IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 328
5422245

	BETWEEN	MAC ANANIA Applicant
	AND	NGATI RANGI DEVELOPMENT SOCIETY INCORPORATED Respondent

Member of Authority:	Robin Arthur
Representatives:	Richard Mark, Counsel for the Applicant Leon Penney, Counsel for the Respondent
Investigation Meeting:	4 April 2014
Determination:	5 August 2014

DETERMINATION OF THE AUTHORITY

A. **Ngati Rangi Development Society Incorporated (the Society) ended its employment of Mac Anania on 9 November 2012 and did so in a manner that was unjustified.**

B. **Within 28 days of the date of this determination the Society must settle Mr Anania's resulting personal grievance by paying him $3000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000, an amount reduced by one-third because Mr Anania contributed to the situation giving rise to his grievance. No lost wages are awarded.**

C. **The Society must also pay Mr Anania for 12 weeks annual leave he was due at the end of his employment, with interest on the sum due (at the annual rate of five per cent) from 10 November 2012 to the date of payment.**

D. No award of costs is made.

Employment relationship problem

[1] Mac Anania worked in the role of Kaitiaki Relationship Manager (KRM) at the Northland Regional Correctional Facility, more commonly known as Ngawha Prison. He was employed by the Ngati Rangi Development Society Incorporated (the Society). A service contract between the Department of Corrections (Corrections) and the Society provided funds for the salary of the KRM role.

[2] On 8 August 2012 Corrections revoked Mr Anania's Specified Visitor status at all Corrections sites for a minimum of 12 months. A letter from Ngawha Prison Manager Chris Lightbown told Mr Anania that his status "*may be reconsidered after the 12 month period if you make application*".

[3] Corrections revoked Mr Anania's visitor status because he was convicted in July 2012 on a drink driving charge and sentenced to 400 hours community service. He had three previous drink driving convictions, the last of those three being some 12 or so years earlier.

[4] Corrections manager Jennie Montague issued the Society with a "*default notice*", dated 10 August 2012, which said Mr Anania's visitor status was revoked because he had not informed Corrections about the conviction "*at the earliest opportunity*" and because he had not met the expectation of Corrections' code of conduct that visitors would comply with the law at all times. Before issuing the notice Ms Montague had not advised the Society of any proposal to ban Mr Anania or discussed with Society representatives what effect such a decision might have on its work at the prison.

[5] The effect of Corrections' decision was that Mr Anania could not carry out his usual duties at Ngawha Prison. Those duties included attending a daily meeting with prison managers and visiting prisoners in their living and work areas inside the prison's secure perimeter. He carried out other duties from his office located in the visitors centre. The centre was just outside the prison walls but still on Corrections property.

[6] The following account of events was established from background documents lodged by the parties and from the sworn or affirmed written and oral evidence given at the Authority's investigation meeting by Mr Anania and two members of the Society's executive committee: Philip Tane, the Society's accountant and Chris Beazley. Mr Beazley had worked as Mr Anania's assistant, was subsequently appointed by the Society to relieve in the KRM position from 13 August 2012 until December 2012 and was appointed to a new role as Tiaki Tangata Manager from January 2013 onwards. The Tiaki Tangata role was specifically mentioned in a new service contract with Corrections agreed with the Society in late September 2012. The KRM role had been specifically referred to in the previous service agreement but was not referred to in the agreement signed in late September.

[7] At its 13 August meeting the Society executive committee had decided Mr Beazley would relieve in the KRM role while the committee lobbied Corrections to change its position on Mr Anania's visitor status. A Society delegation visited Ms Montague on 20 September. The delegation presented a letter stating that the Society's committee unanimously considered Mr Anania's sentence from the District Court "*more than adequate*" and that the Corrections site ban, prohibiting him from carrying out his responsibilities as KRM, was "*a further penalty*" and "*excessive*". The letter was accompanied by a report from Mr Anania rebutting Ms Montague's allegation that he had not informed Corrections of the charge. He said he told the acting prison manager on 16 June and also raised the issue at a managers' briefing on 6 July. However Ms Montague responded, in a letter dated 1 October, that Corrections' decision was "*not a negotiable*" and was "*the minimum sanction*". In light of that response the Society committee made two further relevant decisions at its 9 November 2012 meeting – firstly that Mr Anania would not be paid from the end of October, and, secondly, to advise him the Society would "*leave a position open for [his] return for 12 months or until 7 August 2013*".

[8] There was differing evidence from the three witnesses about whether Mr Anania was told of the committee's 9 November decisions and, if so, when he was told and by whom. However, by the end of the Authority's investigation, the parties agreed that a letter that the committee had decided on 9 November should be sent to Mr Anania, advising him of its decision, was never sent.

[9] Mr Anania said he only found about his removal from the payroll because he was not paid his usual fortnightly salary on 15 November and rang Mr Tane to find out why.

[10] Mr Tane's evidence, as it emerged in the Authority investigation, differed. He believed he spoke with Mr Anania about what was happening some time between Society committee meetings held on 8 October and 9 November. The minutes for the 9 November meeting wrongly recorded Mr Tane as having "*met with*" Mr Anania before 9 November. Mr Tane believed he had a phone conversation with Mr Anania in that period – a phone call Mr Anania insisted did not occur until 15 November (when he had rung to ask why he was not paid).

[11] In a letter dated 5 December 2012 Mr Anania's lawyer raised the issue formally with the Society. The letter said there was an urgent need to clarify Mr Anania's employment position and that, if his employment had been terminated, it was without prior consultation or fair process. A requested meeting to discuss the matter did not occur although the Society committee had delegated Mr Tane to make those arrangements.

[12] Just over a year later, on 17 December 2013, Mr Anania lodged a statement of problem in the Authority alleging he was constructively dismissed and unjustifiably disadvantaged. The Society's statement in reply denied that was the case. It described Mr Anania's employment agreement as having been "*frustrated*" by him not being able to perform his duties after Corrections revoked his visitor status.

The issues

[13] There was some dispute about which form of a written employment agreement applied to Mr Anania at the relevant times. However the parties agreed, by the end of the Authority investigation, that whatever their source, his terms of employment included a requirement that Mr Anania carry out his duties either *in* or *at* the Ngawha Prison.

[14] The issues left for determination were:

(i) what was the status of Mr Anania's employment as a result of decisions taken at the 13 August 2012 meeting of the Society's executive committee?

(ii) Was Mr Anania's employment relationship with the Society ever (in fact and law) ended, and, if so, was it ended by 'frustration' as a result of Corrections' decision, or by some other subsequent action of the Society (including its decision on 9 November 2012 to stop paying him)?

(iii) Whether Mr Anania's employment continued on a suspended and unpaid basis, or ended by 'frustration', or ended by the Society's actions, was how the Society dealt with him justified when measured against the test set by section 103A of the Employment Relations Act 2000 (the Act)?

(iv) If the Society's actions were not justified, what remedies were due to him, considering lost wages (subject to evidence of reasonable endeavours to mitigate his loss) and compensation for hurt and humiliation (also subject to evidence)?

(v) Should any remedies awarded to Mr Anania be reduced due to blameworthy conduct by him contributing to the situation giving rise to his grievance?

(vi) Should either party contribute to the costs of representation of the other party?

[15] In resolving those issues I was assisted by thoughtful and measured closing submissions from Mr Mark and Mr Penney. As permitted by s174 of the Act this determination has not set out all evidence and submissions received but has stated findings of fact and law and expressed conclusions on the issues for resolution.

(i) Mr Anania's employment status from 13 August 2012

[16] Mr Anania alleged the Society's committee had agreed at its 13 August meeting that he could continue to carry out KRM duties outside the prison while Mr Beazley did any duties required inside the prison. The Society's position, as it emerged during the evidence, was that Mr Anania was effectively on leave from 13 August and his pay was deducted from his annual leave entitlement (which he had later confirmed to Mr Tane had accumulated to 12 weeks).

[17] Neither view, I have found, correctly described the legal position or matched the evidence of what occurred in August 2012 and the following few months.

[18] Mr Beazley and Mr Anania concurred in their respective evidence that there was some discussion at the 13 August meeting about the notion that Mr Anania might be able to continue with 'outside' duties while the Society lobbied Corrections to remove or reduce his ban. However there was not, I have found, any agreement by the Society committee to adopt that approach in the discussion its members had once Mr Anania left that meeting. Instead the committee members expected Mr Anania to "*brief*" Mr Beazley on what was needed while Mr Beazley relieved in the role of KRM and they regarded Mr Anania as being on annual leave. No evidence sufficiently confirmed that Mr Anania was directly advised at the time or in the following weeks of the outcome or what was expected of him as a result of decisions at the committee's 13 August meeting.

[19] Mr Anania believed he was suspended from his duties and he would continue to be paid while the matter was discussed between the Society and Corrections. He knew directly-employed Corrections staff were typically suspended on pay in such situations and he thought the same practice was being applied to him.

[20] It was also consistent with his subsequent behaviour. He did not liaise with Mr Beazley about any of the 'inside' duties carried out at the prison and did not carry out any identified 'outside' activities that were part of the KRM role (although he did investigate whether a long-standing planned project for landscaping activities at the local marae and an old school site managed by a Ngati Rangi trust might get underway). Instead Mr Anania used much of the time from mid-August to November to do the 400 hours community service required by his sentence. That he used his time for that purpose – rather than doing whatever was meant by 'outside' duties of the KRM role – suggested he understood there was no agreement or requirement on him to do any work for the Society in that period.

[21] However the Society was not entitled to simply treat this period as annual leave. It could have chosen to initiate a disciplinary process with Mr Anania (about his conduct in incurring a drink-driving conviction, not being about to perform his duties because of the resulting Corrections site ban, and whether he was prompt enough in disclosing the fact of his charge and conviction to the Society). On

beginning such a process the Society would then have needed to directly address whether to formally suspend Mr Anania and whether such a suspension would be on a paid or unpaid basis. Not having done so formally, I have concluded the Society's actions, were in fact and law, a suspension of Mr Anania. As a result the Society must be deemed to have accepted the 'default' position that such a suspension – in the absence of an express contractual provision to the contrary – was to be on pay while the Society did what it could to address the situation directly with Corrections.[1]

(ii) Was Mr Anania's employment ended, and if so, how?

[22] The Society submitted that the legal doctrine of frustration applied to the circumstances in which, as a result of Corrections' decision about his access to the site, Mr Anania became unable to perform his essential duties. Effectively that 'frustrated' the employment agreement because its obligations could not be performed but was for reasons outside the direct control of the Society or Mr Anania. According to the Society, it was that situation rather than its actions or decisions that ended the employment relationship.

[23] Its defence on that ground raised legal questions about whether the existence of a 'frustrating event' meant no further scrutiny of the Society's actions was required, whether the fault of one of the parties was relevant to a finding of frustration, and whether Mr Anania could rely on his own fault (by incurring a drink drive conviction) to avoid such a finding.

[24] An employment agreement may be frustrated where an unforeseen event or change in circumstances renders its performance either impossible or something radically different from what was contracted for by the parties. Such an event or change must have occurred without the fault or default of either party to the employment agreement.[2] However a party cannot rely on its own fault or default to defeat or exclude the other party's claim that performance of an employment agreement has been frustrated.[3]

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[1] *Singh v Sherildee Holidays Limited* (unreported, EC, AC 53/05, 26 October 2005) at 94.
[2] *Paal Wilson A/S v Hannah Blumenthal* [1983] 1 AC 854 at 909 per Lord Brandon.
[3] *F C Shepherd v Jerrom* [1987] QB 301 (English CA) (concerning whether a contract of apprenticeship was frustrated when the worker was sentenced to six months borstal training) as discussed in *Anyanwu v Ebuzoeme & Ors* [2003] UKEAT 0279_03_2011 (20 November 2003) per Judge Daniel Serota QC at [74].

[25] The Court of Appeal has cautioned that both the nature of employment agreements and the potential effects on vulnerable employees means the doctrine of frustration should not be invoked easily.[4] It has also emphasised the need to ask what performance of the agreement actually entailed as the doctrine of frustration only applied if the agreement did not make sufficient provision for dealing with the particular circumstance or event that had occurred. Where an agreement – as it would under the present New Zealand statutory regime – incorporated requirements for the parties to deal with one another in good faith and for the employer to provide an employee with an opportunity to comment on information relevant to changes in their employment, such processes should first be followed. Otherwise it may be premature to conclude further performance of the agreement was not possible.[5]

[26] Those principles are consistent with the approach taken by decisions in the so-called 'triangular employment' cases. The Authority and the Employment Court have recognised the difficult circumstance for an employer where a third party – often (as here) the principal in a service contract with the employer – has demanded that a worker employed by the employer be removed from the principal's premises. However an employer in such situations still remained bound to follow fair procedure and consult the worker on alternative work prospects. Those cases also confirmed an employer's responsibility to properly investigate the circumstances before acting on the principal's conclusions and demands for removal of a worker.[6]

[27] In Mr Anania's case Corrections' decision to ban him from its sites for 12 months was sudden and made without forewarning or talking with the Society about its likely effects. It was a reaction to – and so could be said to be caused by – conduct by Mr Anania that was, by definition, criminal (due to the possibility of a jail sentence being imposed for such a drink driving offence) and to which he pleaded guilty. In that way it arose from fault by him. Although delivered in what the Society regarded as an unexpected and arbitrary manner, Corrections' reaction to someone providing services in one of its prisons getting such a conviction was not surprising (even though some might have viewed its reaction as disproportionate or unnecessary in the circumstances of Mr Anania's service and the particular nature of his duties at the prison).

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[4] *Karelyrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) at [37].
[5] *A Worker v A Farmer* [2010] ERNZ 407 (CA) at [21], [25] and [26].
[6] See *G & H Trade Training Limited v Crewther* [2002] 1 ERNZ 513 (EC, CJ Goddard) at [42].

[28] A similar example of Corrections applying its rules to exclude a person in a 'triangular' employment relationship was its decision to ban access at a different prison for a literacy tutor who had sent a postcard of the Westminster Parliament buildings to a prisoner.[7] The tutor was held by Corrections to have breached its strict policy of 'nothing in, nothing out'. The organisation that employed the tutor to provide literacy and numeracy training at the prison later dismissed her. It said it was unable to see any possibility of maintaining her on-going employment.

[29] The situation in Mr Anania's case was that, if unable to go back into the prison for 12 months, his ability to perform the duties required of his position was radically different from that expected under his terms of employment and the Society's service agreement with Corrections. Both those terms and that agreement referred to his duties being carried out *at* or *in* the prison.

[30] It would not have been a compelling rebuttal for Mr Anania to have argued that the doctrine of frustration could not apply because there was fault by one of the parties. To do so he would have to rely on his own fault in committing the drink drive offence and, after pleading guilty, getting convicted for it. Rather there were three other factors preventing a conclusion that the agreement ended by frustration.

[31] Firstly, two written employment agreements that had set out Mr Anania's terms of employment at different periods contemplated that he could be dismissed for serious misconduct and, as one put it, where his behaviour or conduct was "*unsuitable*" or his performance was "*not satisfactory*". The Society's human resources policy also required employees to report criminal charges or convictions that occurred while employed if they "*were of such a nature as to make it inappropriate for you to continue to be employed*". Mr Anania's evidence did not establish that he had formally advised the Society of the charge or his conviction in July. He said that was because he was considering an appeal. It was not until 8 August, on being ejected from the prison site, that he spoke to Mr Tane about the matter. Incurring a drink-drive conviction, being prevented from performing his duties at his workplace as a result, and not being more prompt in advising his employer of the charge earlier, were each actions or omissions that arguably fell within the scope of the conduct or performance failures expressly contemplated in his

[7] See *Hill v Workforce Development Limited* [2013] NZERA Wellington 65.

terms of employment. On that basis it could not be said such an event was not contemplated by, or could not be foreseen by, the parties.

[32] Secondly, Mr Anania's employment did not actually end as an immediate result of Corrections' action in revoking his visitor status. By its decision to lobby the Corrections manager about the ban or its length, the Society contemplated that Mr Anania's employment could and would continue. It also continued to pay him although he was unable to perform any duties – whether that was on its mistaken view that it could use his annual leave entitlement to do so (rather than the correct basis that he was suspended on pay).

[33] Thirdly, applying the Court of Appeal's analysis referred to in paragraph [25] above, the Society did not adequately carry out its statutory good faith obligations to consult with Mr Anania over what was happening. That failure has been further examined later in this determination. However the immediate effect of that failure was that it was too soon to conclude no further performance of the employment agreement (including its incorporated statutory provisions and terms setting out how the employment could be terminated) was not possible.[8]

[34] Having reached the conclusion that the employment did not end by frustration, I considered the question of whether the employment relationship had continued or had ended was best determined by looking at the effect of the Society's decisions in its 9 November committee meeting.

[35] On one analysis Mr Anania's employment continued after 9 November, albeit unpaid, because his position was said to remain open for 12 months or until 7 August 2013. This suggested or implied that when the period of the visitor ban ended Mr Anania could – and the Society would accept he should – step back into the role and continue to perform it. And, on that basis, the employment relationship could be said to have remained alive (although no work was to be done and no further pay was to be provided in the intervening period).

[36] On the other analysis the committee's decision to stop paying him really ended his employment – it was a situation of no work and no pay. In that light the

[8] *A Worker v A Farmer*, above, at [25].

committee's statement about what it intended to do, or hoped would happen, at the end of 12 months was merely a promise to *re-employ* him at that point. In the meantime, his employment was terminated and there was no employment 'relationship' in the intervening period.

[37] I concluded the latter analysis best described, in a common sense way, the reality of what happened. The Society's decisions at its 9 November 2012 committee meeting ended its employment relationship with Mr Anania. There was no work, no pay and only a hope that both might resume in the future. It was, in effect, a dismissal.

(iii) Were the Society's actions justified?

[38] The nature and manner of how the Society ended Mr Anania's employment from 9 November 2012 – which I have found amounted to a dismissal – needed to be measured against the "*test of justification*" set by s103A of the Act. It actions in suspending Mr Anania from 13 August 2012, and the basis on which it did so, also had to be assessed under the same test.

[39] To be justified those actions had to be what a fair and reasonable employer could have done in all the circumstances at the time. Such an employer would also have met its statutory good faith obligations to be active and communicative in maintaining the employment relationship.[9] Those obligations included providing the worker with access to relevant information and an opportunity to comment before a decision was made that was likely to have an adverse effect on the continuation of the worker's employment.

[40] The Society was active and constructive in the steps it took to lobby Corrections about its decision to remove Mr Anania's visitor status. However it fell below the standard of what a fair and reasonable employer could have done because it failed to adequately communicate with Mr Anania about the effect for him of its committee decisions of 13 August. That failure included not telling him that the ongoing payment of his wages to him was on the basis of deducting those weeks from his annual leave entitlement.

[9] Section 4(1A) of the Employment Relations Act 2000 (the Act).

[41] Nor was he told about the outcome of the Society's lobbying attempt and Corrections' outright refusal to lift or reduce its 12-month ban on site access for Mr Anania. He was not given a copy of Ms Montague's letter making that clear.

[42] Although there was some evidence that one committee member, Bishop Ben Te Haara, did informally meet with Mr Anania – over a cup of tea – at some time between 13 August and 9 November, I accepted Mr Anania's evidence that the situation and its consequences was not squarely discussed by the two men. I also considered that Mr Tane's evidence – although undoubtedly sincere and to the best of his recall of events many months distant – did not establish with sufficient certainty that he had spoken to Mr Anania before the committee's 9 November meeting about the situation and what might happen.

[43] The result was that Mr Anania did not have a proper opportunity to be heard before the committee made the decisions that effectively dismissed him. It was also plainly unfair that the committee decided on 9 November to stop his pay from 30 October and had used his annual leave entitlement to pay for his period of suspension from 13 August.

[44] It was likely that the committee could, ultimately, have made no other decision on 9 November about what to do about Mr Anania's employment status. The Society had no independent funds from which to pay him and no other positions or paid duties to offer. However meeting and talking with him before making its decisions may have resulted in a different outcome on when his pay was stopped, on what arrangements were made to let him know its decision, and on the impact on him of how his employment came to an end. The failure of the committee to even send the letter that it had decided should be sent to him was its final unjustified act – it simply failed to communicate the outcome fairly to him. Months of uncertainty followed.

[45] Accordingly I concluded that how the Society ended Mr Anania's employment was unjustified. As a result he had a personal grievance for unjustified dismissal which required consideration of remedies.

(iv) Remedies

Lost wages

[46] For two reasons I concluded no award for lost wages was warranted.

[47] Firstly, in assessing Mr Anania's loss I was required to consider the likelihood that his employment (and pay) would likely have ended around November 2012 even if the Society had followed a proper procedure in making its decision. The Court of Appeal has described that requirement in this way:[10]

> *Those fixing compensation in this area must have regard to the actual loss suffered by the employee. . . We also emphasise that ... in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed.*

[48] Given the financial constraints on the Society, it was likely Mr Anania's employment would have ended in November 2012 even if the Society had provided him with the information about Corrections' confirmed position and the opportunity to comment on its limited options. It had no independent funds to pay Mr Anania for a position that he could not perform. Another contingency was that the Society could (if done in a procedurally fair manner) have dismissed him either on the grounds of redundancy or fault as a result of the ban and his inadequate prior disclosure of the drink drive conviction (which deprived the Society of the opportunity to be involved in managing the matter before Corrections made the decision to revoke Mr Anania's visitor status). The result was, properly assessed, that the period of lost wages – even if the Society had better handled how it went about making its decisions and communicating them to Mr Anania – would quite likely not have extended beyond November 2012.

[49] Secondly, even the first reason I gave was wrong, Mr Anania had not done enough to mitigate his loss of earnings. Because he was seeking an award of lost wages he was obliged to make reasonable endeavours to find alternative work and

[10] *Telecom NZ Ltd v Nutter* [2004] 1 ERNZ 315 at [81].

earnings. This is how the Employment Court has described the obligation to provide evidence of having made those reasonable endeavours:[11]

> *... Dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.*

[50] However Mr Anania's evidence was that he had kept himself busy at home with family matters and community projects in the months after his work with the Society ended. In mid-2013 he made efforts to contact Corrections officials about the prospect of having his visitor status renewed, without success. It was not until later in 2013 that he began applying for new jobs, including those that would use his previous trade skills as a scaffolder. While his ability to seek work and generate alternative earnings was hampered by at least three factors – the initial uncertainty about the on-going status of his employment by the Society, his age (which at 64, realistically, limited his prospects) and the competition for the very limited job opportunities available in the Northland region – his evidence on what he did do, and when he eventually did it, failed to establish that he had made the reasonable endeavours necessary to support an award of lost wages.

Wage arrears

[51] Mr Anania was entitled to an order for a sum equivalent to his annual leave entitlement at the time his employment ended. He said that entitlement was 12 weeks. No evidence provided on the Society's behalf contradicted his tally. That entitlement was wrongly offset against his wages during the period he was suspended and should have continued to be paid his ordinary wages (not leave).

[52] Accordingly the Society must pay Mr Anania the value of the 12 week leave entitlement due to him when he was effectively dismissed on 9 November 2012. He is also entitled to interest on that amount from 10 November 2012 to the date of payment, at the annual rate of five per cent.[12]

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[11] *Allen v Transpacific Industries Group Limited* (2009) 6 NZELR 530 at [78].
[12] Clause 11 of Schedule 2 of the Act applied.

Compensation for hurt and humiliation

[53] Some of Mr Anania's evidence in support of his claim for an award of compensation under s123(1)(c)(i) of the Act was about the effect on him of having received a conviction for drink-driving and that fact being widely known in his community. He felt humiliated by comments made to him in some public places by people who knew him from his prison work, including some who were former prisoners or family members of prisoners. However the Society could not be expected to compensate him for injury to his feelings from those comments because they were made as a result of his own actions in committing an offence that was nothing to do with his work.

[54] He did give some evidence of the effect on him of how he had lost his job and how he felt humiliated by how he was treated by people he knew, and was related to, in the Society and the negative effect that had on his confidence in participating in wider Ngati Rangi activities. Because the Society was responsible for its unjustified actions in how it had brought about the end of his employment, a modest award of compensation for that humiliation, loss of dignity and injury to his feelings was warranted. I concluded $4500 was the appropriate level to award (but subject to the reduction explained below).

(v) Is a reduction of remedies warranted for blameworthy conduct?

[55] Under s124 of the Act the Authority must consider the extent to which an employee's actions contributed to the situation giving rise to the personal grievance and where a reduction of any remedies awarded is required.

[56] Mr Anania, through his representative, submitted that the grievance arose because the Society failed to properly address the consequences of his loss of visitor status and failed to properly inform him of the status of his employment. On this view his blameworthy conduct of incurring the drink-drive conviction did not contribute to the Society's subsequent failure to deal with him fairly and no reduction of his remedies should result.

[57] I considered that assessment too narrow for the overall merits or equity of the case. The situation giving rise to the grievance occurred because Mr Anania broke the

law, incurred the conviction, and had not taken earlier steps to formally let the Society know what had happened. As a result his employer was surprised, embarrassed and left with limited options on how to deal with the ban (but did try to get it lifted). However Mr Anania was not responsible for subsequent flaws in how the Society handled the matter. I considered a one-third reduction of the award of compensation to him made under s123(1)(c)(i) of the Act was required to mark his contribution to the situation giving rise to his grievance. The reduction does not apply to the wage arrears award for his leave entitlement.

(vi) Costs

[58] I have not made an order for costs because Mr Anania was legally aided in bringing his claim against the Society. If an order had been made it would have been for the sum of $3500, being the Authority's daily tariff for a one day investigation meeting. In the circumstances of this case the tariff would not have required adjustment upwards or downwards on the basis of the factors and principles discussed in *PBO v Da Cruz*.[13]

Robin Arthur
Member of the Employment Relations Authority

[13] [2005] 1 ERNZ 808.