

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 247
5362217

BETWEEN

RUSSELL THOMPSON
Applicant

A N D

HALKETT INVESTMENTS
LIMITED (FORMERLY EYE
PRO EYECARE LIMITED)
Respondent

Member of Authority: David Appleton
Representatives: Phillippa Tucker, Counsel for Applicant
Graeme Miles, Advocate for Respondent
Investigation meeting: 16 October 2012 at Christchurch
Submissions Received: 16 October 2012
Date of Determination: 9 November 2012

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

- A. The applicant's employment was not transferred to the respondent at any time. The applicant remained an employee of Eyebiz (NZ) Limited (now in liquidation) until 26 October 2011.**
- B. The applicant's claims against the respondent are therefore dismissed.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Thompson claims that he was unjustifiably dismissed on 26 October 2011 and claims lost wages and compensation for humiliation, loss of dignity and injury to his feelings. He also claims in respect of holiday pay, unpaid bonuses, substantial unpaid expenses and interest and unpaid employer's contribution to Kiwisaver.

[2] The respondent denies that Mr Thompson was dismissed on 26 October 2011 and denies that he had ever been employed by the respondent (known, at all material times, as Eye Pro Eyecare Limited). It is the respondent's position that Mr Thompson was employed by a series of companies, the last of which was Eyebiz (NZ) Limited (now in liquidation), until 1 July 2011 when that company ceased trading, and Mr Thompson thereafter became an independent contractor.

[3] Eyebiz (NZ) Limited went into liquidation in February 2012 and its director, Mr Miles (who is also the director of the respondent company), became bankrupt thereafter. Mr Miles disputes much of the expenses that have been claimed by Mr Thompson. Mr Miles was also not sure what, if anything, was owed in respect of the claimed bonus and holiday pay.

[4] As it was clear to the Authority that it would take a great deal of detailed investigation to get to the bottom of the substantial expenses claimed, which would incur costs for Mr Thompson, the Authority elected to determine the issue of Mr Thompson's employment status that prevailed in October 2011 and the probable date of the termination of his employment, as a preliminary issue. If the Authority found that Mr Thompson's employer was Eyebiz (NZ) Limited at the date of termination of his employment (whether that termination was 1 July 2011 or 26 October 2011), Mr Thompson would need to decide whether he wished to pursue the monetary claims against that company given that it is in liquidation.

[5] An additional factor persuading me to consider the matter as a preliminary one is that Mr Miles advised the Authority that the respondent company also has no assets. I also note separately that the Registrar of Companies has posted a notice on the Companies Office website that he is satisfied that this company has ceased to carry on business and has initiated action to remove the company from the register.

[6] Therefore, this determination is limited to the identity of Mr Thompson's employer as at the date of the termination of his employment, and the identification of that date.

Brief account of the facts

[7] Mr Thompson was first employed by a company called Eyebiz New Zealand Limited, as was evidenced by an employment agreement dated 23 July 2001.

Mr Thompson's role throughout his employment was to sell spectacle frames to optometrists throughout New Zealand.

[8] According to Mr Miles, on the advice of his accountant, the Eyebiz legal entity through which the business of selling the frames occurred changed over the years, although keeping the Eyebiz name. He said that these changes occurred on the advice of the company accountant, which he did not question. However, although the legal entity changed, the function of each such Eyebiz entity remained the same and, according to Mr Miles, Mr Thompson continued to work for each successive entity until 2011. None of these entities is now trading.

[9] The original employer, Eyebiz New Zealand Limited, was struck off the companies register in March 2007. A company called Eyebiz 2000 Limited took over the business activities of Eyebiz New Zealand Limited, but was struck off the companies register in July 2008. Eyebiz (NZ) Limited then took over the business of Eyebiz 2000 Limited.

[10] Mr Thompson's evidence was that he had not been aware of these changes to the identity of his employer, which Mr Miles did not refute, as he had not told Mr Thompson of the changes. However, over the years, various letters to Mr Thompson notifying him of pay rises and the like had been written on notepaper bearing the different entities' names and, during 2010 and the first half of 2011 at least (and probably in 2009 as well), Mr Thompson's salary payments were received into his bank account from Eyebiz (NZ) Limited. Due to the history of the Eyebiz entities, logic dictates that Eyebiz (NZ) Limited therefore became Mr Thompson's employer when it took over the business of Eyebiz 2000 Limited. I believe that, as far as Mr Thompson was concerned, he believed himself to have been employed by *Eyebiz* (whatever legal entity that name may represent) until around October 2010, at which point, he asserts, his employment was taken over by Eye Pro Eyecare Limited.

[11] The respondent (known as Eye Pro Eyecare Limited at the material time) was originally set up in January 2003 under another name and, according to Mr Miles, was a completely separate entity both legally and functionally from the Eyebiz stable of companies. Whereas the Eyebiz companies sold frames to optometrists throughout New Zealand, Eye Pro Eyecare Limited had an exclusive arrangement with around 38 optometrists, each of which paid a membership fee in return for discounts on products such as frames, contact lenses and sun glasses sourced by Eye Pro Eyecare.

[12] Mr Miles was adamant that Mr Thompson not only had never been employed by Eye Pro Eyecare Limited, but that he had not been permitted to represent Eye Pro Eyecare Limited to the Eye Pro group of optometrists. This was because Mr Thompson sold frames on behalf of Eyebiz (NZ) Limited to optometrists which were in direct competition with the Eye Pro Eyecare group of optometrists. Mr Miles explained that, for Mr Thompson to have represented Eye Pro Eyecare Limited at the same time as selling frames to the EyePro competitors would have damaged the EyePro brand. I accept that evidence.

[13] The picture, however, is complicated by a number of factors which, at first sight, make it appear that Eye Pro Eyecare Limited became Mr Thompson's employer at some point between August 2010 and October 2011. These factors are as follows.

Eye Pro Eyecare payments to Mr Thompson's account

[14] In August 2010, salary and expenses payments began to appear in Mr Thompson's bank account from Eye Pro Eyecare Limited as well as from Eyebiz (NZ) Limited. Mr Miles explained that this was because Eyebiz (NZ) Limited was suffering cashflow problems around that time and so Eye Pro Eyecare Limited honoured the payments owed by Eyebiz (NZ) Limited in return for cross charges in the accounts. I accept that evidence and also accept that this fact does not result in Eye Pro Eyecare becoming Mr Thompson's employer.

Formerly exclusive Eye Pro Eyecare brands to be sold by Mr Thompson

[15] On 7 October 2010, Mr Thompson was given the price list of what he called *EyePro products*. He said a sales representative had left and he had therefore started selling these products. Mr Miles agreed that Mr Thompson had been given a price list for certain products but that these were not *EyePro products* because EyePro did not have any products. What had happened was that the suppliers of the brands that had been sold exclusively to Eye Pro Eyecare Limited optometrists had decided that it wanted those brands to be sold more widely (i.e., nationally). Therefore, Mr Thompson was asked to sell those brands to all of the optometrists he dealt with in New Zealand. Mr Miles says, however, that this does not mean that Mr Thompson started to represent Eye Pro Eyecare Limited; it means that he started to sell frames that had formerly only been offered to the Eye Pro Eyecare group of optometrists. He was still employed by Eyebiz (NZ) Limited, still represented Eyebiz (NZ) Limited

alone and did not sell to the exclusive group of optometrists. Mr Thompson did agree in evidence that, when he was asked to start to sell these extra frames, he continued to sell the same frames that he had been selling on behalf of Eyebiz (NZ) Limited.

Formation of Eye Pro Distribution

[16] Around the same time, a letter had been prepared to go out to all of the customers of Eyebiz (NZ) Limited. This letter, which had been copied to Mr Thompson, advised Eyebiz (NZ) Limited's customers that Eyebiz (NZ) Limited would, over the following few weeks, *begin integrating several functions of the current Eyebiz operation into EyePro to create a combined sales and distribution operation to be named EyePro Distribution Limited*. EyePro Distribution Limited was not a separate legal entity (there is no such company on the companies register) but an operation that was to distribute the existing Eye Pro Eyecare Limited collections together with several selections from the Eyebiz (NZ) Limited brands to independent practices.

[17] The letter explained that, because of changes in optical wholesaling in New Zealand, Eyebiz (NZ) Limited was no longer able to offer a wide range of brands, models and designs supported by high levels of stock holding. On the other hand, Eye Pro Eyecare Limited had continued to expand and develop as a marketing organisation for independent optical practices nationally offering its own range of optical and sunglass brands, lens packages and contact lenses. Eye Pro Eyecare Limited had also started to distribute international brands from international suppliers.

[18] The letter stated that, as Eyebiz (NZ) Limited and Eye Pro Eyecare Limited already shared premises and many operating costs and staff, the decision would streamline several administrative functions and cost savings would be reinvested into brands and ongoing support programmes. Eyepro Marketing Limited (the marketing arm of Eye Pro Eyecare Limited) was to remain unchanged and continue to be a fully transparent operation that delivered marketing services to the Eye Pro Eyecare Limited members.

[19] A new pricing structure was to be introduced benefiting participating practices with discounts of between 25% and 30% on selected brands and representation of the brands was to be made by the existing Eyebiz (NZ) Limited sales team under the new company name.

[20] Mr Thompson regarded this letter as *confirming the merger of Eyebiz entities into Eyepro*. Mr Miles, however, stated that it was made clear to Mr Thompson that, whilst he was now to sell frames that had formerly only been made available to the Eye Pro Eyecare Limited optometrists, he was not representing Eye Pro Eyecare Limited, for the reason stated above.

[21] The Authority was shown a number of reference letters from different optometrists, some of which referred to Mr Thompson as *latterly having been employed by Eye Pro* or words to that effect. However, it is my belief that it was the letter to optometrists announcing the creation of the combined sales and distribution operation to be named EyePro Distribution Limited that put that name in their minds and which caused them to refer to Mr Thompson as being employed by Eye Pro. In reality, optometrists were in no position to know which entity employed Mr Thompson.

Alphera Finance application form

[22] Mr Thompson produced a copy of an application for credit which Mr Thompson said had been filled out by Mr Miles but whose purpose was for Mr Thompson to borrow funds, secured against his family house, for the benefit of Mr Miles and his companies. The form states that Mr Thompson's employer was Eye Pro Eyecare Limited and that it had been his employer for 8 years. Mr Thompson said that this has been provided to him in October 2010.

[23] Mr Miles stated that the form had been filled out by him but that it had been supplied in October 2011. Furthermore, the purpose of the application form had not been for Mr Thompson to borrow funds secured against his house for the benefit of Mr Miles and his companies. The form, belonging to Alphera Finance Services, had been filled out by Mr Miles at Mr Thompson's request to obtain funds to purchase a vehicle that was registered to Eyebiz (NZ) Limited. Mr Miles said that Mr Thompson's wife had not been happy for Mr Thompson to take on the loan and so the application had been taken no further. The reference to Eye Pro Eyecare Limited was an error that he had made.

[24] On this particular point, I entirely accept Mr Miles' evidence. Alphera is part of BMW Group financial services and it seems extraordinary that Mr Miles would simply hand one of his employees a form expecting him to sign it so that the

employee would take a charge over his house to lend money to his employer. Furthermore, there is nothing to suggest, even in Mr Thompson's evidence, that he had been employed by Eye Pro Eyecare Limited for 8 years.

Avis GEB number

[25] Around May 2011, an Avis GEB number had been provided to Mr Thompson by Eye Pro Eyecare Limited. Mr Miles accepts this but explains that the Avis card had been issued under the group arrangement that Eye Pro Eyecare Limited had with Avis to get the best deals based on usage volume. He said that a similar arrangement had been in place with Vodafone to collectively gain discounts based on the number of users and that these facts do not prove that Mr Thompson was an employee of Eye Pro Eyecare Limited.

[26] Mr Miles' evidence is that, around May 2011, it was clear that Eyebiz (NZ) Limited was in financial difficulties and was likely to cease trading. It was around this time that Mr Miles had his first conversation with Mr Thompson to advise him of this possibility. He said it was in May or June that he offered Mr Thompson the opportunity to take over, as an independent contractor, the brands of two key suppliers (CMI and L'Amy). Mr Miles explained that, at the time, he strongly believed that these would be significant suppliers and that, without the overheads associated with the Eyebiz (NZ) Limited company, Mr Thompson would be able to make a go of it and make a viable business out of the brands.

[27] Mr Miles said that he spoke to a representative of CMI who, initially, had had reservations about the proposal but that he had agreed that he would provide Mr Thompson with CMI's product on a contract basis, at least provisionally. By this time, it was clear that there would be no distributor for CMI's products in the South Island after the end of June. Mr Miles said that Mr Thompson would have had meetings with the representative of CMI about this, or at least telephone calls. Mr Thompson denied this.

[28] On 30 June 2011, Eyebiz (NZ) Limited ceased trading and, according to Mr Miles, from 1 July 2011 Mr Thompson became an independent contractor representing the CMI brands. Mr Miles said that the representation of the L'Amy brands, which had much lower sales, was taking longer to arrange because the company is based overseas.

[29] Mr Miles advised the Inland Revenue Department that Eyebiz (NZ) Limited was no longer employing people. Mr Miles also decided that, in order to assist Mr Thompson succeed in the venture, he would continue to make payments to Mr Thompson from the Eye Pro Eyecare Limited account, in the same sums as Mr Thompson had been receiving net of tax up to the end of June 2011 as salary. However, because he regarded Mr Thompson as a contractor at that point, he did not account to the IRD for tax and did not withhold any tax.

[30] Mr Miles' evidence was that he made it clear to Mr Thompson that Mr Thompson needed to get a structure in place which would enable him to operate as an independent contractor for the two suppliers and he intended to give him six months to do so. In addition, as well as making payments to Mr Thompson, Mr Miles arranged Mr Thompson's travel and accommodation whenever he was selling in the North Island. He also allowed Mr Thompson to use the premises of Eye Pro Eyecare Limited and its facilities, including its fax machine.

[31] Mr Thompson's evidence was that, as far as he was concerned, when he was told that Eyebiz (NZ) Limited was no longer going to trade, he was not concerned because, by now, he believed he was employed by Eye Pro Eyecare Limited. As for the offers made to him by Mr Miles to take on the CMI and L'Amy brands as an independent contractor, he had no interest in that as he was a salesman and not a businessman.

[32] In October 2011, Mr Miles discovered that Mr Thompson had told at least one key optometrist that he was owed a significant sum of money by Eye Pro Eyecare Limited and that he had been *bad mouthing* Mr Miles personally. By chance, the representative of CMI heard this and told Mr Miles that he no longer wished Mr Thompson to represent its brands. This was around the end of October. Upon learning this, Mr Miles asked Mr Thompson to meet with him and declined to arrange the flights and accommodation for his next sales cycle because he wanted to find out more about what Mr Thompson had been saying about him.

[33] Mr Miles denies that he called Mr Thompson into what was a disciplinary meeting, saying that he wanted to talk to him on a personal level because he had heard that Mr Thompson had been making disparaging remarks about Mr Miles personally. Mr Miles said that, whilst he had continued to engage with Mr Thompson after 1 July

2011, he had not been managing him but had been assisting him to make a go of the venture of being an independent contractor.

[34] Around the same time, Mr Thompson's lawyers wrote to Mr Miles asking Mr Miles to sign a personal guarantee in respect of the sums that Mr Thompson says are owed to him by Mr Miles and his companies. Mr Miles declined to sign this personal guarantee and instructed lawyers to advise Mr Thompson that he was not an employee of Eye Pro Eyecare Limited (as had been stated in Mr Thompson's lawyers' letter) and had been not employed since 1 July 2011. It was this letter, dated 26 October 2011, that Mr Thompson's lawyers took to constitute a dismissal of his employment.

Which entity was Mr Thompson's employer (if any) on 26 October 2011, when Mr Thompson says his employment ceased?

Did Mr Thompson's employment transfer to Eye Pro Eyecare Limited?

[35] It is of assistance, as a starting point, to consider s. 6 of the Employment Relations Act 2000 in determining this question. Sections 6(2) and 6(3) provide

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[36] Mr Thompson states, essentially, that he assumed he had become employed by the respondent company because of the factors that have already been identified above. This was why he was not worried, he says, when he was given to understand that Eyebiz (NZ) Limited was to cease trading. Mr Thompson does not assert that there was an express agreement between him and the respondent company, or between him and Mr Miles on behalf of the respondent company that his employment was to transfer to the respondent company at any point. If he believes that there was, I have seen no evidence of such an express agreement.

[37] Mr Thompson's argument, therefore, is that his employment transferred by way of conduct to the respondent company in October 2010 and that he remained employed by it until his dismissal on 26 October 2011. The onus lies with him to prove this, on a balance of probabilities.

[38] However, it is a basic principle of employment contract law that a change of employer must be subject to the mutual agreement of the parties. This derives from the principle that a contract for service is personal to the parties and cannot be assigned without the agreement of both parties. (See, for example, *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451 at [22] and *Heritage Expeditions Limited v Fraser* [2011] NZEmpC 157 at [47]).

[39] Mr Miles' evidence was that the respondent company was specifically never intended to be Mr Thompson's employer because the respondent company represented a group of optometrists which were in competition with those optometrists to which Mr Thompson supplied frames. I believe Mr Miles in this respect, as it is credible and, although Mr Thompson asserted he was asked to sell *EyePro products*, he did not expressly contradict the assertion that he essentially sold frames for Eyebiz to optometrists who were in competition with the EyePro members.

[40] Furthermore, when Mr Miles realised that Eyebiz was going to have to cease trading as it was no longer solvent, he advised Mr Thompson of this fact and made an offer to him that he take over representing two of the spectacle brands as a sole trader. He specifically did not offer that Mr Thompson start working for Eye Pro Eyecare. If he had believed that Eye Pro Eyecare had already become Mr Thompson's employer, he would have had no need to suggest that Mr Thompson become an independent contractor as Eye Pro Eyecare was continuing to trade at that point.

[41] In light of this, in the absence of an express finding that the respondent company agreed (by way of offer from the respondent, which was accepted by Mr Thompson or vice versa) to be Mr Thompson's employer, I cannot find that that Mr Thompson's employment was transferred to it at any point in time. The conduct of the respondent cannot operate to override its express intention not to employ Mr Thompson.

The doctrine of undisclosed principal

[42] Mr Thompson's counsel also relies on the doctrine of undisclosed principal. This doctrine applies when a person alleged to be the employer claims to have been acting for another, who is said to be the true employer, at the time of engagement. Where this fact is not disclosed to the employee the doctrine of *undisclosed principal* will usually apply and the employee can then choose who to proceed against (*Cuttance v Purkis* [1994] 2 ERNZ 321 (CEC34/94)).

[43] The doctrine of undisclosed principal usually arises when it is unclear from the outset whether an employee is employed by an entity or the individual who represents that entity. The individual will usually assert that he or she acted as an agent for the entity. In the present case, however, Mr Thompson was clearly employed by an Eyebiz entity from the outset of his employment, and, even if Mr Thompson was not aware exactly which Eyebiz entity employed him at any given time, it was only at some point in or after October 2010 that he could have reasonably believed that an Eyebiz entity no longer employed him.

[44] In his evidence, Mr Thompson says that he *assumed* he was employed by Eye Pro Eyecare from all the documentation he had been given. By this I understand he refers to the various factors cited above. However, I believe that this assumption is a *post hoc* rationalisation which he now relies upon to support his assertion that he became employed by that company. Mr Thompson appears to have been uncurious as to which company employed him at the time. This is not a criticism of Mr Thompson, but it does call into question the assumption he now asserts he made.

[45] For the doctrine of undisclosed principal to assist him, Mr Thompson would have to show that Eye Pro Eyecare Limited did nothing to advise Mr Thompson that his employment was not with that company. First, however, this assumes that his employment transferred to Eye Pro Eyecare in the first place; this I cannot find occurred for the reasons already given.

[46] Second, I believe that the respondent did take steps to advise Mr Thompson that his employment was not with Eye Pro Eyecare in any event. First, Mr Miles gave evidence that, when the Eye Pro Distribution concept was launched, he had to emphasise to Mr Thompson that he did not represent Eye Pro. That is incompatible with a message that encouraged Mr Thompson to think he was employed by Eye Pro.

Secondly, Mr Miles gave evidence that, when he told Mr Thompson in May or June 2011 that Eyebiz (NZ) Ltd was about to cease to trade, he made an offer to Mr Thompson to become a sole trader, as he put it, as an alternative to redundancy. Such an offer is incompatible with a situation where Mr Thompson was employed by Eye Pro Eyecare, as that company was continuing to trade, and was solvent and would have been able to continue to employ Mr Thompson (as it did). The cessation of Eyebiz trading would have had no effect on that situation.

[47] Therefore I cannot find that the doctrine of undisclosed principal assists Mr Thompson to argue that he became employed by Eye Pro Eyecare Limited.

When did Mr Thompson's employment with Eyebiz (NZ) Limited cease?

[48] Having found that there was no transfer to the respondent company of Mr Thompson's employment, I must next determine what happened to Mr Thompson's employment with Eyebiz (NZ) Ltd, and in particular, whether it terminated on 1 July 2011, and if so, whether Mr Thompson became employed by another employer, or whether he became an independent contactor thereafter.

[49] The starting point in analysing this situation is to establish when Mr Thompson ceased to be employed by Eyebiz (NZ) Ltd. An employee's employment may come to an end in various ways, including:

- a. express termination by the words or deeds of the employer, or those of its agent, (including constructive dismissal);
- b. termination by the employee's inaction (such as the employer failing to take steps to rescue the situation when a third party building owner issued a trespass notice against an employee – see [*Tropotova v OCS Ltd*](#) ERA Christchurch CA157/10, 6 August 2010);
- c. resignation by the employee;
- d. abandonment of employment;
- e. frustration.

[50] It is my view that none of these mechanisms operated to terminate Mr Thompson's employment with Eyebiz (NZ) Limited until 26 October 2011, when Mr

Thompson learned from a letter written by the respondent's lawyers, that he had been purportedly dismissed on 1 July 2011. At that point he treated himself as having been dismissed from 26 October.

[51] There is no evidence that Mr Miles or anyone else took positive steps to dismiss Mr Thompson from the employment of Eyebiz (NZ) Limited on or around 1 July 2011. Mr Miles' evidence was that he made an *offer* to Mr Thompson to become a sole trader (presumably on behalf of CMI and L'Amy) and that he made arrangements for Eye Pro Eyecare to continue to pay him the equivalent of his net wage (but without paying PAYE) for around the next six months to give Mr Thompson time to get a structure in place for going out on his own. Mr Miles advising the IRD that Eyebiz no longer employed anyone did not operate to terminate Mr Thompson's employment with Eyebiz because that message was not communicated to Mr Thompson. To be effective, a dismissal must be communicated (by words or deeds) to the employee being terminated.

[52] Mr Thompson was adamant he did not agree to be an independent contractor and simply continued to receive the payments as if they were salary. I cannot find that he accepted the offer to become an independent contractor. He erroneously believed that his employer had become Eye Pro Eyecare Limited, and so had no intention of going out on his own.

[53] Given that no positive steps were taken to terminate Mr Thompson's employment relationship with Eyebiz (NZ) Limited and that Mr Thompson did not accept the offer to become an independent contractor representing the spectacle frames of CMI and L'Amy, I must conclude that Mr Thompson remained an employee of Eyebiz (NZ) Limited until 26 October 2011 (notwithstanding that it had ceased trading from 1 July 2011).

[54] This conclusion is supported by applying the well known tests used by the courts to determine whether someone is an employee or an independent contractor. I agree with the submissions of Mr Thompson's counsel that, when applied to the situation that prevailed from 1 July to 26 October 2011, the control test, integration test, economic reality test and multiple tests all support a conclusion that Mr Thompson was not operating as an independent contractor, but as an employee.

Summary

[55] In summary, I find that Mr Thompson remained employed by Eyebiz (NZ) Limited (now in liquidation) until his dismissal in 26 October 2011, that the respondent never employed Mr Thompson and that, consequently, no further application in the Authority against the respondent company can proceed.

Costs

[56] Mr Miles represented the respondent company at the investigation meeting and so no legal costs should have been incurred. However, if the respondent company believes that it may have costs properly recoverable from Mr Thompson, it should seek to agree with him how those should be dealt with. In the absence of agreement within 28 days of the date of this determination, the respondent company should lodge and serve a memorandum setting out the costs it seeks and the basis for them. Mr Thompson will then have a further 28 days within which to lodge and serve any response.

David Appleton
Member of the Employment Relations Authority