

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 252
3136731

BETWEEN PUKEKOHE HIGH SCHOOL
BOARD OF TRUSTEES
Applicant

AND PETER JOHN MATHIAS
Respondent

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Applicant

AND PUKEKOHE HIGH SCHOOL
BOARD OF TRUSTEES
Respondent

Member of Authority: Rachel Larmer

Representatives: Paul Pa'u advocate for Pukekohe High School Board
of Trustees
Dzintra King counsel for Mr Mathias

Investigation Meeting: On the papers

Submissions and Other Information Received: 26 March 2023 from Mr Mathias
31 March 2023 from Pukekohe High School Board of
Trustees
12 April and 9 May 2023 from Mr Mathias

Date of Determination: 18 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter involved an original claim and counterclaim.

The parties

[2] On 27 April 2021 the Pukekohe High School Board of Trustees (the Board) lodged a Statement of Problem against the Pukekohe High School's former Assistant Principal, Mr Peter Mathias.

The Board's originating claims

[3] The Board claimed Mr Mathias had engaged in serious, deliberate and sustained breaches of good faith that had caused significant loss to the Board. It claimed Mr Mathias had been "*grossly negligent*", "*recklessness*" and "*deceptive in his dealings*" with the Board and that his deception had resulted in breaches of his employment agreement and good faith obligations, causing significant loss to the Board.

[4] The Board said it became aware of the facts that gave rise to these causes of action on or about 18 February 2021, when it received a witness statement from Mr Mathias in respect of an Authority claim brought against the Board by another former employee Mr Good.¹ The Authority did not accept that claim as these matters had been raised in a letter the Principal had sent Mr Mathias in June 2021, which is discussed later.

[5] The Board sought penalties for the alleged breaches of good faith and of Mr Mathias' employment agreement and a finding that these breaches were caused by his gross negligence, recklessness and deceptive conduct.

[6] The Board also sought to hold Mr Mathias "*liable*" for all of the Board's losses in relation to all payments made to entities controlled by Mr Good and for the payments made to Network Plus Limited (discussed later). The Board also sought interest and costs.

Originating claims withdrawn

[7] The Board withdrew all of its claims against Mr Mathias on 10 March 2022, with no issue as to costs.

¹ *Good v Pukekohe High School Board of Trustees* [2021] NZERA 421.

Mr Mathias' counterclaim

[8] Mr Mathias lodged a counterclaim against the Board when he filed his Statement in Reply to the Board's claims on 17 May 2021.

[9] He claimed that by lodging its Statement of Problem, the Board had breached the settlement agreement that the parties had entered into pursuant to s 149(4) of the Employment Relations Act 2000 (the Act) ("*the settlement agreement*").

[10] Mr Mathias identified the following breaches of the settlement agreement:

- (a) The lodging of the Statement of Problem breached the confidentiality obligations;
- (b) The content of the Statement of Problem disparaged him;
- (c) He did not receive a written reference when his employment ended (it was provided almost 16 months after that); and
- (d) The written reference he was given was not sufficiently "*positive*".

[11] Mr Mathias claimed that a compliance order should be issued pursuant to s 137(1)(iii) of the Act, to compel the Board to provide him with a positive written reference. Mr Mathias also sought a penalty for each breach of the settlement agreement, part of which he asked to be paid to him instead of the Crown.

Board's response to the counterclaim

[12] The Board denied all of Mr Mathias' claims. It said it had not breached the settlement agreement, but that even if it had, then no penalty should be imposed on it.

[13] The Board said it did not disparage Mr Mathias because the allegations in the Statement of Problem were not public knowledge. The Board also said that it was entitled to bring a penalty claim against Mr Mathias, so the proceedings were not precluded by the settlement agreement.

[14] The Board denied breaching the 'reference related obligations' in the settlement agreement because there was no date by which it had to provide his written reference, and that it could not provide more positive information than it had already done so.

[15] The Board also denied Mr Mathias' allegation that the Statement of Problem had been lodged because he had declined to meet with the Board to discuss Mr Good's proceedings or as retaliation for him providing a witness statement to Mr Good.

Mr Good's Authority proceedings

[16] The Board's Statement of Problem against Mr Mathias related to issues involving Mr Good, so some information about Mr Good's previous Authority proceedings is relevant to this matter

[17] The Authority issued a determination in *Good v The Board of Trustees of Pukekohe High School*, in which Mr Good's personal grievance claims for unjustified disadvantage and unjustified dismissal did not succeed.²

[18] Mr Good was the Pukekohe High School's (the School's) IT Manager. He was summarily dismissed on 15 September 2020 for serious misconduct because he had refused to do his duties as an employee, unless his company's invoices were paid. These invoices related to work that had been done after Mr Good had clearly been instructed not to give any more work to his companies.

[19] Mr Good had an unusual and irregular 'dual arrangement' with the School.

[20] He was paid as a teacher under the applicable collective agreement and had responsibility for all of the day to day requirements of the School's network management. However, he was also engaged as an independent contractor to do additional network development work for the School, which would otherwise have been contracted out to external parties. Mr Good also invoiced the School for this work done by his companies or companies associated with his family.

[21] This hybrid arrangement was not properly documented and it was a "*significant departure*" from the terms of the collective agreement, which did not permit employees who were covered by it to also be engaged as contractors.

[22] While he was an employee Mr Good set up three companies; Tech FX Limited, Focus Media Limited and App FX Limited which invoiced the School for IT related services. The

² Above n1.

Tech FX Limited invoices were authorised for payment by Mr Mathias, as Mr Good's Line Manager.

[23] Mr Richard Barnett became the School's Principal in July 2018. He was not informed of Mr Good's 'dual status arrangement' by former Principal McKinnon, nor by Mr Good or Mr Mathias. There was also no evidence provided that former Principal McKinnon had the delegated authority to make the dual status arrangements with Mr Good.

[24] Principal Barnett considered that the arrangement breached the Ministry of Education and the Office of the Auditor General guidelines on procurement. He also formed the view that the School was paying Mr Good for services as the School's Network Manager, so he should not also be invoicing the School through entities he was controlling for those same services.

[25] Because Mr Mathias was Mr Good's Line Manager at the material times, and had authorised the payment of invoices to his companies, the Board wanted to hold Mr Mathias responsible for the significant losses Mr Good's company arrangements had allegedly caused the School.

The Authority's investigation

[26] The Authority held an investigation meeting for this matter in Auckland on 31 August 2022. Mr Mathias and Principal Barnett both gave evidence in person to the Authority. The parties also filed written submissions after the investigation meeting.

[27] This matter was subsequently reallocated to this Member on 22 March 2023, under clause 16 of Schedule 2 of the Act.

[28] It was subsequently agreed with the parties that this matter would now be determined 'on the papers'.

[29] The parties were given a preliminary indication of the outcome of each of Mr Mathias' claims and were directed to mediation in the hope that they may be able to resolve their employment relationship problems by agreement.

[30] However, that did not occur and Mr Mathias advised the Authority that he wanted a substantive determination to be issued.

Issues

[31] The following issues are to be determined:

- (a) Did the Board breach the settlement agreement by any or all of the following?
 - Clause 1 – by lodging the Statement of Problem;
 - Clause 5 – by disparaging Mr Mathias in the Statement of Problem;
 - Clause 5 – by failing to provide a written reference at the end of his employment; and
 - Clause 5 – by failing to provide him with a sufficiently positive written reference.
- (b) Should a compliance order be issued to compel the Board to provide Mr Mathias with a more positive written reference?
- (c) If the settlement agreement has been breached, should a penalty be imposed on the Board for its breaches?
- (d) If so, should part of the penalty be paid to Mr Mathias?
- (e) What costs should the successful party be awarded?

Did the Board breach the settlement agreement?

Did the Board breach clause 1 of the settlement agreement by lodging the Statement of Problem?

[32] Clause 1 of the settlement agreement stated:

The following is a confidential, full and final settlement of all matters between Peter and his employer relating to his employment and the termination of his employment.

[33] The acknowledgement clause in the settlement, that was signed by the parties, expressly stated (among other things) that the parties understood that once the mediator had signed the settlement agreement, then:

Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether be action, appeal, an application for review, or otherwise.

[34] The Statement of Problem did not relate to enforcement proceedings, because the penalties sought by the Board did not relate to alleged breaches of the settlement agreement. The Board therefore breached the confidentiality obligations in the settlement agreement by lodging the Statement of Problem with the Authority.

[35] The lodgement of the Statement of Problem by the Board involved it pursuing litigation against Mr Mathias in circumstances where the settlement agreement had clearly recorded that would not be permitted.

[36] The Board's claim that the Statement of Problem related to penalty claims, which were not covered by the settlement agreement did not succeed. The settlement agreement was stated to be "*in full and final settlement of all matters*", so that included any potential penalty claims.

[37] While it was open to the parties to have reserved the right to pursue penalty claims, meaning that the settlement agreement covered all issues between the parties except any penalty claims that arose out of Mr Mathias' alleged breaches, that did not occur.

Did the Board breach clause 5 of the settlement agreement by disparaging Mr Mathias in the Statement of Problem?

[38] Disparaging remarks include comments about a party that discredit it, dishonour it, lower it in esteem or standing or dignity, which degrade it, vilify, criticise or speak of slightly.

[39] The remarks that the Board made about Mr Mathias in the Statement of Problem were clearly disparaging.

[40] Mr Mathias was described in clauses 1.1–1.5 of the Statement of Problem as "*grossly negligent*", "*reckless*", "*deceptive in his dealings*" and was alleged that his negligence, recklessness and deception had resulted in breaches of his employment agreement and of his good faith obligations to the Board, which had caused "*significant loss*".

[41] Clauses 2.7, 2.9 and 2.16 of the Statement of Problem also disparaged Mr Mathias because they dishonoured or discredited him.

[42] Clause 2.7 of the Statement of Problem claimed that Mr Mathias knew that Mr Good's dual arrangement with his companies was not disclosed to, or approved by, the Board, was not

disclosed to or approved by the Board's auditors, breached the Office of the Auditor General guidelines, was highly irregular, was not in the best interests of the Board and was unlawful and/or contrary to public interest.

[43] Clause 2.9 of the Statement of Problem alleged that Mr Mathias knew there had been no assessment of whether the services charged by Mr Good's companies were good value or whether the work invoiced was already part of his normal duties as an employee.

[44] Clause 2.16 of the Statement of Problem alleged that Mr Mathias approved Mr Good's invoices from his companies without assessing whether they were reasonable, without assessing whether the services and products had been provided and without assessing whether the work done was of fair value to the Board.

[45] Clauses 2.22, 2.23 and 2.24 of the Statement of Problem also disparaged Mr Mathias because they alleged:

- (a) He was deceptive, noting that concerns that had been expressed to him by senior Board trustees over a lack of financial transparency;
- (b) He chose not to disclose Mr Good's arrangement to the Board;
- (c) He was reckless in breaching his employment agreement and good faith obligations by not disclosing Mr Good's arrangement regarding his dual roles or the payments being made to Mr Good's entities to the Board;
- (d) He was also reckless by failing to inform the Board that the invoices from Tech FX, Focus Media and from App FX were from Mr Good's companies;
- (e) He never sought Board approval for Mr Good's arrangement with his companies to continue, or advised the Principal to do so.

[46] Clauses 2.25 to 2.28 of the Statement of Problem disparaged Mr Mathias by claiming he was personally responsible for significant losses.

[47] Clause 2.25 alleged that Mr Mathias' actions "*resulted in considerable loss and damage*" to the Board. Clause 2.26 alleged that Tech FX was unjustifiably paid \$1,281,452.80. Clause 2.27 alleged Mobile App FX was unjustifiably paid \$109,391.45 and Clause 2.28 alleged Focus Media was unjustifiably paid \$31,410 for the financial years 2017-2019.

[48] Clauses 2.34 and 2.35 of the Statement of Problem disparaged Mr Mathias by blaming him for significant losses.

[49] Clause 2.34 was disparaging because it claimed Mr Mathias had been “*grossly negligent and/or reckless in his dealings over Network Plus Limited*”, because he knew it had been paid \$602,311.57 for goods and services similar to those supplied by Mr Good and his companies.

[50] Network Plus Limited (Network Plus) was not controlled by Mr Good. However, as Head of Department he initially approved the Network Plus invoices. Mr Mathias had recommended to the School that these substantial invoices be paid. The Board claimed those recommendations breached Mr Mathias’ employment agreement and his good faith obligations to the School.

[51] Clause 2.35 was disparaging because it claimed Mr Mathias’ actions had resulted in significant loss because “*Network Plus Limited was unjustifiably paid \$602,311.57.*”

Finding on alleged disparagement claim

[52] It was obvious that the content of the Statement of Problem had disparaged Mr Mathias.

Did the Board breach clause 5 of the settlement agreement by failing to provide Mr Mathias with a written reference at the end of his employment?

[53] Clause 2 of the settlement agreement recorded that Mr Mathias’ employment ended on 27 January 2021.

[54] Clause 5 of the settlement agreement provided (amongst other things) that “*the Principal will provide Peter with a positive written reference at the end of his employment and stand by that reference if contacted by future employers.*”

[55] No time was specified for the provision of the reference other than “*at the end of his employment*”. Because the employment ended on 27 January 2021, the reference was required on or around that date.

[56] However, the Board failed to provide a written reference to Mr Mathias until 18 May 2022, almost 16 months after Mr Mathias’ employment had ended.

[57] That delay in providing the written reference breached clause 5 of the settlement agreement, because the timeframe “*at the end of his employment*” had to be read in a way that was reasonable. The reference therefore should have been given to him at the end of January or at the very latest February 2021.

[58] The purpose of a positive reference is so that the employee can use it when seeking new employment. Mr Mathias was deprived of the benefit of having a positive written reference available to him until 18 May 2022.

Did the Board breach clause 5 of the settlement agreement by failing to provide Mr Mathias with a sufficiently positive written reference?

[59] Clause 5 of the settlement agreement required Principal Barnett to provide Mr Mathias with “*a positive written reference*”.

[60] The written reference dated 18 May 2022 was objectively positive. It talked about:

- (a) Mr Mathias being “*a longstanding and popular member of staff*”;
- (b) The fact that he had “*built close networks in the school community*”;
- (c) It noted that he had a broad portfolio and was willing to take on additional tasks, which included responsibility for “*day relief*”;
- (d) Mr Mathias was described as “*an important member of the school’s leadership team*”.

[61] Mr Barnett did not feel able to provide any further positive comments in addition to these because it was his integrity on the line, as potential employers would be relying on his information. He therefore wanted to ensure that what was recorded in the positive written reference was information that he felt able to stand behind if asked to verbally confirm.

[62] Although it was open to the parties to have agreed on the wording of the “*positive written reference*” when they negotiated the terms of the settlement agreement, they did not do so. That left the actual content of the positive written reference to the Principal’s discretion. Provided that the content was objectively positive, then the requirements of clause 5 of the settlement agreement would have been met.

[63] That was the case here, so Mr Mathias' claim that the written reference dated 18 May 2022 had breached clause 5 of the settlement agreement, because it was not sufficiently positive, did not succeed.

Should a compliance order be issued to compel the Board to provide Mr Mathias with a positive written reference?

[64] Mr Mathias' claim for a compliance order did not succeed.

Should a penalty be imposed on the Board for its breaches of the settlement agreement?

Authority's penalty jurisdiction

[65] Section 149(4) of the Act gives the Authority power to impose a penalty for breaches of a settlement agreement that has been certified by a mediator from Mediation Services.

[66] Penalties are discretionary, with the Authority's discretion to be exercised on a 'judicial' and principled basis. The penalty to be imposed will be fact based, and dependent on the circumstances of each particular case.

[67] It is appropriate and necessary for penalties to be imposed on the Board to signal disapproval of the Board's actions and to punish it for breaching the terms of the settlement agreement that the parties entered into on 15 July 2020. Penalties also need to be imposed to act as a deterrent to the Board, and to others, who may be inclined to breach a settlement agreement.

Section 133A of the Act

[68] Section 133A of the Act requires the Authority to have regard to the following factors when assessing penalties:

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

- (e) Whether there has been compensation, reparation or restitution or other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (f) Circumstances of the breach, including the vulnerability of the employee; and
- (g) Whether the person in breach has previously had a penalty imposed on them.

Employment Court cases

[69] The leading Employment Court case on penalties is *Borsboom v Preet PVT Limited (Preet)*, which set out the following additional penalty considerations, in addition to the mandatory section 133A factors, that should apply.³ These included:

- (a) The need for penalties to act as a deterrent, both to the particular party being penalised and to the wider community in general;
- (b) Culpability of the party being penalised;
- (c) Consistency with penalty awards in similar cases;
- (d) Ability to pay the penalty imposed; and
- (e) Proportionality of the penalty when compared to the breach that is being penalised.

[70] The Chief Judge of the Employment Court in *Nicholson v Ford* and in *A Labour Inspector v Daleson Investments Limited* summarised the applicable framework to be used when assessing penalties, having regard to the statutory requirements, and the full Employment Court's judgment in *Preet*.⁴ The Authority has adopted that approach.

Preet – four step penalty assessment process

[71] The full Employment Court in *Preet* set out a four step penalty assessment process for the Authority to use when imposing penalties.⁵

Step One – identify the number and nature of the breaches. This has four sub steps, namely:

- i. Identify the number of breaches;
- ii. Identify the nature of each breach;
- iii. Identify the maximum penalty for each of the identified breaches; and

³ [2016] NZEmpC 143.

⁴ *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 at [19] and [20]; *Borsboom v Preet PVT Limited* (above n3).

⁵ *Preet* (above n3), at [151], [201] and [202].

iv. Consider whether global penalties should apply.

Step Two – establish a provisional starting point by assessing the severity of the breaches in each case. Consider both aggravating and mitigating features.

Step Three – consider the means and ability of the party in breach to pay the provision penalty reached in Step Two.

Step Four – apply the ‘proportionality’ or ‘totality’ tests to ensure the amount of each final penalty is just in all of the circumstances.

[72] The Employment Court in *Preet* noted that “*globalisation*” of penalties could occur at any step in the recommended four step process, but it warned that globalisation should not diminish the significance of repeated, or a series of, breaches.⁶

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

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

[74] The Act aims to promote mutual good faith behaviour. It recognises that creating and maintaining productive employment relationships is characterised by good faith and legally compliant dealings between those in employment relationships.

[75] The Act also sets out mechanisms for employment problems and disputes to be addressed and resolved in a good faith manner. Mediation is promoted by the Act as the primary problem solving mechanism for employment relationship problems.

[76] The penalties that are to be imposed on the Board must be set at a level that deters it from acting in future in a way that breaches its obligations under a settlement agreement, thereby contravening one of the objects of the Act by undermining the legitimacy of using mediation as the primary problem solving mechanism.

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

[77] The Board engaged in three breaches of the settlement agreement, one breach of clause 1 and two breaches of clause 5. The maximum penalty per breach is \$20,000, so the potential maximum penalties that could be imposed on the Board would be \$60,000.

⁶ *Preet* above n3, at [100] and [139] to [142].

[78] The Authority considers that these breaches of the settlement agreement should be globalised into one indivisible breach that will be penalised. That globalisation has reduced the potential maximum penalty to \$20,000, because a potential maximum penalty of \$60,000 would be out of proportion to the seriousness of the breaches.

[79] Although the breaches were at the lower end of the scale in terms of seriousness, the fact that they involved breaches of a settlement agreement is concerning, as was the fact that the Board settled Mr Mathias' employment relationship problem and then approximately nine months later lodged proceedings against him.

[80] The disparagement in the Statement of Problem was seen by the Authority only, because the claims the Board made did not proceed to a public investigation meeting, nor was there a substantive determination issued on the Board's originating claims, which would have made them public.

[81] However, this determination on the counterclaim has made the Board's disparagement public, although it is noted that Mr Mathias elected for that to occur, because he wanted a public determination of his claims to be on the record. In terms of the timing of the reference, that was provided very late (almost 16 months after it should have been) but it was in the end provided.

[82] There was no good reason for the Statement of Problem to have been lodged. Nor was there any reasonable excuse for the Board to delay providing Mr Mathias with a positive written reference for so long after the end of his employment. The Board has therefore engaged in very obvious breaches of its obligations under the settlement agreement.

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

[83] The Board's breaches were deliberate. The Board has an experienced employment lawyer on it and it was represented by an advocate at the material time. It ought to reasonably have known under the settlement agreement that it could not subsequently pursue litigation against Mr Mathias relating to his employment (and the ending of it) but it decided to lodge proceedings against him anyway.

[84] On 7 May 2021 Mr Mathias' counsel emailed the Board's advocate to advise that the proceedings the Board had filed could not proceed due to the settlement agreement, which was in full and final settlement of all employment related matters.

[85] It was pointed out to the Board that the settlement agreement included settlement of any issues involving Mr Mathias that had related to Mr Good, because it was clear such matters were known to the Board before the settlement agreement was entered into.

[86] Mr Mathias' counsel referred the Board to the letter dated 26 June 2020 that Principal Barnett had sent to Mr Mathias. This letter identified a number of serious performance concerns and made allegations that Mr Mathias may have been negligent or careless.

[87] Concern 3 in the letter dated 26 June 2020 dealt with Mr Mathias' approval of invoices from companies controlled by Mr Good. A sampling of the invoices of concern, that Mr Mathias had approved, was also attached to the 26 June 2020 letter.

[88] The specific concerns the Board had about Mr Mathias were identified in the 26 June 2020 letter. This included that he had approved substantial invoices for payment without inquiring as to whether the work was undertaken, whether the work had been approved, or into the possible conflict of interest. The invoices Mr Mathias approved should have raised red flags, given Mr Good was being paid as an employee to do the same or similar that he had also invoiced via his companies.

[89] Principal Barnett expressly stated in the 26 June 2020 letter:

I am deeply concerned that you have not enquired more carefully into the work covered by these invoices which on the face appear to be for work which Martin Good has already been paid for as the School's IT Manager. This was either careless or negligent on your part and there has been significant loss to the Board.

[90] The Board clearly had concerns that Mr Mathias may have acted in a way that was negligent, careless or otherwise undermining of trust and confidence by approving for payment invoices to companies that were controlled by Mr Good and his family. The Board was also aware that the alleged careless or negligent behaviour by Mr Mathias may have resulted in "*significant loss to the Board*".

[91] Subsequent to the 26 June 2021 letter that had identified a range of concerns about Mr Mathias' conduct (not just issues involving the approval of invoices from companies controlled by Mr Good), the parties entered into the settlement agreement.

[92] The Statement of Problem attempted to relitigate these same matters, which were known to the Board and, so therefore had already been a subject of compromise and settlement in the settlement agreement entered into on 15 July 2020.

[93] The Board was specifically put on notice by Mr Mathias' counsel "*Before I am put to the trouble of writing an SIR I would appreciate your notifying the Authority that the claim is withdrawn.*" Despite that very clear warning, the Board proceeded with its claims against Mr Mathias, which were not withdrawn until 10 March 2022, after Mr Mathias had advised that he would be proceeding with his counterclaim against the Board.

[94] The fact that the Board withdrew its claims on 10 March 2022 indicated that it must have recognised its claims had no prospect of success. That had been pointed out to the Board from the outset by Mr Mathias' counsel in her email of 7 May 2021, so the delay of 10 months between that email and the withdrawal of the Board's claims was inexplicable.

[95] The Board has therefore engaged in deliberate and intentional breaches of the settlement agreement.

Mandatory statutory consideration 4: The nature and extent of any loss or damage caused by the breach

[96] Mr Mathias has been put to considerable inconvenience as a result of the Statement of Problem the Board lodged. In particular he:

- (a) Was required to file a Statement in Reply;
- (b) Has been directed to attend (and has attended) mediation twice;
- (c) Has had the burden of preparing evidence for an Authority investigation;
- (d) Attended an in-person investigation meeting and he has been questioned about his evidence
- (e) Had to engage counsel to file submissions on his behalf after the investigation meeting; and
- (f) Has had to engage with the Authority about this matter subsequent to the filing of his written submissions.

[97] None of this should have been necessary. The purpose of entering into a settlement agreement is to ensure that whatever problems the parties may have had regarding the

employment relationship, they are concluded so the parties have certainty that there has been finality regarding those matters, and can move on.

[98] The Board's actions have completely undermined that. In addition to the inconvenience that Mr Mathias has clearly suffered, he has likely been stressed by the reopening of issues that he thought had been resolved.

[99] The fact that Mr Mathias has required there to be a written substantive determination regarding his counterclaims means that the issues that were previously dealt with, by the parties on a confidential basis in the settlement agreement, have now become a matter of public record. That is another adverse consequence that the Board's improper actions have caused.

Mandatory statutory consideration 5: Whether there has been compensation, reparation, or restitution or other steps taken to avoid or mitigate the breaches

[100] The Board withdrew its claims against Mr Mathias, but that was done at a late stage and only after he had made it clear that he would be proceeding with his counterclaim. Likewise, the positive written reference was provided, but that occurred almost 16 months after the end of his employment, which undermined the benefit of it.

[101] The Board has not provided the Authority with any evidence that suggests that it understands how hurtful and distressing its disparaging comments have been to Mr Mathias. The Board did not accept that Mr Mathias had suffered any loss or damage, which the Authority considered was an unrealistic stance to adopt.

[102] The loss of one's mana is not insignificant. Being subjected to an ongoing Authority process which involves derogatory comments about you and claims for significant damages would have understandably been highly distressing for Mr Mathias.

Mandatory statutory consideration 6: Circumstances of the breach

[103] The circumstances of the breach have been explained by the Authority in this determination, and are seen as an aggravating factor.

Mandatory statutory consideration 7: Whether the Board has been found to have engaged in similar conduct

[104] There was no evidence presented to the Authority that the Board had previously had penalties imposed on it.

Preet additional consideration 1: Deterrence, both particular and general

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

[106] There is a strong need to preserve the sanctity of settlement agreements by ensuring that they will be upheld, particularly because the Act promotes and encourages the resolution of employment problems by mediation. One of the express aims in s 3(a)(v) and (vi) of the Act is to reduce the need for judicial intervention.

[107] The Employment Court in *Lumsden v Sky City Management Limited*⁷ noted that:

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

[108] The Board's behaviour in this matter has fallen short of appropriate behaviour expected from a party to a settlement agreement. The penalty must be at a level that strongly discourages the Board from engaging in such conduct in future.

[109] It is therefore necessary for the penalties imposed to be at a level that clearly reflects to the Board and the wider community that a party cannot enter into a settlement agreement and then breach it. Settlement agreements cannot be allowed to be undermined in that way.

Preet additional consideration 2: Degree of culpability

[110] The Board has a high level of culpability. It took its actions after being in receipt of legal advice and in the face of Mr Mathias' counsel putting the Board on notice that it could not legally pursue the proceedings. Instead of course correcting at that point, the Board continued with its claims until they were finally withdrawn on 10 March 2022.

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

[111] The Authority in *RPW v H & C* engaged in a detailed analysis of 11 cases in which a penalty had been imposed on a party for a breach of a non-disparagement clause in a certified mediated settlement agreement.⁸ The Authority has had regard to that analysis, and to the level

⁷ [2017] NZEmpC 30.

⁸ [2019] NZERA 121.

of penalties set in the *RPW v H & C* matter, when assessing penalties in respect of the Board's breaches in this matter.

[112] The Authority considered that the breaches in this case were not as serious as those in *RPW v H & C*, including in the cases that were analysed by the Authority in its determination in that matter.

Preet step 2 – Establish a starting point by assessing the severity of the breaches

[113] The breaches of the certified settlement agreement fell at the lower end of the scale. The aggravating features included that the Board's actions were the antithesis of good faith conduct and undermined that one of the primary objects of the Act was to encourage the use of mediation to solve employment problems.

[114] There has been no public retraction of the disparaging comments, other than the withdrawal of the claims. Nor has there been a public acknowledgement of the hurt, stress and inconvenience Mr Mathias has been caused. The withdrawal of the Board's originating claims, and the provision of the positive written reference, occurred so late that it undermined the value of those mitigating steps.

[115] An appropriate starting point for assessing penalties was \$4,500.

Preet additional consideration 4: Means and ability to pay (Preet – Step 3)

[116] There was no evidence that the Board was not in a position to be able to pay penalties.

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

[117] Step 4 of the *Preet* penalty assessment process requires the Authority to apply the proportionality or totality test to ensure that the penalty imposed is just in all the circumstances.⁹

[118] The Authority considered that a globalised total penalty of \$4,500 should be imposed on the Board for its breaches of the settlement agreement. A 'cross check' indicated that was the equivalent of \$1,500 per breach for the three breaches.

⁹ *Preet* above n3, at [151].

[119] The Authority noted that the penalties imposed in the *RPW v H & C* matter averaged \$1,885 per breach. Those breaches were far more serious, extensive and contrary to the public interest than the breaches that the Board in this matter have engaged in.

[120] Accordingly, the Board is ordered to pay total penalties of \$4,500 for its three breaches of the settlement agreement dated 15 July 2020.

Should part of the penalty be paid to Mr Mathias?

[121] Penalties are normally payable to the Crown. However, the Authority has a discretion under s 136(2) of the Act to order that some or all of any penalty imposed may be paid to “*any person*”.

[122] It is appropriate to recognise that Mr Mathias has been the person who has been personally affected by the breaches. He brought these breaches to the Authority’s attention and he has had to pursue these proceedings in order to get a public finding that records the Board’s wrongdoing.

[123] Mr Mathias is not able to be compensated for the hurt, stress, inconvenience and other adverse effects the Board’s breaches of the settlement have had on him. It is appropriate to recognise that by awarding most of the penalty to him.

[124] Accordingly, the Board is ordered to pay \$3,000 of the penalty imposed to Mr Mathias personally to recognise his time and effort in pursuing these breaches and the fact that he has been harmed by the Board’s actions. The balance of the \$1,500 penalty is to be paid directly to the Crown bank account.

[125] The Board is ordered to pay the penalty imposed in this determination within 28 days of the date of this determination.

What costs should be awarded?

[126] Mr Mathias as the successful party is entitled to an award of costs in his favour. The Authority understands that there have been without prejudice except as to costs communications between the parties. Costs will therefore be dealt with by an exchange of costs memoranda.

[127] This investigation meeting was conducted by another Member. The parties will therefore need to advise this Member of how many hours the investigation meeting took (as she does not have that information), so that the one day tariff of \$4,500 can be appropriately pro-rated to reflect the actual time this investigation took.¹⁰

[128] The parties should also identify any factors that they say should result in the notional starting tariff being adjusted, including without prejudice except as to costs communications.

[129] Mr Mathias has 14 days within which to file a costs memorandum. The Board has 14 days from receipt of Mr Mathias' costs memorandum to file its own costs memorandum. The Authority will not consider any cost submissions that are made outside of this timetable, without the prior authorisation of the Authority.

Rachel Larmer
Member of the Employment Relations Authority

¹⁰ As this investigation meeting was conducted by another Member and the details about time the investigation meeting took is not available to this Member.