IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 522
5352432

	BETWEEN	GORAN MARSIC Applicant
	AND	BODY CORPORATE 198245 (The Ridge) Respondent

Member of Authority:	Rachel Larmer
Representatives:	Te Kani Williams, Counsel for Applicant Tim Rainey, Counsel for Respondent
Investigation Meeting:	20 September 2011 at Auckland
Submissions Received	26 September 2011 from Applicant 27 September 2011 from Respondent 5 October 2011 from Applicant
Determination:	09 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Goran Marsic claimed he was unjustifiably dismissed from his position as Building Manager by Body Corporate No.198245, The Ridge ("the BC"). The BC said Mr Marsic was never an employee so the Authority did not have jurisdiction to hear his dismissal grievance.

[2] By consent the status issue was dealt with as a preliminary issue.

The law

[3] Section 6 of the Employment Relations Act 2000 ("the Act") sets out the meaning of employee. An employee means *"any person of any age employed by an employer to do any work for hire or reward under a contract of service."*[1]

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[1] Section 6(1) ERA.

[4] When determining whether a person is employed under a contract of service, the Authority is required to determine the real nature of the relationship between the parties.[2]

[5] When determining the real nature of the relationship the Authority must:

(a) consider all relevant matters, including the intention of the persons; and

(b) not treat as determinative any statement by the persons describing the nature of their relationship.[3]

[6] The leading case on s.6 is the Supreme Court decision in *Bryson v. Three Foot Six Limited.*[4] The Supreme Court held the reference to *"all relevant matters"* in s.6(3) of the Act included:

> "*the written and oral terms of the contract between the parties, which will usually contain indications of their common intention regarding the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. All relevant matters equally clearly requires the Court or the Authority to have regard to the features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract, and the way in which it actually operated in practice, that it will usually be possible to examine a relationship in light of the control, integration and fundamental test."*

[7] Industry practice is another factor which may be considered by the Authority when determining the real nature of the relationship between the parties.[5]

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2 Section 6(2) ERA.
3 Section 6(3) ERA.
4 [2005] ERNZ 372
5 Ibid 4

Intention of the parties

Written Agreement

[8] The starting point involves consideration of the written agreement entered into by the parties at the outset of their relationship.

[9] The parties entered into an "*Agreement to Appoint Building Manager"* which was signed by Mr Marsic and by the Secretary of the BC on 25 October 2003 ("the Agreement"). It was pursuant to this Agreement that Mr Marsic provided the building manager services.

[10] I find that the following terms in the Agreement are indicative of an independent contractor arrangement and therefore suggest that the parties did not intend to create an employment relationship:

a The parties to the Agreement are described as the BC and Mr Marsic together with his "*successors and assigns*". This necessarily contemplates that Mr Marsic may subsequently assign his obligations under the Agreement;

b Clause 1 anticipated that the Agreement may be assigned by the building manager with the prior approval of the BC. It also allowed Mr Marsic to arrange for a substitute building manager, who is paid by him and not the BC, to replace him for up to four weeks during the year;

c Clause 2 provided that the term of the appointment was from 1 December 2003 *"until the next AGM."* It also contained a straightforward termination on notice clause which permitted either party to terminate the Agreement on four weeks' notice;

d Clause 3 provided that Mr Marsic was to be paid "*a fee of $10,400 per annum exclusive of GST, payable monthly in arrears in instalments of $866.67."* I consider it significant that the *"fee"* was not described as wages/salary and that Mr Marsic was required to invoice the BC monthly in arrear for his fee;

e Clause 4 recorded the building manager duties but did not set a reporting line or provide for management oversight;

f Clause 5 provided for Mr Marsic to charge the BC an additional fee for any advice or additional services he provided over and above those specified under the Agreement;

g Clause 6 entitled Mr Marsic to charge the BC for disbursements in addition to his monthly fee;

h Clause 7 imposed on Mr Marsic the responsibility for complying with ACC and tax liabilities;

i Clause 8 allowed Mr Marsic to assign his interest under the Agreement with the prior consent of the BC;

j Clause 9 allowed Mr Marsic to engage another person to perform his duties under the Agreement if he was unable to do so because of accident or illness. In which case Mr Marsic incurred the cost of engaging another person and he had to obtain the BC's approval (which could not be unreasonably withheld) to the substitute building manager;

k Clause 11 allowed the BC to terminate the Agreement (other than the termination on notice provision in clause 2) upon the happening of specified events;

l Clause 12 provided for the service of notices on the parties;

m Clause 15 provided that any disputes or differences between the parties were to be referred to arbitration, which I consider indicates the parties did not intend for employment related legislation to apply to their arrangement.

[11] Mr Marsic relied on the following three clauses to support his contention that the parties intended to enter into an employment relationship:

a Clause 4(f) – Availability of building manager. This stated that the building manager's responsibilities would usually be undertaken during normal working hours but he also had to be available to deal with emergencies that arose outside of those hours. I consider this is a neutral provision which could apply equally to an independent contractor as to an employee;

b Clause 4(j) – Observance of Body Corporate Rules. This provided that when enforcing the observance of the BC Rules, the building manager was still subject to review by the BC who could give him directions limiting his authority when administering the observance of the BC rules. I do not accept Mr Williams' submission that this indicated that Mr Marsic could not make any real decisions without the approval and supervision of the BC. This clause ensured that the BC could constrain Mr Marsic if he was performing his services in a manner which was contrary to what the BC owners wanted him to do. I consider that this clause is neutral because it could apply equally to an independent contractor as to an employee;

c Clause 4(i) – Monthly Report. Mr Marsic was required to provide the BC with a monthly written report which was to detail attendances by the Police, inspectors, emergency services and which was to list any problems or failures with the building services and to record events such as detection of fire or smoke and call outs by service contractors, such as the lift maintenance contractor. I see this as merely a reporting mechanism to ensure the owners were kept informed of key building related matters. I see this as another neutral clause which could apply equally to an independent contractor or an employee.

Pre Agreement intentions

[12] Mr Marsic said that even if the Agreement did not make it clear the parties intended to enter into an employment relationship that was in fact their mutual intention because that is what they had discussed and agreed before the Agreement was signed.

[13] Mr Marsic's evidence was that prior to signing the Agreement in October 2003 he had discussions with the (at that time) BC Secretary, Mr Ian Martin during which he alleged they discussed Mr Marsic being an employee. I did not find that evidence credible.

[14] The email to the BC committee sent by Mr Martin on 12 October 2003 talked about the "*appointment*" of Mr Marsic as building manager at The Ridge, but did not refer to his employment. This was also reflected in an email dated 3 October from Mr Martin which again referred to "*appointment*" (not employment) and to the minutes of the Annual General meeting held on 1 October 2003, which also referred to the

"*appointment of building manager"* and which recorded that "*an expression of interest was welcomed from Goran Marsic, owner of apartment 9 and it was agreed to refer this to the incoming owners committee to finalise an appointment […]"*

[15] The BC did not do anything to comply with any employment related obligations such as the requirement to deduct PAYE or to keep wage and time records as required by law. Nor was there any evidence that the BC had ever resolved to employ Mr Marsic and take on the corresponding legal burdens an employment relationship would impose.

[16] It would have been a big step for the BC to have committed to an employment relationship. If that had been the BC's intention then I would have expected to have seen evidence (such as meeting minutes, resolutions, instructions to the BC Secretary) that was what the owners had intended to do. The evidence satisfied me that the owners wanted a building manager to deal with building maintenance and associated issues, not that they wanted to take on the obligations associated with employing someone.

[17] The ability of Mr Marsic to assign the Agreement, the absence of any annual leave, sick leave, and public holiday provisions, the ability of either party to terminate on four weeks notice, the obligation on Mr Marsic to find and pay for a replacement to do his work if he was incapacitated, the absence of any reference to wages/salary, the fact he had to invoice monthly to obtain his fee, the reference to GST, the obligation on Mr Marsic to pay his own tax and ACC liabilities and the reference to arbitration are all provisions which I find were inconsistent with a mutual intention to enter into an employment agreement.

[18] Mr Marsic had previously been an employee so he must have been aware of his employment entitlements, at least in terms of being paid wages or salary from which the employer has deducted PAYE and in terms of his Holidays Act leave entitlements. It is therefore surprising that Mr Marsic did not raise concern about any of the clauses I have identified as being inconsistent with an employment relationship. It is also surprising that during the relationship he never asserted he was an employee and never sought to have any employee related entitlements complied with.

[19] I consider it more likely that the Agreement accurately reflected the parties' mutual intentions regarding the status of their arrangement, namely that it was not intended to be an employment relationship.

Alteration of mutual intention?

2005 AGM

[20] One of the items on the AGM agenda in October 2005 was a proposal to extend "*Goran's employment term*". At the AGM on 19 October 2005 the BC resolved:

> *"[…] The current terms of contract provide for reappointment of the building manager at each Annual General Meeting. The Chairman proposes that since the Building Manager is under the supervision of the Owners Committee that it be:*
>
> *Resolved that in place of an annual review, the contract of employment for the Building Manager continue within the terms of the existing contract."*

[21] Mr Marsic said this showed that the BC intended him to be an employee. I do not agree. I find that the resolution does not purport to alter the nature of the BC's relationship with Mr Marsic or to vary the terms of the original contract. It merely extends the duration of it. I consider this was an administrative type decision made to save the AGM time.

[22] Mr Williams submitted that even if the parties had entered into an independent contractor relationship in October 2003 then the status of their relationship changed by mutual agreement "*no later than October 2005"* following the AGM of the BC. He submitted that the references to "*employment*" indicated that (at least from then) the parties intended to be in an employment relationship.

[23] I do not accept that the use of the term "*employment"* by a non-legally qualified individual within the context of extending the existing contract arrangements was intended to express a view about the status of the relationship between the parties.

[24] I find that the use of the word "*employment"* is neutral in this context because the emails involved a discussion of the "*building manager's contract"* and the word "*contract"* is usually associated with an independent contractor arrangement. I do not accept that the use of the word "*employment"* indicated a mutual intention to change the status of the parties' arrangement or relationship from that recorded in the Agreement.

[25] The use of the word "*contract*" in the proposal and resolution is consistent with there being an independent contractor arrangement. Although the use of the word

"*employment*" is a term used solely for employment relationships, I find that here it was used by laypeople who were likely to have used the term employment without meaning for it to indicate the status of the relationship between the parties and without a specific intention to create an employment relationship. I consider it more likely the term "*employment*" was used to refer to the work required under the Agreement.

[26] The resolution about continuing with the existing contract was an administrative matter that was addressed to avoid the need for each AGM to vote to reappoint a building manager. I find that the sole purpose of discussing the building manager was so that the BC could continue its existing arrangement with Mr Marsic without having to vote on it every year.

[27] Mr Marsic said he stopped providing monthly invoices from around the time of the AGM but still got paid his monthly fee which he said showed he had become an employee. The invoicing issue is not determinative of the parties' status, it is just one factor to consider. Overall the evidence about the October 2005 AGM did not satisfy me that there was a mutual intention in October 2005 to create an employment relationship.

[28] Even if I had found that the use of the word "*employment"* was a label which was mutually intended by both parties to reflect their understanding of their arrangement, such a label is still not determinative, but is merely one factor to consider when determining the real nature of the relationship.

2007 "salary" increase

[29] There was discussion in or around October 2007 about a possible fee increase for Mr Marsic. This resulted in an exchange of emails which referred to Mr Marsic's fee as a "*salary increase."* However, I find the reference to salary was made by a lay person who was actually referring to Mr Marsic's contract fee, not to any wage/salary payments. I consider it likely the layperson did not understand the significance of referring to the contract fee as a salary.

[30] I do not consider the reference to "*salary*" is determinative of the status of the parties' relationship. I find that discussions and communications in 2007 regarding an increase to the contract fee did not change the mutual intention as expressed in the Agreement that Mr Marsic was an independent contractor.

Conclusion

[31] I find that the parties' mutual intention at the commencement of their relationship was that Mr Marsic would be an independent contractor and I find that mutual intention did not change over the course of their relationship.

Operation and practice

[32] I find that the parties operated in practice as if they were in an independent contractor arrangement, not an employment relationship because the parties performed the Agreement in accordance with its expressed terms throughout the eight years that Mr Marsic was the building manager.

[33] I find that Mr Marsic did not act consistently with his evidence that he always believed he was an employee. He never applied for annual leave, he never asked permission to be away from the workplace but would come and go as and when he pleased, he never sought permission to obtain additional employment, he never applied for sick leave, he never sought to obtain his public holiday entitlements when he worked on public holidays, he never kept a record of his days or hours of work so the BC had no way of knowing how much work he was doing, he never claimed payment for the public holidays he did not work. He also concurrently did outside paid work which was undertaken at times that suited his convienence.

[34] Likewise the BC never treated Mr Marsic as if he was its employee. It never deducted PAYE from his fee, it never kept any of the records that have to be held for an employee, it did not ask Mr Marsic to keep track of his days and hours of work. It never performance reviewed him and it never held salary reviews. His continued engagement (up until 2005) was by vote of the AGM each year and his contract fee was only adjusted by vote of the AGM, which Mr Marsic was aware of.

[35] I consider it significant that Mr Marsic failed to assert any of the rights that were associated with an employment relationship such as holiday or sick leave entitlements or participation in Kiwisaver. Whenever he took a holiday he arranged for his daughter to cover his building manager responsibilities in accordance with clause 1 of the Agreement. Although he said he never paid his daughter, that was a matter between them. Had he arranged for someone else to cover him, then he and not the BC would have been responsible for paying that person.

[36] Mr Marsic was free to choose his days and hours of work. He could come and go as he pleased and he could ensure that his building manager duties suited his other personal and business commitments. Mr Marsic did not have to account to the BC for

time spent on the job nor did he have to get the BC's permission for his outside work as a tennis coach at the Parnell Tennis Club, or for the many tennis coaching sessions which he ran for schools and for Tennis New Zealand during the day.

[37] I find that Mr Marsic's tax returns also make it clear that he regarded himself as a contractor, not an employee. Mr Marsic declared in his tax returns that his BC income was "*self employed income"*. Mr Marsic took tax deductions on the basis that he was self employed and he even set up a separate company which received the fee paid by the BC for the building manager services, from which he deducted his expenses and a "*director's salary*."

[38] It is clear that Mr Marsic's work as a tennis coach could potentially have impacted on his availability to work for the BC. However, Mr Marsic did not even think to ask permission from the BC to undertake additional paid work, and I consider this reflects his view and perception that he was an independent contractor, not an employee.

[39] Mr Marsic did not suggest he was anything other than an independent contractor until after he found out that the BC was considering ending its arrangement with him because it wanted to engage another contractor at less cost.

[40] I find that Mr Marsic and the BC both treated their arrangement in practice as if Mr Marsic was an independent contractor, not an employee.

Control

[41] I did not accept Mr Marsic's evidence was that he was subject to a high level of control by the BC. The evidence satisfied me that the BC exercised very little control over Mr Marsic and that he had a substantial degree of autonomy.

[42] Mr Marsic had no set days or hours of work and he was not required to report to a supervisor or the BC on a day-to-day or even weekly basis. I find that there was effectively no oversight or management of his performance. Mr Marsic largely controlled his own activities and he was in the main left to his own devices.

[43] I find that the requirement for Mr Marsic to provide the BC with monthly reports did not indicate it had a high level of control over him. I consider they were just an administrative mechanism for ensuring that building maintenance issues were communicated in a timely manner to the BC so owners could be made aware of building issues that affected them.

[44] Even in a contract for services there needs to be some element or mechanism of control so that those paying for the services know that they are being provided with the contract services in the manner which was intended. The monthly reports provided that information to owners.

[45] The lack of control by the BC over Mr Marsic is evident from his ability to conduct other business activities (such as his tennis coaching) at times and days that suited himself. It is also significant that Mr Marsic did not need to seek permission from the BC for any periods during which he intended to be away from the BC premises undertaking his own additional business activities. I find that Mr Marsic had total flexibility to be able to run his other business activities around the services he had to provide under the Agreement.

[46] In his evidence Mr Marsic said he was subject to supervision and Mr Williams submitted that was reflected by the entry in the 2005 minutes of the AGM where the chairperson is recorded as stating that the building manager is "*under the supervision of the owners committee*".

[47] I do not accept Mr Marsic's evidence that he was under "*the constant supervision of the owners committee and as such cannot make decisions autonomously*". I find that there was not constant supervision because he was largely left to his own devices to determine what work needed to be done, when it needed to be done, how it needed to be done, and by whom it should be done.

[48] One example of what Mr Marsic described as BC's supervision was the instruction to him (in response to his advice that he was going to arrange towing of cars that were improperly parked), that owners needed to be consulted before he arranged to have vehicles towed and that a written car park policy should be implemented before he started automatically towing cars.

[49] Mr Marsic was asked to submit a set of recommendations around the towing of vehicles. Mr Marsic said that this showed that he was not entitled to exercise any discretion over the towing of vehicles. I do not agree. The BC understandably asked him to introduce a towing policy and to communicate that to all owners before he started removing cars. I do not see that as supervision, I see it as the BC looking to protect its owner's rights and interests.

[50] Mr Williams submitted that emails from one of the owners to Mr Marsic expressing frustration about the lift constantly not working properly showed he was directly answerable to the owners. I disagree with that interpretation.

[51] These emails show that at least one of the owners was expressing frustration because visitors had been stuck in the lift. This is exactly the sort of issue that Mr Marsic was responsible for resolving, and it was quite appropriate for it to be raised with him in the way that it was. The lift had been recently serviced so it was appropriate for Mr Marsic to raise ongoing lift issues with the lift repairer. The owner was quite properly drawing a building issue that required input from Mr Marsic to his attention. He was not exercising control over Mr Marsic.

[52] Mr Marsic also suggested that because he received "*training*" before he commenced the building manager role that indicated he did not have any special or particular skills so must have been in an employment relationship.

[53] I find that Mr Marsic was subject to an induction which identified the sorts of building issues he would be responsible for but I do not accept he got specific job training. I agree that his role did not require him to have any special or specific skills because the performance of the building manager duties were to a large respect a matter of common sense.

[54] Although the duties identified in the October 2003 Agreement are duties which could all be undertaken without any special training I do not consider that is indicative of the status of the relationship on the particular facts of this case.

Integration

[55] The Employment Court has commented that the integration test is not necessarily all that suitable a test if there is only one individual involved in providing the services.[6] Notwithstanding that, I find that Mr Marsic was not integrated into the BC. I consider the building manager was a standalone function which was treated as such in practice by the BC and owners.

Fundamental or economic reality test

[56] I find that Mr Marsic was in business on his own account. His tax returns make that clear.

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[6] *Clark v. Northland Hunt Inc.* AK AC66/06 27 November 2006, Perkins J [correct citation required]

[57] Mr Marsic signed his tax returns as true and accurate statements of his income and expenses during each of the relevant tax years. From 2003 to 2007 Mr Marsic completed an IR3A form.

[58] From 2004 until 2006 Mr Marsic said his tennis income was recorded together with the BC income because his tax agent advised him that the BC were not paying taxes on the income they were providing, so he had to reflect it in the IR3A as income from self employment along with his other non-taxed activities.

[59] I consider that if Mr Marsic had believed he was an employee then the advice from his tax agent in 2003/4 would have caused him to raise the issue of his status with the BC at that stage.

[60] However instead of disputing his status with the BC, Mr Marsic instead entered into a series of tax returns which clearly identified himself as self employed and his income as having come from "*self employment.*" He also signed that "*the information in this return is true and correct and represents my assessment for the year […]*". He signed, immediately under the area for signature with the notation "*there are penalties for not putting in a tax return or for putting in a false return. Read page 8 in the guide*"

[61] If Mr Marsic had any doubts he was not self employed, then I consider the above declarations and warnings put him on notice of the importance of accurately disclosing his income. He was in receipt of professional tax advice and his adviser had told him he was not being treated for tax purposes as if he was an employee. I consider it significant Mr Marsic did nothing about that advice which suggests that at that time he knew he was not an employee and agreed with the BC not treating him as an employee.

[62] For the period 1 April 2007 – 31 March 2008 Mr Marsic's accountant recommended he set up a company to receive the income he was receiving from the BC. I find he made that recommendation so Mr Marsic could claim expenses and therefore pay less tax.

[63] Mr Marsic followed his tax advisor's advice and set up a company called Building Management Ltd ("BML") of which he was the sole director.

[64] A statement of financial performance for the year ended 31 March 2008 was prepared for BML. This identified the fee received from the BC as "*sales*" from which was deducted expenses which included accounting fees, bank charges and the

use of his home office. The total expenses deducted amount to $1,704.94. Mr Marsic was recorded as having received "*director's salaries"* which was the amount received from the BC, less the expenses claimed. Mr Marsic also paid ACC levies based on him being a shareholder employee.

[65] This same financial arrangement applied to the subsequent years being the FY08/09; FY09/10 and FY10/11.

[66] Mr Marsic completed seven tax returns over the period of this relationship with the BC. None of these tax returns identified that Mr Marsic had ever received any wages or salary from the BC. Nor did they identify that the BC had deducted any PAYE. All seven tax returns indicated that Mr Marsic believed he was self employed.

[67] Whilst giving evidence Mr Marsic sought to distance himself from his tax returns by suggesting that he was naïve or did not understand the implications of declaring that he was self employed or that his only income had been received in the course of self employment.

[68] I consider it more likely that Mr Marsic was happy to obtain the tax benefits of self employment up until the time that the BC indicated it would be terminating its Agreement with him. It was at that stage that Mr Marsic decided he wanted to avail himself of the benefits and protections accorded to employees. I did not find Mr Marsic's professed naivety regarding his tax arrangements to be credible.

[69] Mr Marsic structured his arrangement with BC as a separate business and took advantage of minimising his tax liabilities accordingly. This occurred over many years and I find his assertion that he simply left it all to his accountant and did not understand the implications of his tax arrangements disingenuous in light of the overall factual position.

Industry practice

[70] I heard evidence from Mr Stephen Plummer, who is a director of Centurion Management Services Ltd and who has been the secretary of the BC since 23 September 2010. Centurion is a professional Body Corporate Secretary which provides services to approximately 200 bodies corporate in the Auckland area. I was told that it was one of the largest body corporate secretaries in New Zealand.

[71] Mr Plummer's evidence was that as an experienced body corporate manager he was not aware of body corporate ever directly engaging a building manager as an

employee. His experience was that where a property required a building manager then the body corporate would contract an individual or a management company to provide those services on a contract basis because bodies corporate are not set up to administer even the very basics of an employer/employee relationship and they do not have systems that would include accounting for PAYE, ACC levies, Kiwisaver, Holiday Act entitlements and the like.

[72] Mr Plummer said the requirements for body corporate were different from ordinary companies because the costs of the body corporate had to be met by levies raised on the unit owners and the body corporate then had to account to the unit owners for all costs incurred. Mr Plummer said that most bodies corporate would find the administration associated with an employment relationship too burdensome which was the main reason why building managers were retained on a contract basis.

[73] Mr Plummer said he had never seen a building manager employed on anything other than a contract basis.

[74] I do not consider I had a clear enough picture of industry practice to be able to come to a definitive view about it. I have therefore considered that to be a neutral factor.

Tax

[75] I consider that the tax arrangements are strongly in favour of the parties being in an independent contractor relationship, not an employment relationship.

Outcome

[76] I find that Mr Marsic was not an employee pursuant to the definition of employee in s.6 of the Act. All factors indicate that the intention of the parties was to enter into a contract for services and that this was how the arrangement worked in practice until it was terminated by the BC.

[77] Taking all relevant factors into account, I find that the real nature of the relationship between the parties was not an employment relationship. Accordingly, I do not have jurisdiction to determine Mr Marsic's grievance. It follows that Mr Marsic has no personal grievance based on an unjustifiable dismissal, pursuant to s.103(1)(a) of the Employment Relations Act 2000.

Costs

[78] The BC has been wholly successful and is entitled to a contribution towards its costs. The parties are encouraged to resolve costs by agreement, but if that is not possible then the BC may apply for costs by way of memoranda within 14 days of the date of this determination, with Mr Marsic having 14 days within which to respond.

Rachel Larmer
Member of the Employment Relations Authority