear the choice was his (Mr Risetto's) to make. As a result of the phone message Mr Risetto said he advised Mr Powdrell he would not be doing any further business with him, due to the significantly greater size of the business from the Bayly group of properties.

[78] A recording of that phone message was provided to the Authority. It did not support Mr Hamilton's assertion to the Authority that he had told all the people he contacted that the "no dealing" was a temporary measure during the investigation. In the voice mail message he left for Mr Risetto, Mr Hamilton placed no limit, either time-based or event-based, on the Partnership's withdrawal of business if Mr Risetto continued to undertake work for Mr Powdrell.

[79] Alaister Grey, who managed a transport company, gave evidence under summons of a long association between that company and the Partnership. Mr Grey, who is a relative of Mrs Powdrell, said the transport company had undertaken stock cartage work for Cricklewood Station and had also done some cartage work for Mr and Mrs Powdrell under their H & J Powdrell Trust. He recalled receiving a visit from Mr Hamilton in August 2019 during which Mr Hamilton told him he would prefer if the transport company pulled back from the relationship with Mr and Mrs Powdrell. Mr Grey did not believe this was an ultimatum but he was not told the request to pull back was a temporary measure.

[80] I was not persuaded by Mr Hamilton's denials in relation to Mr Keefe's evidence and am satisfied he disparaged Mr Powdrell in the course of the conversation he acknowledged having with him. I also accept Mr Keefe's evidence that Mr Hamilton did not specify the Partnership would not deal with Mr Keefe's business only for the duration of its investigation. Mr Hamilton had not done that in the voice mail message he left for Mr Risetto and I find it more likely than not that he conveyed a similar message to Mr Keefe.

[81] Ms Brown submits the Partnership is free to give its business to whomsoever it chooses. That is undisputed. However, in this situation the Partnership was operating in a small community in which it was well known that Mr and Mrs Powdrell had long been employees at Cricklewood Station. When a senior employee of the Partnership informed businesses and individuals that, if they continued providing services to Mr Powdrell they would lose the Partnership's business, there was an implication that Mr Powdrell had done something wrong to warrant such an action from his former employer.

[82] As Judge Corkill stated in *Byrne v NZTA*,⁶ "disparagement" is "capable of broad effect" and "any statement having a negative meaning could be disparaging in a general sense. That is, a disparaging statement can be expressly stated, or implied."⁷ In this instance, Mr Hamilton's message to Messrs Keefe and Risetto was disparaging of Mr Powdrell. His message to Mr Grey that the Partnership would prefer him to "pull back" from the relationship with Mr and Mrs Powdrell was, to a slightly lesser degree, disparaging of both of the applicants.

[83] A number of witnesses gave evidence about communications with them, by telephone or in person, that were instigated by Ms Wallingford. One of these was Ian Denton, who had been employed to work on Mr Powdrell's own farm since 2014 and was also employed on a casual basis at Cricklewood Station.

[84] Mr Denton said Ms Wallingford had left a business card at his house in late July or early August 2019 asking him to call her. Mr Denton did so and said he offered to meet Ms Wallingford at his workplace, which was at the Powdrells' farm. By his account, Ms Wallingford declined saying she did not want to be anywhere near Mr Powdrell or on his property. Mr Denton said he was not happy with her response and took her comments as a criticism of Mr Powdrell.

[85] Ms Wallingford confirmed she had a telephone conversation with Mr Denton and, in her written brief of evidence, said she did not think it appropriate to go onto Mr Powdrell's farm to speak with Mr Denton. In oral evidence Ms Wallingford denied having said she did not want to go onto Mr Powdrell's property: her recollection was that she had informed Mr Denton she did not want to go there while he was at work.

⁶ *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187.

⁷ N6 at [80].

[86] I accept Ms Wallingford made it clear that she did not wish to meet Mr Denton on Mr Powdrell's farm. I do not accept that in doing so she was necessarily being critical of Mr Powdrell. It would have been awkward for her to interview one of Mr Powdrell's employees on Mr Powdrell's property, given the nature of her instructions from the Partnership.

[87] While Mr Denton interpreted Ms Wallingford's view as critical of Mr Powdrell, I am not persuaded his interpretation of her words was necessarily accurate. I do not find that Ms Wallingford disparaged Mr Powdrell in her telephone conversation with Mr Denton.

[88] Barry Everest, who has owned and operated an earthmoving business for more than 20 years in the Wairoa area, told the Authority about a phone call he had received from Ms Wallingford in which she asked him about work he had undertaken for Cricklewood Station. Mr Everest said Ms Wallingford mentioned a contractor who had performed work for Mr Powdrell on his own personal farm and invoiced Cricklewood for the work at Mr Powdrell's request.

[89] Mr Everest said he told Ms Wallingford that was not how he operated and Mr Powdrell had never asked him to do anything like that. He said he had invoiced Mr Powdrell for all the work he did on his (Mr Powdrell's) own farm and Mr Powdrell had paid those invoices.

[90] Ms Wallingford had a different account of her conversation with Mr Everest. She said she asked him a question about invoicing for work he had undertaken for Mr Powdrell on his farm and had accepted his response. She said there was no further discussion between them.

[91] Kenneth King, who is a director of a building and farm supplies company, gave evidence of being visited by Ms Wallingford in or around August 2019. He said she told him she was investigating dealings with Mr Powdrell at Cricklewood Station and that there had been fraud there. Ms Wallingford told him Mr Powdrell had been buying goods from his (Mr King's) company and sending them to his own farm or to his bach but charging them to Cricklewood Station.

[92] Mr King said he told Ms Wallingford that information was incorrect and Cricklewood Station, under Mr Powdrell, had not used his company for supplies for two years at that time, with the last time it had spent any significant money there being the year ending March 2014. Cricklewood Station's expenditure had been substantially smaller than Mr Powdrell's personal purchase of supplies for his own properties.

[93] Ms Wallingford denied making any accusations or allegations against Mr Powdrell when interviewing Mr King. She said she asked Mr King a series of direct questions, such as whether he had ever delivered product to Mr Powdrell's bach or farm and billed Cricklewood.

[94] Richard Harding, a principal at a Gisborne firm of chartered accountants, gave evidence of a meeting he had with Ms Wallingford on 31 July 2019 at which she informed him she was investigating Mr Powdrell. Mr Harding had been Mr Powdrell's accountant for many years. By Mr Harding's account, Ms Wallingford said she believed there had been fraud by Mr Powdrell in relation to the social club at Cricklewood Station, and theft by him in relation to stock that was missing and of man hours.

[95] Mr Harding said Ms Wallingford also told him about Mr and Mrs Powdrell's personal use of the cook's food allowance during their employment at Cricklewood Station. In Ms Wallingford's estimation, this represented hundreds of thousands of dollars over the 14 years they had been at the station.

[96] Mr Harding said he provided information to Ms Wallingford about the long-standing Partnership-approved financial arrangements regarding goat mustering that had led to the establishment of the Cricklewood Station social club.

[97] Mr Harding said he had never had reason to believe that any of the Powdrells' financial affairs were questionable but he was taken aback by Ms Wallingford's accusations to the extent that, at the time, he doubted his long-time clients. Mr Harding subsequently attempted to obtain details from Ms Wallingford of the Partnership's specific allegations so that Mr and Mrs Powdrell could respond to them properly. Ms Wallingford was unwilling to provide any information to him about her investigation as she said she had no instructions to do so.

[98] Ms Wallingford could not recall discussing any topic with Mr Harding other than the Cricklewood Social Club Fund and the large number of transactions over a two-year period that did not make sense to her. While that was the extent of her recollection of the matters discussed during their interview, she stopped short of denying the matters Mr Harding said had been canvassed.

[99] After considering Ms Wallingford's evidence, and that of the witnesses who gave evidence about their interviews with her, I have concluded Ms Wallingford made statements about Mr Powdrell that were disparaging of him to Mr Harding and Mr King in the course of

her investigation. She referred to the theft of man hours and stock in her interview with Mr Harding and to what she believed to be misappropriation of social club funds by Mr Powdrell. Ms Wallingford also disparaged Mrs Powdrell in informing Mr Harding of the Partnership's view that she and Mr Powdrell had made personal use of the cook's allowance.

[100] I also find it more likely than not that she prefaced her question to Mr Everest by referring to a contractor who had done work for Mr Powdrell on his own property and was asked to invoice Cricklewood Station for it. In doing so, she disparaged him.

[101] In concluding Ms Wallingford made such comments, I have taken into account the instructions she received from Mr Hamilton and the tone of the email communications from him in the latter part of July 2019. Her task was to find sufficient evidence for a criminal prosecution against Mr Powdrell for fraud. That was plain from Ms Wallingford's first report to the Partnership following receipt of Mr Hamilton's instructions of 01 July 2019 as the report included the statement that she had "conducted initial inquiries to corroborate suggested fraudulent activity by Hutton Powdrell, and any other potential witnesses." (emphasis added). The instructions did not require her to take an impartial stance on whether or not Mr Powdrell had committed fraud, but to seek evidence supporting his guilt. In the context of those instructions, I prefer the evidence of the interviewees over that of Ms Wallingford.

[102] I note here that it was not part of my investigation to determine the veracity of any allegations the Partnership made about purported wrongdoing by Mr Powdrell. A comment may be disparaging regardless of whether or not it is true.⁸

[103] I have accepted that Ms Wallingford was unaware of the settlement agreement between Mr Powdrell and the Partnership and that she had been given no advice about how she was to refer to him in her interviews with persons of interest. While I have found she disparaged Mr Powdrell in the course of her investigation, she cannot be held responsible for unwitting breaches of settlement agreements she knew nothing about. The Partnership bears the responsibility for that as it gave her no guidance over the care she needed to take when referring to Mr Powdrell in the course of her investigation.

[104] The settlement agreements with both Mr Powdrell and Mrs Powdrell contained confidentiality provisions, which will explain why the Partnership did not advise Ms

⁸ N4 at [37].

Wallingford about the existence of those documents. It could, however, without breaching that confidentiality, have made it plain to Ms Wallingford there was a need for discretion and care in how she referred to the Powdrells when conducting interviews with persons of interest.

[105] There is no evidence the Partnership did that other, perhaps, than Mr Hamilton's instruction to Ms Wallingford, following her 31 July 2019 report, to keep on with her investigation "on the lowdown". That instruction was too vague, however, to provide guidance in relation to how she spoke of the Powdrells in future interviews and it was too late in any event as Ms Wallingford and/or her company had already interviewed more than 30 people in the community by that time.

[106] I referred earlier to the Partnership's submission that it should not be found to have breached the settlement agreement with Mr Powdrell if it disparaged him after discovering some of the activities he had undertaken during his employment as station manager. I do not accept the premise of that submission. The only evidence the Partnership provided to support its claim to have discovered wrongdoing by Mr Powdrell was the stock audit report of May 2019 that showed more sheep on Cricklewood Station than expected from stock records.

[107] As I have already noted, Mr Hamilton's evidence to the Authority was that on receiving the stock audit report he was immediately suspicious that the additional sheep were stolen and he was concerned the Partnership would be implicated in stock rustling. His evidence suggests he had nothing to substantiate the wrongdoing he immediately associated with Mr Powdrell. He had neither the time nor expertise, by his account, to investigate the matter himself. In the absence of anything more substantial, Mr Hamilton could not claim to have discovered wrongdoing at the time the Partnership instructed Ms Wallingford.

[108] The Partnership's submission on this matter was not assisted by many of the documents it provided to the Authority being so heavily redacted that they revealed nothing of the wrongdoing it alleged it had discovered. This includes the report the Partnership says it made to the Serious Fraud Office (SFO) in September 2019, of which only the title page was provided to the Authority.

[109] I conclude that the Partnership, through its employee, Mr Hamilton, and its agent, Ms Wallingford, disparaged Mr Powdrell and, to a lesser but not insignificant extent, Mrs Powdrell in the course of their investigation into Mr Powdrell's activities while he was employed as the

station manager at Cricklewood. There was no evidence that Mr Bayly or the other partners had disparaged either Mr or Mrs Powdrell.

[110] It is appropriate for a compliance order to be made in respect of the non-disparagement provisions of both Mr and Mrs Powdrell's respective settlement agreements. I will return shortly to address the issue of whether it is appropriate for a penalty or penalties to be imposed.

C Third alleged breach –full and final settlement

[111] The Partnership acknowledges that settlement agreements are final and binding; cannot be cancelled; the sanctity of them is to be preserved; and penalties are to deter people from breaching those agreements. However, the Partnership submits that settlement agreements are not intended to be used to prevent a criminal or civil prosecution or from making a protected disclosure to report criminal activity.

[112] In Ms Brown's submissions she asserts that Mr Hamilton and Ms Wallingford both come under the definition of an employee under the Protected Disclosure Act 2000 (the PDA), and the Partnership comes under the definition of an organisation. She submits the disclosures made by Mr Hamilton and/or Ms Wallingford and/or the Partnership about "serious criminal wrongdoing" to the SFO were protected by the provisions of the PDA.

[113] Ms Bendall objects to the Partnership raising the PDA defence for the first time in written submissions. The PDA had not formed part of the Partnership's statement in reply and had not been argued during the Authority investigation. Ms Bendall submits it was unconscionable for the Partnership to introduce the PDA in submissions after the failure to raise it as a defence earlier in the proceedings had denied Mr and Mrs Powdrell the opportunity to cross examine the Partnership's witnesses about the protected disclosure/s they allegedly made to the SFO.

[114] Additionally, in Ms Bendall's submission, the Partnership has not complied with the provisions of the PDA noting that, at no stage in the proceedings, had the Partnership provided any evidence it was making a protected disclosure during its investigation or at the time of making a complaint to the SFO. Ms Bendall submits it is clear that the Partnership did not contemplate making a protected disclosure at the time and observes it has provided no evidence of the material it disclosed to the SFO.

[115] I note the PDA provides that a disclosure of information is not prevented from being a protected disclosure of information merely because the employee does not expressly refer to the PDA when making the disclosure so that may not necessarily rule out any disclosure made by the Partnership.⁹ However, raising the PDA as a defence for the first time in written submissions meant there was no opportunity for either the Authority to question witnesses for the Partnership about the protected disclosures they purportedly made or for counsel for Mr and Mrs Powdrell to do so.

[116] The PDA has processes and requirements over protected disclosures. In the absence of the opportunity to question the relevant witnesses over the disclosures they made, I am unable to assess whether there is any validity to the claim that the report allegedly made to the SFO constituted a protected disclosure. Accordingly, I do not accept the Partnership's submissions on that matter.

[117] Ms Bendall submits the matters the employer investigated after Mr Powdrell and Mrs Powdrell's respective employment relationships with the Partnership ended all related to Mr Powdrell's activities while he was employed as station manager at Cricklewood. This, in her submission, breached the full and final provisions of the settlement agreements as all those matters arose directly from, and occurred during, the employment relationship.

[118] The intent of the full and final settlement agreements Mr and Mrs Powdrell entered into with the Partnership was, in Ms Bendall's submission, to draw a line under their employment relationships. She said this did not preclude any criminal investigation being carried out into alleged wrongdoing by Mr and Mrs Powdrell but, because the Partnership's investigations concerned matters that directly arose from and occurred during their employment, those investigations breached the full and final provisions of the settlement agreements.

[119] Ms Bendall also observed that in the course of Mr and Mrs Powdrell's employment the Partnership had raised many of the matters that were subsequently investigated by Ms Wallingford and Mr Hamilton. She noted specifically issues around goat mustering, the social club, queries around fuel usage and Mr Denton's working hours. In Ms Bendall's submission there is sufficient evidence to establish that the Partnership had a degree of suspicion and concern regarding Mr Powdrell's activities as Station Manager at Crickleton.

⁹ Section 6A of the PDA.

[120] Ms Brown opposes those submissions and submits that, if the Applicants' views on investigations carried out by the Partnership were to be accepted, the Partnership could only investigate matters that arose before Mr and Mrs Powdrell's employment relationships began or after they ended. In her submission, the full and final provisions of the settlement agreements drew a line under what was known to the parties at the end of the employment relationship.

[121] Ms Brown also rejects the proposition that the Partnership had concerns during Mr and Mrs Powdrell's employment over a number of the matters that subsequently formed part of its investigations. In Ms Brown's submission the Partnership had no knowledge of "criminal activities" at the time it entered into the settlement agreements with them. If it had known, it would not have entered into those agreements or agreed to the terms that it did. In her words, the stock audit that was carried out after the settlement agreements were signed opened up a 'can of worms'.

[122] I accept that there is insufficient evidence to substantiate the Partnership having prior suspicions about stock issues. There is some evidence, including letters and emails, that issues such as fuel usage, work undertaken by Mr Denton, and goat mustering, including issues of taxation and the social club account, were matters that had been raised by the Partnership, or by its accountants.

[123] In her submissions Ms Brown distinguished between matters arising out of the employment relationship and those that did not. The former matters were covered by the full and final provisions of the settlement agreements but the latter were not. In Ms Brown's submission the latter category included goat mustering, and any potential serious criminal wrongdoing.

[124] Ms Brown referred to *8i Corporation v Marino* in which Judge Inglis (as she then was) referred to exceptions to the phrase "full and final".¹⁰ The Judge observed that:

...while the term "final and binding" in s 149(3)(a) may appear, on its face to be unambiguous, the courts have long seen such faces to be multi-faceted. For example, in the law on compromise agreements it is well established that the phrase "full and final" is subject to exceptions (such as where a party deliberately withholds information about an issue which, if it had been known, would have affected the agreement). If the phrase "full and final" is susceptible to such interpretation, "final and binding" may be similarly interpreted, thereby

¹⁰ *8i Corporation v Marino* [2017] NZEmpC 69.

allowing the unlawfulness of a term to provide a gateway into re-examining an agreement.¹¹

(footnotes omitted)

[125] I note that judgment, in which (now) Chief Judge Inglis was reflecting on how “final and binding” may be interpreted, preceded the Court of Appeal’s judgment in *TUV v Chief of NZ Defence Force*.¹² The Court of Appeal, having dealt with the matter of capacity raised in that case, went on to consider the meaning of s 149.¹³ That meaning was to be ascertained from its text and in light of its purpose and the grounds on which a settlement agreement was liable to be set aside, including for lack of capacity, duress, undue influence and unconscionability. In those cases the settlement agreement was void or voidable at its inception.¹⁴

[126] The Court then observed that s149(3)(ab), which provides that the terms of a s 149 settlement agreement may not be cancelled under ss 36 to 40 of the Contract and Commercial Law Act 2017, may have “the surprising and, presumably, unintended, consequence of preventing cancellation of a settlement agreement that was procured by fraud.” The Court could not see any policy justification for holding either party to a settlement agreement that had been procured by a fraudulent misrepresentation made by the other party, and observed this was an issue that Parliament may wish to consider in the context of any future review of the Act.¹⁵

[127] It has not been suggested that any issues as to lack of capacity, duress, undue influence or unconscionability arise in relation to the settlement agreements. Ms Brown’s submission that the Applicants themselves clearly knew of their criminal actions and failed to reveal them appears to fall within the area of “fraudulent misrepresentation” referred to by the Court of Appeal. If so, Ms Brown’s submission must fail unless and until the review alluded to by the Court takes place and results in a change to the current law.

[128] In Ms Bendall’s reply submissions she noted Mr and Mrs Powdrell had never taken the position that, if the Partnership had legitimate concerns, it could not take those concerns to the proper authority for investigation. She submits it would have been a simple matter for the

¹¹ N10 at [32].

¹² *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12.

¹³ *TUV v WXY* [2018] NZEmpC 154.

¹⁴ N12 at [39] to [45].

¹⁵ N12 at [47].

Partnership to hand over the stock audit and stock records to the Police and ask them to investigate any discrepancy. What Mr and Mrs Powdrell objected to was the Partnership's conducting of what Ms Bendall characterised as "extensive and intrusive enquiries around Wairoa" which in her view spread accusations about them in their local community.

[129] I agree with Ms Bendall. It was clear from Mr Hamilton and Mr Bayly's evidence that the impetus for the engagement of Ms Wallingford was the stock audit report. Yet the investigation it instructed Ms Wallingford to carry out was for the purpose of gathering evidence of criminal activity on a range of Mr Powdrell's actions, not confined to the stock numbers on Cricklewood Station. The Partnership provided no evidence of its reasons for doing so other than the suspicions it had formed regarding Mr Powdrell on receipt of the stock audit report.

[130] The matters that witnesses said were raised with them in their interviews with Mr Hamilton and/or Ms Wallingford included theft of man hours as well as livestock; the charging to Cricklewood Station of goods and for services supplied to Mr and Mrs Powdrell in relation to their own properties; personal use by both Mr and Mrs Powdrell of the Station cook's food allowance; use/misuse of Cricklewood social club funds and the mustering of goats.

[131] I accept Mr and Mrs Powdrell's submission that the raising of those matters, which all related to alleged activity by them during their employment at Cricklewood Station, undermined the full and final nature of their settlement agreements. Whether the suspicions were founded or not is something I cannot determine as no evidence was presented or able to be gleaned in the course of my investigation. Ms Brown's submission that settlement agreements should not be allowed to sanction criminal actions is not persuasive in the absence of evidence to support allegations of such activity, or even to support that such actions may have occurred.

[132] I note here that I do not accept Ms Brown's submission that goat mustering fell outside the employment relationship and was not caught by the settlement agreement provisions. I find Ms Bendall's submission, which was based on evidence before the Authority that goat mustering was an original part of Mr Powdrall's terms and conditions of employment, to be more persuasive.

[133] I find that the full and final provisions of Mr and Mrs Powdrell's respective settlement agreements were breached by the Partnership. Compliance orders are appropriate and will be made. I will return shortly to address whether a penalty or penalties should be imposed.

[134] I note at this point that Ms Bendall also seeks an order that the Partnership remove the trespass from Partnership properties, some of which are used for public activities. I decline to do so as the trespass notices were served by a police officer and I have no power to order the Police to remove them.

Obstruction of Authority's investigation

[135] As I have noted in paragraph [6] above, I held a preliminary meeting with the parties some months before the substantive investigation meeting for the purpose of resolving an information disclosure issue. Counsel for Mr and Mrs Powdrell had sought a number of documents relating to the Partnership and Ms Wallingford's investigation into her clients which the Partnership was unwilling to disclose.

[136] I summonsed four persons to attend that meeting which took place in Gisborne on 29 November 2019. The summonsed persons were Mr Hamilton; Ms Wallingford; and two of the three partners of the Bayly Partnership, being Mr Humphry Bayly and Ms Diana Roberts. Mr John Bayly, who was the third partner, was excused from attending on medical grounds.

[137] The summons for each of the four persons was slightly differently worded to reflect the particular person's role/relationship. Each required the summonsed person to bring to the investigation meeting any documents within their possession or control:

... including, but not limited to, letters, emails, texts, notes of phone calls, file notes and reports (including drafts) that are in your power, possession and/or control that are relevant to the proceedings. The documents include all documents exchanged between the first and second respondents and Owl Investigations/Kate Wallingford regarding the H & J Powdrell Partnership, Alton Farm, Hutton Powdrell and Joanne Powdrell; all documents between the partners of the Bayly Partnership and Tom Hamilton; and all documents exchanged between all persons, and businesses and the first and/or second respondents and Owl Investigations/Kate Wallingford, during the course of the investigations into the H & J Powdrell Partnership, Alton Farm and/or Hutton Powdrell and/or Joanne Powdrell.

[138] Mr Bayly, Ms Roberts and Mr Hamilton presented with no documents. Ms Wallingford had provided some documents to the Authority in advance of the meeting.

[139] Ms Roberts described herself as a silent partner in the Partnership and said she was in the process of extricating herself from it. She said she had no documents and no awareness of the claims made by Mr and Mrs Powdrell. She had no recollection of there being any discussion about Mr and Mrs Powdrell at the last meeting of the Partnership she had attended.

[140] Mr Bayly said he had brought no documents as he had not disparaged Mr or Mrs Powdrell in any of them. When questioned about the documents itemised in the summons, he said he had misread the summons.

[141] Mr Hamilton said he too had misread the summons. He also asserted that documents relating to the fraud investigation were not relevant to the issue of whether he or Mr Bayly had made any disparaging remarks about Mr Powdrell or Mrs Powdrell and said the Partnership claimed privilege in relation to those documents on the basis that they had been created for the dominant purpose of litigation.

[142] Many of the documents Ms Wallingford provided were heavily redacted. She asserted that the information she had gathered in the course of the investigation undertaken for the Partnership was solely for the purposes of litigation and therefore subject to litigation privilege.

[143] With regard to the disclosure issue, the Partnership through its legal representative at the time, Mr Simperingham, submitted that the Authority should not and could not order disclosure in the proceeding as the proceeding relates to an action for the recovery of a penalty. He referred to the Employment Court Regulations 2000 which provide, in regulations 40 to 52, the disclosure regime applicable to matters brought to the Employment Court. At regulation 39(2) it is specified that nothing in regulations 40 – 52 applies to any action for the recovery of a penalty.

[144] I note that the Authority is bound by its own regulations, namely the Employment Relations Authority Regulations 2000. The Employment Court Regulations do not apply to the Authority. The Authority regulations contain no equivalent disclosure provisions to those of the Employment Court. However, the Authority's powers under s 160(1) of the Act include the power to:

- (a) call for evidence and information from the parties or from any other person:
- (b) require the parties or any other person to attend an investigation meeting to give evidence:

- (c) interview any of the parties or any person at any time before, during, or after an investigation meeting: ...

[145] Those powers have do not have any equivalent restriction to that contained in regulation 39(2) of the Employment Court Regulations

[146] With regard to litigation privilege counsel for the Partnership referred to the privilege provisions of the Evidence Act 2006. Whilst acknowledging that Act did not apply to the Authority, Mr Simperingham submitted the Authority should find Ms Wallingford was engaged for the purpose of litigation and her documents were legally privileged.

[147] Ms Bendall accepted that under the common law privilege may attach to documents but denied that it applied in this instance. Counsel submitted that the documents relating to the investigation carried out by Ms Wallingford and her company for the Partnership had been created for a number of purposes and not for the dominant purpose of obtaining legal advice in relation to the current proceedings in the Authority.

[148] Ms Bendall referred to the “dominant purpose test” in *Guardian Royal Exchange Assurance v Stuart*¹⁶ where the Court of Appeal proposed as “the New Zealand rule” that:

...when litigation is in progress or reasonably apprehended, a report or other document obtained by a party or his legal adviser should be privileged from inspection or production in evidence if the dominant purpose of its preparation is to enable the legal adviser to conduct or advise regarding the litigation.

[149] In that case, the Court unanimously held that the documents under examination did not meet that test and were not privileged as they had been prepared for a number of purposes, of which contemplated litigation was just one.

[150] I do not accept the Partnership’s submissions regarding disclosure and am satisfied the Authority has the power under s 160 of the Act to require witnesses to provide information as sought from the four persons who were summonsed to attend the preliminary meeting. However, I find the Partnership’s submissions regarding litigation privilege sufficiently persuasive that I am not prepared to find it obstructed my investigation in failing to provide the documents that had been sought.

¹⁶ *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596.

[151] In doing so I take into account the nature of the proceedings, which are for compliance with settlement agreements and penalties for breaches of them. The Authority's ability to determine those matters has not been impeded by the Partnership's failure to provide the documents sought. In some respects, the Partnership's decision to invoke litigation privilege may have deprived it of the ability to substantiate the defences it has raised.

[152] In determining that the Partnership did not obstruct my investigation the parties, I also take into account that the summonsed witnesses all attended the preliminary meeting, explained their reasons for either not providing documents or for providing redacted documents, and all responded to questions put to them.

Penalties

Legal considerations

[153] The Partnership is liable, under s 149(4) of the Act, to a penalty or penalties being imposed for its breaches of Mr Powdrell and Mrs Powdrell's respective settlement agreements.

[154] A partnership is not a legal entity and, as made clear by Judge Perkins in *Labour Inspector v Parihar*, the partners share separate individual liability for any penalties that may be imposed.¹⁷ The maximum penalty for a breach is \$10,000.¹⁸ Not all breaches will result in the imposition of a penalty and it is relevant to ascertain how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.¹⁹

[155] Section 133A of the Act sets out factors the Authority and Court are to take into account when considering penalties. They are (summarised):

- (a) the object of the Act; and
- (b) the nature and extent of the breach; and
- (c) whether it was intentional, inadvertent, or negligent; and
- (d) the nature and extent of loss or damage suffered by any person, or gains made or losses avoided by the person in breach, due to the breach; and

¹⁷ *A Labour Inspector v Paramjeet Singh Parihar in Partnership with Kuldip Kaur Parihar trading as Super Liquor Flagstaff and Super Liquor Hillcrest* [2019] NZEmpC 145 at [14].

¹⁸ S 135(2) of the Act.

¹⁹ *Xu v McIntosh* [2004] 2ERNZ 448 at 464.

- (e) whether the person in breach has paid any compensation, reparation or restitution or taken other steps to mitigate any adverse effects, actual or potential;²⁰ and
- (f) the circumstances in which the breach occurred, including the vulnerability of the employee; and
- (g) whether the person in breach has been found by the Authority or court, in proceedings under this or any other Act, to have previously engaged in similar conduct.

[156] The Employment Court has provided guidance over the application and weighting of those factors in *Borsboom (Labour Inspector) v Preet PVT Limited*²¹ and further refinements have been subsequently made by the Court, including in *Nicholson and Ford*.²²

[157] Additional guidance on the effect of the separate liability of partners on the calculation of penalties is provided in *Labour Inspector v Parihar*.

Penalties in this instance

[158] I have found the Partnership breached Mr Powdrell and Mrs Powdrell's respective settlement agreements. Mr Powdrell's wages were withheld for two days; both Mr and Mrs Powdrell were disparaged by the issuing of trespass notices against each of them in respect of Partnership properties; and by other disparagement in the course of the Partnership's investigation. Both Mr and Mrs Powdrell's settlement agreements were breached, to different degrees, by the Partnership embarking upon an investigation into matters that were claimed to have occurred during their employment.

[159] Counsel for Mr and Mrs Powdrell submits that breaches identified in relation to Mr Powdrell are breaches against Mrs Powdrell by implication as well as breaches against the H & J Powdrell Partnership.

[160] I reject that submission. Mrs Powdrell had her own employment arrangements with the Partnership and her own settlement agreement. There is no justification for treating breaches of Mr Powdrell's settlement agreement as implied breaches of Mrs Powdrell's settlement agreement and I will consider the issue of penalties for Mr Powdrell and Mrs Powdrell separately. As far as I am aware, the H & J Powdrell Partnership had no relationship with the

²⁰ References in s 133 A to a "person in breach" also refer to a person involved in a breach.

²¹ [2016] NZEmpC Christchurch 143.

²² [2018] NZEmpC 132.

Bayly Partnership. It did not feature in either Mr Powdrell or Mrs Powdrell's settlement agreements and has no relevance to the issue of penalties.

[161] Turning first to Mr Powdrell, I have identified nine separate breaches in respect of his settlement agreement, which means there is potential for \$90,000 to be imposed in penalties. While it is likely Ms Wallington disparaged Mr Powdrell in all 40 of the interviews she conducted, in light of her acknowledgement of linking him to potential criminal activity at Cricklewood Station, I will restrict my consideration of penalties for breach of the non-disparagement provisions to those I have more evidence about. I will address each of the breaches, then consider the issues of globalisation and individual Partner liability.

[162] Ms Bendall acknowledged in submissions that the Partnership's breach of the wages provision was at the lower end of the scale, being a delay of only two days from the day the wages should have been paid. In her submission, however, that breach set the tone for the continuing breaches that followed and should not be overlooked.

[163] Mr Powdrell spoke of inconvenience caused by the late payment of his wages but provided no evidence of the effect this had or any loss caused by it. Given that he had recently lost his position as Station Manager and would shortly have to vacate his home of the past 14 years, it is reasonable that any delay in paying his wages in accordance with the terms of the settlement agreement he had entered into with his former employer would be a cause of consternation to Mr Powdrell.

[164] The circumstances in which payment of Mr Powdrell's final wages and holiday pay was delayed were, as Mr Bayly's letter of 22 May 2019 informed Mr Powdrell, that items of station property under Mr Powdrell's control had not been located. Also pin numbers and passwords that Mr Powdrell was required to supply the Partnership under his settlement agreement had not been provided.

[165] Mr Bayly advised Mr Powdrell that his final pay would have the cost value of the missing property deducted, and an amount of \$1,500 would be deducted for the cost of resetting passwords and pin numbers unless he returned the property, or satisfactorily explained its whereabouts, and provided those pins and passwords. His final pay was put on hold in the meantime.

[166] Mr Bayly had signed the 8 May 2019 settlement agreement and was aware that Mr Powdrell's wages were due on the next available pay day which, as the parties agreed, was 22 May 2019. Mr Bayly was also aware that Mr Powdrell and his family were still living on Cricklewood Station in accordance with the agreed terms of the settlement and that he had 28 days within which to return all Partnership property including pins and passwords. Mr Bayly's letter was sent well within that 28 day period. Mr Powdrell's evidence, which was not challenged, was that he had not been contacted about the missing property and the pins and passwords before he received Mr Bayly's letter.

[167] Any breach of a settlement agreement is serious and I find in the circumstances that the delay in payment of Mr Powdrell's final wages warrants a penalty. I disagree, however, with counsel for Mr Powdrell's view that the delay in paying wages should be treated more severely because it signalled the start of a series of breaches of agreed terms of settlement. I find it appropriate to treat this breach on its face rather than as an omen of breaches to come.

[168] In assessing the amount of the penalty I view as an aggravating factor that the Partnership delayed the final wages for reasons related to property not yet returned, while the agreed timeframe for its return still had 14 days to run. Offsetting that, there was a mitigating factor in that the Partnership rectified the non-payment within two days.

[169] Taking into account the seriousness of withholding a person's wages, the moderate inconvenience suffered by Mr Powdrell, and the deterrent factor that a penalty sends to the employer in this instance and to other employers, I find a modest penalty to be appropriate. While the maximum penalty for a breach is \$10,000, if I were to apply a separate penalty for this breach, taking into account both the aggravating and mitigating factors, it would provisionally be for \$750.

[170] With regard to the breaches of the non-disparagement provisions of Mr Powdrell's settlement agreement, I have found he was disparaged by the action of the Partnership in trespassing him from Cricklewood and other Partnership farm stations. I have found the Partnership had no reasonable justification for trespassing Mr Powdrell on the basis of a text he had sent Mr Hamilton. Nor was there good reason for requesting that Police serve the trespass notices which, as the constable who dealt with Mr Hamilton's request told him, was normally done only where there had been threats of violence.

[171] Trespassing Mr Powdrell from Partnership properties was a deliberate and unreasonable act by the Partnership. I accept Mr Powdrall's evidence of being embarrassed and affected by his former employer's action and by the message it conveyed to him and to those who knew of the trespassing. It merits the imposition of a penalty. I consider the information given to the Police that Mr Powdrell had threatened violence to a Partnership employee to be an aggravating factor. There are no mitigating factors to consider. Considered as a stand-alone penalty I would provisionally find \$5,000 to be an appropriate penalty.

[172] The second series of breaches of the non-disparagement provision of Mr Powdrell's settlement agreement consisted of the Partnership's advice to Mr Keefe and Mr Risetto respectively that, if they continued to provide services to Mr Powdrell, the Partnership would not deal with them. That advice and the Partnerships's advice to Mr Grey that it would prefer him to pull back from his relationship with Mr and Mrs Powdrell, implied some wrongdoing on their part. It was deliberate and the Partnership either knew, or should have known, that its communications with these three individuals would reflect poorly on Mr Powdrell.

[173] I find the imposition of a penalty to be merited. Considered as stand-alone penalties for each of this series of breach I would find \$1,500 per breach to be an appropriate provisional penalty, yielding \$4,500 in total.

[174] The final series of breaches of the non-disparagement provisions of Mr Powdrell's settlement agreement consisted of the investigator's communications with Mr Everest, Mr King, and Mr Harding. In those three interviews I have found the investigator associated Mr Powdrell with potential fraud. With Mr Everest and Mr King the investigator referred to Mr Powdrell purchasing goods and/or services for his private purposes, which he charged to his employer's account. With Mr Harding, the investigator referred to fraud relating to Cricklewood's social club account and theft in relation to man hours and stock. Her reference to Mr and Mrs Powdrall's personal use of the cook's food allowance also implied either fraud or theft over many years by them.

[175] As I have already noted, the investigator had no knowledge of Mr Powdrell's settlement agreement and accordingly the breach of the non-disparagement provision was unintentional on her part. While the investigator was unaware of the settlement agreement, I have found she received no instruction or advice from the Partnership about taking care not to impugn or

disparage Mr Powdrell in the course of her investigation. In this situation I would describe the breach as negligent on the part of the Partnership.

[176] Mr Powdrell's evidence, which I accept, was that the nature of the allegations made against him to members of the community had been destructive and hurtful. They had done damage to his reputation and left him worried about future employment prospects, humiliated and mentally drained.

[177] I find this series of breaches of the non-disparagement provisions of Mr Powdrell's settlement agreement also merits the imposition of a penalty on the Partnership. If I were to consider each breach as meriting a separate penalty I would impose a penalty of \$2,500 per breach in view of the serious nature of the allegations made against Mr Powdrell to individuals and businesses in the local community, totalling \$7,500.

[178] The third category of breach of Mr Powdrell's settlement agreement was that of the full and final provisions. The breach of this provision by the Partnership commencing an investigation into Mr Powdrell's actions during his employment at Cricklewood Station led to the breaches of the non-disparagement provisions. It was an intentional breach that I accept has had a negative impact on Mr Powdrell's life.

[179] I find the imposition of a penalty is warranted to impress upon the Partnership and other employers the importance of adhering to a bargain made through a mediated settlement agreement. If I were to award a separate penalty for this breach, the provisional penalty would be \$5,000.

[180] The total provisional penalties for the breaches of Mr Powdrell's settlement agreement is \$22,750.

[181] I have found nine breaches of Mr Powdrell's settlement agreement. Any breach of a s 149 settlement agreement is serious as it may undermine public confidence in the efficacy of such statutory provisions. The Act promotes mediation as the primary problem-solving mechanism, other than for enforcing minimum standards, so it is important that public confidence is maintained in the effectiveness of mediation and any settlements achieved under the provisions of s 149. As noted above, I consider the two day delay in paying wages to be less serious than the other breaches because of the swift rectification by the Partnership.

[182] That was, however, the only instance in which I consider the Partnership made any effort to mitigate the damage caused by its breaches of Mr Powdrell's settlement agreement. Ms Bendall submits that those breaches caused Mr Powdrell irreparable reputational damage such that he no longer has an opportunity to progress his career as Farm Manager in the Wairoa area where he has spent his working life. Ms Bendall has estimated his loss, based on the Partnership's evidence of his and Mrs Powdrell's combined packages being \$200,000 per annum at \$1,000,000 over the next five years. I do not accept that as an accurate estimate of loss. Mr Powdrell has the ability to seek employment outside the area and it is not realistic to assume he would choose not to do so if he were unable to find work locally.

[183] Mr Powdrell could not be classified as a vulnerable person as that is understood in the employment area. There is no evidence the Partnership has previously engaged in similar conduct but there is also no acknowledgement by the Partnership that it has breached Mr Powdrell's settlement agreement. There is no evidence that the Partnership is unable to pay a penalty imposed by the Authority.

[184] Having considered each of the three categories of breach of Mr Powdrell's settlement agreement, I turn to the issue of whether it is appropriate to award a global penalty or separate penalties for each breach. Ms Bendall submits that this is not a case where penalties should be globalised or treated as one continuous breach. To do so, in her view, would result in the imposition of an artificially low potential maximum penalty that would not reflect the serious level of breaches and wrongdoing committed by the Partnership.

[185] In Ms Bendall's submission, the Partnership acted as vigilante in this matter, publicly vilifying and isolating Mr and Mrs Powdrell for alleged, unproved wrongdoings that they have had no opportunity to address. Her assessment of the penalties that should be imposed on the Partnership in respect of the breaches of Mr Powdrell's settlement agreement is \$428,400.

[186] Ms Brown opposes the imposition of any penalty and submits the Partnership was simply looking into "serious potential wrongdoing within its organisation". In counsel's submission there is no evidence that the Partnership, Mr Hamilton or the investigator, who was unaware of the settlement agreements, set out with the clear purpose and deliberate intent to breach those settlement agreements. The Partnership was, in her view, acting with lawful purpose in search of factual information about matters related to the Partnership's business and

property. However, if the Authority were to impose a penalty, in Ms Brown's submission it should be one indivisible penalty.

[187] I do not accept in full either counsel's submissions regarding penalties. Mr Powdrell has inflated the number of breaches and the appropriate quantum of penalties. The Partnership has downplayed its actions, failed to acknowledge any responsibility for breaching Mr Powdrell's settlement agreement, and shrugged its collective shoulders about any damage its actions may have caused to him.

[188] I do, however, accept Ms Brown's submission regarding the imposition of one penalty. Having indicated the penalties I would provisionally impose for separate breaches of Mr Powdrell's settlement agreement, I find there is merit in imposing one global penalty on the basis that, while there were a number of breaches, they were all breaches of the same settlement agreement under the same statutory provision, s 149(4) of the Act. The global penalty is provisionally \$22,750.

[189] Before confirming that global penalty I need to consider whether it is proportional in relation to other penalty amounts imposed in order to satisfy myself that it is just in all the circumstances. The Authority has access to a database of cases built up over the years and both counsel helpfully provided tables of penalties imposed for breaches of settlement agreements over the last several years. Having taken the information from those sources into account, I am satisfied the provisional global penalty of \$22,750 is proportional in relation to other cases.

[190] At this point I need to consider the apportionment of penalties among the three partners. As I have noted above, the Bayly Partnership at the time the settlement agreements were entered into with Mr and Mrs Powdrell, and during the time the events that prompted these proceedings occurred, comprised three members. They were Mr John Bayly (since deceased); Mr Humphry Bayly who is referred to as Mr Bayly in this determination; and Ms Diana Rogers.

[191] Ms Rogers described herself as a silent partner who was in the process of extricating herself from the Partnership. Mr John Bayly had, by Mr Powdrell's account, ceased to be the person to whom he reported by February 2019 when he began reporting to Mr Humphry Bayly, who is Mr John Bayly's son. Mr Bayly described himself in a written brief of evidence as a trustee and Director of the Partnership. He also referred in that brief of evidence as having, over the last eight to eleven years, progressively taken over from his father and a brother-in-law the supervision of the three Partnership properties which include Cricklewood.

[192] It is reasonable to infer from this that Mr Bayly is the leading Partner and, from the evidence, was the partner involved in the settlement agreements and in discussions and subsequent actions relating to the engagement of the investigator. It is also reasonable to infer that neither Mr John Bayly nor Ms Diana Rogers were significantly involved in those matters. This will affect the apportionment of penalties particularly in relation to any deterrent effect.

[193] On the basis of the information that was provided and that which I have inferred, I find it appropriate that 80 percent of the penalties imposed with respect to Mr Powdrell and Mrs Powdrell be attributed to Mr Bayly with the remaining 20 percent being split equally between Mrs Rogers and Mr John Bayly.

[194] Ms Bendall submits a minimum of 80 percent of any penalties imposed should be awarded to Mr Powdrell under s 136 of the Act. Her argument is based on the nature of the breaches; the cost of bringing this matter to the Authority including summoning unwilling witnesses, and the inability for Mr Powdrell to be compensated through remedies.

[195] I agree it is appropriate to award a proportion of the penalties to Mr Powdrell but disagree that costs are a proper consideration as they fall to be considered, and awarded, separately. I also note the proceedings brought by Mr Powdrell were for compliance and penalties not for a personal grievance where a successful applicant might expect to be awarded compensation. The default position for penalties under the Act is that they are paid, through the Authority or the Court, to the Crown. The Authority and Court have the discretionary power to order the whole or any part of any penalty that is recovered to be paid to any person.²³

[196] In this instance I find it appropriate to award 75 percent of the penalty imposed on the Partnership to Mr Powdrell with the remaining 25 percent to be paid to the Authority for depositing in a Crown bank account.

[197] Turning to Mrs Powdrell, I have identified four breaches of her settlement agreement were made by the Partnership. All were breaches of the non-disparagement provision, the first of which related to the trespass notices from Cricklewood Station and other Partnership properties. The second was the Partnership's request to Mr Grey that he "pull back" from the relationship with Mrs and Mr Powdrell. The third and fourth breaches arose from the investigator's interview with Mr Harding in which Mrs Powdrell was implicated in the misuse

²³ Section 136(2) of the Act.

over several years of the cook's food allowance for personal purposes, and in unauthorised use of fuel.

[198] Applying a similar analysis as I have done with the breaches of Mr Powdrell's settlement agreement, I have concluded penalties are warranted for each of the four breaches, which I find are best dealt with by way of one global penalty.

[199] I consider each of the breaches to have been equally serious and I accept Mrs Powdrell's evidence as to the negative impact, including an emotional toll and stress, she has experienced as a result of them. I assess an appropriate global penalty for the four breaches as \$6,000. The apportionment of liability among the Partners will again be 80 percent liability for Mr Bayly, with the remaining 20 percent divided equally between Mr John Bayly and Ms Rogers. Mrs Powdrell is to receive 75 percent of the global penalty with the remaining 25 percent to be paid to the Authority for depositing in a Crown bank account.

Orders

[200] The Partners of the Bayly Partnership are ordered to comply fully with all the extant provisions of the 8 May 2019 settlement agreements the Partnership entered into respectively with Mr Powdrell and Mrs Powdrell. This compliance order comes into effect immediately.

[201] Penalties are ordered against the Partners of the Bayly Partnership for breaches of Mr Powdrell's settlement agreement as follows:

- A Mr Humphry Bayly is to pay \$18,200, of which \$13,650 is to be paid to Mr Hutton Powdrell and \$4,550 is to be paid to the Authority for payment into a Crown bank account.
- B Mr John Bayly is to pay \$2,275, of which \$1,706.25 is to be paid to Mr Hutton Powdrell and \$568.75 is to be paid to the Authority for payment into a Crown bank account.
- C Ms Diana Rogers is to pay \$2,275, of which \$1,706.25 is to be paid to Mr Hutton Powdrell and \$568.75 is to be paid to the Authority for payment into a Crown bank account.

[202] Penalties are ordered against the Partners of the Bayly Partnership for breaches of Mrs Powdrell's settlement agreement as follows:

- A Mr Humphry Bayly is to pay \$4,800 of which \$3,600 is to be paid to Mrs Joanne Powdrell and \$1,200 is to be paid to the Authority for payment into a Crown bank account.
- B Mr John Bayly is to pay \$600, of which \$450 is to be paid to Mrs Joanne Powdrell and \$150 is to be paid to the Authority for payment into a Crown bank account.
- C Ms Diana Rogers is to pay \$600, of which \$450 is to be paid to Mrs Joanne Powdrell and \$150 is to be paid to the Authority for payment into a Crown bank account.

[203] All of the payments listed above are to be made within 28 days of the date of this determination.

Costs

[204] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Powdrell and Mrs Powdrell may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the Partners of the Bayly Partnership would 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.

[205] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²⁴

Trish MacKinnon
Member of the Employment Relations Authority

²⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].