IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 74A/09
5159924

	BETWEEN	NEW ZEALAND MERCHANT SERVICE GUILD First Applicant
		DAVID BOURNE, JOHN CONRAD, JAMES KING-TURNER Second Applicants
	AND	REAL JOURNEYS LIMITED Respondent

Member of Authority:	Paul Montgomery
Representatives:	Paul McBride, Counsel for Applicants Janet Copeland, Counsel for Respondent
Investigation Meeting:	23, 24 and 25 June 2009 at Te Anau
Submissions received:	25 June, 2 July and 27 July 2009 from Applicants 25 June, 22 July 2009 from Respondent
Determination:	5 October 2009

DETERMINATION OF THE AUTHORITY

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[1] This matter arises from the respondent undertaking a review of its Milford Sound operations in view of the significant decline in demand for the services it provides given the economic recession and the consequent reduction in inbound tours.

[2] The first applicant (the Guild) has raised a dispute in respect of the respondent's process, claiming the respondent is in breach of its obligations under the collective agreement (CEA).

[3] All three second applicants are members of the Guild and all three are permanently stationed at Milford Sound and are launch masters undertaking the command of the company's launches in the Sound and, on occasions, beyond it. During the off season, the three undertake reduced cruises and are deployed on routine maintenance tasks on the vessels and the onshore facilities of the respondent.

[4] Three other launch masters are assigned to skipper cruises in Milford Sound in the high summer season. In the off season, they are redeployed from Milford Sound to undertake work on vessels being surveyed and undergoing heavier maintenance programmes at other company facilities. These three are not currently union members.

[5] All six men are hired as launch masters as their primary role with the respondent and retain their individual rates of pay during the off season, no matter where they are deployed and on what tasks.

[6] The Guild has raised a dispute in respect of the process employed by the company in selecting those roles in Milford Sound which are surplus to its requirements. The Guild claims the respondent has misapplied the relevant section of the CEA and seeks a ruling on the matter.

[7] Further, on behalf of the three second applicants, it has raised a personal grievance, alleging they are being targeted by the company because they are involved in the activities of a duly registered union. The applicants allege the company is in breach of s.107 of the Employment Relations Act 2000.

[8] The respondent denies it is in breach of its obligations under the CEA and denies breaching its obligation of good faith in respect of the applicants. Further it adamantly denies the second applicants have been *lined up* on the ground that they are members of the Guild.

[9] The company counterclaims damages from all applicants and complains the personal grievance allegations are an *abuse of process* and are solely designed to delay the respondent's restructuring process. Further, the company says it has incurred very significant costs due to what it refers to as the applicants' *delaying tactics*. In the event the Authority finds for the respondent, it seeks penalties from the first applicant and from each of the second applicants.

The issues

[10] To determine these matters, the Authority needs to make findings on the following issues:

- How, if at all, is the status of the second applicants' failure to provide an undertaking as to damages in an interim setting affected in a substantive action; and
- Which launch masters ought to be included in the selection pool for possible redundancy; and
- Has the respondent acted in accordance with the terms of the CEA where redundancies are contemplated; and
- Has the respondent breached its obligations to act in good faith under s.4 of the Act; and
- If the respondent is in breach, what are the appropriate remedies to be applied?

[11] In respect of the counterclaim by the respondent, the issues are:

- Have the applicants abused the employment problem solving process as set out in the Act; and
- Have the applicants breached their obligations under s.4 of the Act; and
- Have the applicants breached clause 22 of the CEA; and
- What, if any, remedies are to be awarded to the respondent?

The historical background

[12] In the face of significantly reduced passengers, the company initially proposed a package of changes aimed at achieving the savings needed by retaining as many staff as possible. This would extend the winter season to six months; paying launch masters on a 7-on/7 -off roster during the winter season rather than 10-on/4-off as at present; a reduction in launch masters' incomes due to the proposed roster change; operating only one vessel in the

winter season; reducing to three vessels deployed on summer day cruises; delay the deployment of one vessel until early November 2009; reduce daily sailings to four per day and launch master positions in the summer season from the current six to five; adjust pay rates of the launch masters to align with the main vessel to which they are assigned; and a reduction in vehicle mileage rates.

[13] At the time this proposal was presented to the Guild, all six Milford Sound launch masters were eligible for selection for the one redundancy proposed and four of those six were union members.

[14] The proposal was presented to Ms Dench and Mr Conrad on 9 February 2009 and they raised some issues, in particular, that of a variation to the CEA and which positions would comprise the pool for selection. Ms Hood, the HR manager, responded by letter on 16 February 2009 to the questions put by the Guild representatives and indicated the selection pool would be the launch masters permanently based at Milford Sound. The letter also makes it plain that in the event agreement on the proposal could not be reached, and the cost reduction achieved, the company would have to reconsider the proposal which might give rise to higher job losses.

[15] Given a range of events, the consultation with the union members took considerably more time than anticipated. The respondent says there was no challenge to its scheduled timeframe of getting members' feedback by 24 February 2009 and being able to announce its decision on 9 March. That deadline for feedback was initially extended to 24 March, yet by 26 March the company had received no information from the union so wrote on 26 March 2009 advising that it would need to proceed without Guild input if no response was received by 27 March.

[16] The union response was received at 5.55pm on 26 March. The company's view is the delay in responding was not the *active, constructive, responsive and communicative* behaviour required under the good faith provisions of the Act. Nor, it says, does the behaviour accord with the principles set out in s.22 of the CEA.

[17] The union rejected any variation to the CEA and as a result the company set about redesigning the proposal which it presented to the union on 1 April 2009 with feedback due on 14 April. As the Guild would not agree with the roster change proposed, the revised proposal indicated a reduction in the Milford launch master head count in the summer to four.

[18] No response was received to this communication. The Guild sent a notice to the company raising a dispute instead. This dispute went to mediation, following which the respondent sent a proposal for settlement of the issues by way of letter on 1 May 2009. The union's response was to issue proceedings in the Authority.

[19] The application for interim relief was put before the Authority on 28 May 2009 and, on the basis of untested evidence, determined in favour of the Guild. The substantive investigation was scheduled for 23-25 June 2009 in Te Anau. At that meeting, more extensive evidence was put before the Authority.

The investigation meeting

[20] Evidence for the applicants was presented by Ms McAra, Guild general secretary, Mr Conrad, Mr King-Turner and, briefly, Mr Bourne. Ms Dench, who was involved in the early consultation process on behalf of the Guild, did not attend.

[21] For the respondent, the Authority heard evidence from Mr David Hawkey, chief executive officer; Mr Paul Norris, area manager Milford Sound; Ms Kerry Hood, human resources manager; Mr Paul Phelan, branch manager Milford; Mr Peter Bloxham, chief launch master; Mr Brian Humphrey, general manager engineering and supply; Dennis Lilley, Danny Hyland and Dean Thompson, launch masters Milford in the summer season and engineering labourers in the off season.

[22] The Authority records its thanks to all who gave evidence in the course of its investigation. I thank counsel for their submissions which I have considered in determining these matters.

[23] As counsel for the parties had exchanged some documents late in the week prior to the investigation meeting, the Authority delayed the starting time in Te Anau to enable counsel to brief witnesses in respect of those documents. Some of the documents concerned were not provided to the Authority prior to the meeting. They were copies of two Board minutes covering matters in relation to the restructuring which is at the heart of this matter.

[24] In the course of questioning Mr Hawkey, Mr McBride produced one of these minutes to the Authority alleging the document was evidence of predetermination on the part of the respondent. Ms Copeland strenuously objected to opposing counsel's action and

insisted he produce the second set of minutes relating to the 5 February 2009 Board meeting. They were produced to the Authority.

[25] Ms Copeland made it plain that she believed the tactic placed the Authority in an invidious position and Mr McBride was attempting to present that part of a scenario which favoured his client's interests. Further, she submitted, to avoid prejudice to her clients, it was necessary for the Authority to call evidence from Mr Bayliss, the Board chair.

[26] I adjourned the investigation meeting to speak to counsel and have them address the situation caused by Mr McBride's introducing these minutes without warning. He told the Authority he produced them on the ground of relevance and defended his doing so because the respondent had provided the minutes to him and thus was aware he had them.

[27] Counsel for the applicants had sought discovery of the minutes on 16 June 2009, four days after advising the Authority the applicants were not lodging further evidence on 12 June. On 22 June at around 10am, Mr McBride advised the Authority he would advise it of any evidence in reply by that evening. None was received.

[28] No leave was sought to admit the documents nor were they provided to the Authority on 23 June before the investigation meeting began at 11am.

[29] Once I had read the documents, there was little to be done but admit them and evaluate their significance. Ms Copeland urged the Authority to accord them and other subsequently proffered items of evidence no weight.

[30] For the avoidance of doubt, I have considered the minutes. They are of little assistance to the applicants' case as they simply record the Board's being presented with proposals on how company management had analysed the company's position and its proposed reaction to a very significant financial threat. Far from a smoking gun whipped from Mr McBride's holster, the documents are more akin to a lobbed damp squid.

Analysis and discussion

[31] The difficulty the respondent faces is the significant drop in tourist numbers to Milford Sound. The issue is founded on its need to address staffing levels in that operation and how it has addressed the process for reducing staff numbers in the Milford operation in the light of the CEA and its obligations under s.4 of the Employment Relations Act 2000.

The CEA

[32] The two relevant sections of the CEA in this matter are clauses 15.2 and 22.

[33] Section 15.2 reads:

> ***Redundancy***
>
> *Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the employer's business.*
>
> *Redundancy does not include a situation solely involving a seasonal lay off or the completion of a fixed term engagement.*
>
> *Whenever a possible redundancy situation arises, for whatever reason, the employer will review the circumstances in detail and consider all options open to them, including redeployment; retraining; rearrangement of tasks and possible changes to performance criteria.*
>
> *We will then advise employees of our proposal and consult with those affected, together with their representatives or support people. We will consider the employees' responses alongside the proposal and the employer will then make a final decision after taking into account all information. Employees selected for new or redefined positions will be chosen on their ability to perform the tasks to the standards required.*
>
> *Where redundancy occurs, the employer shall give four (4) weeks' notice of termination of employment, in writing, to those employees affected, or pay four (4) weeks' wages in lieu of notice. This notice is in substitution for and not in addition to the notice set out in the general termination clause (clause 9). Such notice shall be worked or paid at the employer's discretion.*
>
> *In the event the employee's employment is terminated on the basis of redundancy, the employee shall be entitled to notice of termination of employment, but no compensation for redundancy will be paid unless the sum of compensation is mutually agreed between the union and the employer.*

[34] Clause 22 reads:

> ***Mutual understanding and cooperation***
>
> *The employee agrees to cooperate fully with the employer over changes in duties or work operations that may be reasonably required to maintain an efficient and productive business.*
>
> *Conversely, the employer agrees to discuss changes with the employee and the union if either party deems necessary.*
>
> *The employer, employees and the union agree to behave in a fair and reasonable manner towards each other throughout the employment relationship and to comply with all obligations and responsibilities contained in this agreement in good faith.*

[35] The relevant parts of s.4 of the Act read as follows:

> *4. Parties to employment relationship to deal with each other in good faith.*

> *(1) The parties to an employment relationship specified in subsection (2):*
>
> *(a) Must deal with each other in good faith; and*
>
> *(b) Without limiting paragraph (a), must not, whether directly or indirectly, do anything –*
>
> *(i) To mislead or deceive each other; or*
>
> *(ii) That is likely to mislead or deceive each other.*
>
> *(1A) The duty of good faith in subsection (1) –*
>
> *(a) Is wider in scope than the implied mutual obligations of trust and confidence; and*
>
> *(b) Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
>
> *(c) Without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees to provide the employees affected –*
>
> *(i) Access to information, relevant to the continuation of the employee's employment, about the decision; and*
>
> *(ii) An opportunity to comment on the information to their employer before the decision is made.*
>
> *(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.*
>
> *(1C) For the purposes of section 1B **good reason** includes:*
>
> *(a) Complying with statutory requirements to maintain confidentiality;*
>
> *(b) Protecting the privacy of natural persons;*
>
> *(c) Protecting the commercial position of an employer from being unreasonably prejudiced.*

[36] The parties to this employment relationship are covered in s.2 of this section.

The dispute – alleged breach of clause 15.2

[37] The applicants allege the respondent's process is *unlawful and unjustifiable* as it isolated the three permanent Milford launch master roles, each of which is held by a member of the Guild, while excluding the three summer season launch master roles, none of which is currently held by a Guild member. They have taken issue with the composition of the selection pool and the selection criteria employed by the respondent. In respect of

the selection pool, the applicants have raised the question: what, if any, substantive differences are there between the second applicants' employment and those of the other launch masters?

[38] I originally formed the view that all six launch masters operating on Milford Sound should form the selection pool. I did so on the basis that it is their skills as launch skippers which are the primary reason for being hired by the respondent, rather than any other attribute each man might possess. None of the evidence put before the Authority at the substantive investigation has changed my view on that matter.

[39] The evidence of Ms Hood (para.42) sets out the respondent's rationale for narrowing the pool to the three launch masters based year round at Milford.

[40] The reason is the three summer-only Milford launch masters are redeployed in winter months and are paid from different budgets/cost centres and hence do not provide year-round cost reduction to the Milford Sound operational budget.

[41] I am reassured by the evidence of Mr Alexander, the respondent's general manager – engineering and supply, that while the three summer-only launch masters are deployed in the division managed by Mr Alexander, their costs including wages and salaries are allocated to that division. Their costs transfer to Mr Norris' operation only during the summer season. It follows greater cost savings attach to the reduction in the number of year-round Milford launch masters whose costs are met year-round by the Milford operation alone.

Legal Principles

[42] As has been made clear in a number of Court judgements, it is not the role of the Court or Authority to usurp the employer's management role; (see *Mackintosh v. Carter Holt Harvey Limited* AC 93/00, Travis J).

[43] The Court of Appeal in *NZ Fasteners Stainless Limited v. Thwaites* [2000] 2 NZLR 565 summarised the position:

> *The principles are clear enough. Redundancy is determined in relation to the position not the incumbent. Whether a position is truly redundant is a matter of business judgement for the employer. The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably and in good faith could have reached it may be impeached. … Where there is a genuine redundancy that will justify termination of the employment of the person in the position.*

[44] In *Simpson Farms Limited v. Aberhart* AC 52/06 Colgan CJ considered these principles in the light of s103A of the Act and concluded:

> *So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.*

[45] I find the respondent's prerogative is to dispense with those positions which will provide its business with the greater cost savings.

[46] Turning to the applicant's contention that the individual items selected by the respondent for the purposes of selecting the launch masters' skill mix for its Milford operation are inappropriate and are weighted against the three second applicants, I am satisfied on the evidence put before the Authority that the selection of those criteria lies solely with the company.

[47] Clause 15.2 of the CEA sets out what the parties have **agreed** will occur in the event a redundancy situation arises. The company undertakes to consider all options open to it and then to advise employees of the proposal and consult with those affected. It also undertakes to consider the employees' responses to the proposal and the employer will then make the final decision after taking all the information into account. I find this is precisely what the respondent has done. It was not, and is not, required to do more. The applicants' claim that they ought to have been consulted as to the criteria against which each launch master was to be assessed has no basis in the CEA.

[48] Further, I am satisfied the independence of each assessor was maintained in the course of evaluating the employees being assessed.

Alleged discrimination

[49] There are two legs to this aspect of the applicants' claim. The first to be established by the employees is that the respondent or its representatives acted in one of the ways listed in subsection (1) of s.104 of the Employment Relations Act 2000, the second is for the employees to establish that the discrimination was directly or indirectly by reason of union involvement and satisfies one of the *gateways* set out in s.107.

[50] Under s.119, the applicants must prove the action occurred and that they are persons in the relevant situation. Only then does the presumption apply and require the respondent to show the actual reasons for the action in question.

[51] The grounds alleged here are s.107(1)(b) in respect of Mr Conrad and s.107(1)(d) in respect of all three second applicants. Mr Conrad had been engaged in collective bargaining on behalf of the Guild's members and clearly his situation accords with s.107(1)(b). Section 107(1)(b) reads:

> *107* ***Definition of involvement in activities of union for purposes of s.104***
>
> *(1) For the purposes of s.104, involvement in the activities of the union means that, within 12 months before the action complained of, the employee –*
>
> *…*
>
> *(b) had acted as a negotiator or representative of employees in collective bargaining.*

[52] The question now is, do all three second applicants fall under the provisions of s.107(1)(d)? Section 107(1)(d) reads:

> *(d) Had made or caused to be made a claim for some benefit of an employment agreement either for that employee or for any other employee or had supported any such claim, whether by giving evidence or otherwise.*

[53] There was evidence before the Authority to support this contention. It is clear all three opposed the first proposal put to the Guild for consideration and rejected any variation to the CEA. All three second applicants are actively committed to and supportive of the Guild's objectives. That, I find, falls short of the required standard. Colgan J (as he then was) in *Pacific Rim Investments Flight Catering v. Groom* [1998] 3 ERNZ 1018 said:

> *I do not accept that merely being employed on, and thereby receiving the benefits of, an employment contract amounts to the making or the causing to be made of a claim for some benefit of that contract. … It means, for practical purposes, the making of a claim to a contractual benefit that has been omitted or refused by an employer, the sort of claim that a dissatisfied employee takes up through a delegate, a union representative, through a labour inspector or even personally. It is not simply the completion of a timesheet or some other mechanism for ensuring that regular pay is received or the like.*

[54] There was no probative evidence before the Authority establishing any enmity towards the Guild and its members on the part of the respondent or its management. While it was evident to the Authority at the investigation meeting that frustration levels in both parties were considerable, given the complex and unpalatable nature of the issues with which they were wrestling, that frustration fell well short of hostility.

[55] The ground for the restructuring proposal is patently obvious, the initial proposal included four Guild members and two non members, the objective was to minimise the

number of job losses at Milford while maximising the financial savings. That proposal was rejected by the Guild members as was their right.

[56] The second proposal doubled the proposed redundancies and was restricted to the three second applicants because greater savings from the Milford operational costs would ensue as these three positions are allocated permanently to the Milford cost centre.

[57] I find the respondent has rebutted the presumption in respect of the relevant sections of the Act.

Undertaking as to Damages

[58] Ms Copeland submits the failure of the second applicants' to lodge an undertaking as to damages at the time of the application for interim relief, is fatal to their case, and their claims ought to be dismissed. Counsel relies on a recent decision from Colgan CJ *NZALPA v. Jetconnect* AC 23/09, 3 June 2009, in which the Chief Judge stated the failure of the second applicant, a pilot, to give an undertaking as to damages was *an insuperable stumbling block*. The Chief Judge refused injunctive relief to NZALPA under the usual tests for interim applications.

[59] The submission carries undoubted weight in an interim setting and had it been put to the Authority at the interim investigation would likely have impacted on the second applicants' claims. Given the Queenstown meeting took place on 28 May 2009, six days prior to the issuing of this judgement, it would have required remarkable insight to rely on a dictum yet to issue.

[60] That said, the Authority's investigation in Te Anau was, without question, in relation to substantive matters and no undertakings as to damages are required in a substantive setting. All applicants remain exposed to penalties in a substantive setting and counsel has sought penalties against each. The counterclaim is dealt with below.

The counterclaim

[61] The respondent claims the applicants have failed to be active, constructive, responsive and communicative during the consultation process begun by the company on 9 February 2009; failed to respond to the company's 1 May 2009 post-mediation settlement proposal before commencing proceedings in the Authority; and have abused the dispute resolution process in the setting of genuine redundancies. The respondent notes these

behaviours are in breach of both s.4 of the Act, have been deliberate, serious and sustained and further, are breaches of clause 22 of the CEA.

[62] The company seeks a penalty of up to $10,000 against the Guild and of up to $5,000 from each of the second applicants in respect of the breaches and that, in accordance with s.135 of the Act, the penalties levied be paid to the respondent.

[63] In addition, the respondent seeks damages from the first and second applicants for breaching clause 22 of the CEA; the striking-out of the dispute claim on the basis it is an abuse of process; general damages for this abuse of process and costs. The company accepts Mr Bourne did not contribute to what it cites as bad faith behaviour.

[64] The applicants deny the breaches alleged and submit they were simply exercising their rights under the law.

Analysis and discussion

[65] The power of the Authority to award penalties for breaches established is set out in s.160(1)(m)(i) of the Act. The Authority's power to award damages is established essentially by s.127(2) of the Act where interim reinstatement is sought, and when any other interim relief is sought, as in this matter, by importing the process set out in Rule 7.54 of the High Court Rules.

[66] In this case, the first applicant has reworded Form 2 of the Authority Regulations to align the undertaking with matters *provided for in the statement of problem*. The undertaking is signed by Ms McAra who told the Authority *I hold a Bachelor of Laws degree, and am admitted to the Bar*. In considering this matter, and in the light of Ms McAra's experience as Guild secretary for over six years, the Authority is satisfied the undertaking as filed covers the Guild's intention to be bound by any order the Authority may make in respect of damages.

Abuse of process

[67] The raising of the dispute itself does not constitute an abuse of process. The circumstances surrounding its being raised however, warrants further scrutiny. Following an unsuccessful mediation, the respondent sent a revised proposal for settlement to the Guild's counsel on 1 May 2009. The proposal was not responded to and the applicants commenced proceedings in the Authority.

[68] Those actions go beyond discourtesy and border on contempt of the dispute resolution process and of the respondent's genuine efforts at resolution. The manner in which the dispute was raised is not in accord with the principles of good faith nor in accord with clause 22 of the CEA.

[69] The respondent also takes issue with the inclusion in the dispute of the allegation of discrimination against the second applicants. The submission is that discrimination is, under the Act, a personal grievance and as such is distinct from the dispute involving the interpretation, application or operation of an employment agreement. I accept this is so. However, the jurisdiction of the Authority is sufficiently broad to encompass matters such as this. The Employment Relations Authority Regulations 2000 at s.4 make it clear:

> *4.* ***Application***
>
> *(1) These Regulations are not to be strictly interpreted or applied, but are to be interpreted and applied in a way that best enables the Authority –*
>
> *(a) To support successful employment relationships and the good faith obligations that underpin them;*
>
> *(b) To determine the substantial merits of any case without regard to technicalities;*
>
> *(c) To deliver speedy, informal and practical justice to the parties to any matter before it.*
>
> *(2) Subclause (1) does not limit the power of the Authority to give, in relation to any case before it, any directions that are necessary or expedient in the circumstances of the case.*

In the respondent's submission, the behaviour of the applicants and, in particular, its failure to meet deadlines in the course of the consultation process, were inconsistent with their obligations under s.4(1A) of the Act.

[70] The Guild experienced some difficulties in conducting meetings with its members given the geographical dispersion of those members. This was particularly so in relation to the first restructuring proposal. The variations were rejected following a second series of members' meetings as the first series had been poorly attended.

[71] From the evidence before the Authority, the greater delays occurred following the notification of the reworked second proposal. I think it fair to observe the company, and particularly Ms Hood, was prompt and thoroughly professional in replying to requests for clarification from the Guild. The Guild was less prompt in its responses which led to deadlines for feedback being significantly extended on several occasions. I am not convinced the delays were deliberately obstructive. However, given the seriousness of the

company's situation and its pressing need to progress matters, both known to the Guild, was certainly very unhelpful. The behaviour falls short of being *responsive and communicative* as required by s.4(1A) of the Act.

[72] In addition, I find the applicants' behaviour is in breach of their obligations under clause 22 of the CEA.

[73] I find the first applicant failed to be responsive and communicative in the situation in which it was aware of the serious financial stress to the respondent, and therefore breached its obligations under s.4(1A) of the Act.

Determination

[74] Returning to the issues set out above in this determination I find:

- The second applicants' have status to approach the Authority in relation to a substantive matter despite their failure to provide undertakings at the interim stage.
- All six Milford launch masters ought to be included in the selection pool. The selection of the two positions to be dispensed with is at the respondent's prerogative in the light of its cost savings objectives.
- The respondent has acted in accordance with s.15.2 of the CEA in its approach to addressing the redundancy issue.
- The respondent has not breached its obligations to the applicants under s.4 of the Act.

[75] In respect of the counterclaim, I find:

- The actions of the applicants fall short of abuse of the problem resolution process.
- The applicants have breached their obligations as their behaviour fell short of being active, constructive, responsive and communicative in their dealing with the respondent, as required under s.4 of the Act.
- The applicants have breached their obligations to behave in a fair and reasonable manner towards the respondent throughout the employment

relationship and to comply with all obligations and responsibilities contained in this agreement in good faith (clause 22). Their failure to respond to the respondent's 1 May 2009 proposal and begin action in the Authority is the behaviour in question.

Penalties and damages

[76] As noted above, the Authority has sparse information in relation to financial damage sustained by the respondent as a direct result of the interim injunction being determined in the applicants' favour.

[77] Counsel for the respondent submits issues relating to penalties and/or damages may require a further investigation meeting. That may be necessary, and I invite submissions on that point. Once received, a further telephone conference will be convened to determine how the parties wish to proceed on this one remaining issue.

Costs

[78] Costs are reserved pending determination of the penalties/damages issue.

Paul Montgomery
Member of the Employment Relations Authority