

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 728  
3056104

BETWEEN                      TIMOTHY FENSOM  
Applicant

AND                              KME SERVICES NZ PTY  
LIMITED  
Respondent

Member of Authority:      Robin Arthur

Representatives:            Michael McDonald, advocate for the applicant  
Tim Lane, director of the respondent

Investigation Meeting:      10 September 2019

Determination:              20 December 2019

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**DETERMINATION OF THE AUTHORITY**

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- A. KME Services NZ Pty Limited (KME) unjustifiably dismissed Tim Fensom. Before doing so, KME also unjustifiably disadvantaged Mr Fensom by not adequately consulting over a change to workplace practice before it was made.**
- B. In settlement of his grievances for unjustified dismissal and unjustified disadvantage, KME must pay Mr Fensom the following sums by no later than 31 January 2020:**
- (i) \$11,286, less any applicable tax, in reimbursement of lost wages; and**
  - (ii) \$12,000, without deduction, as compensation for humiliation and injury to his feelings.**
- C. Costs are reserved with a timetable set for memoranda if an Authority determination of costs is needed.**

## **Employment Relationship Problem**

[1] KME Services NZ Pty Limited (KME) dismissed Tim Fensom on 30 October 2018. He had worked for KME for eight months as a leading hand electrician on the construction project for a 62,000 square metre hospital building in central Christchurch.

[2] KME said Mr Fensom committed serious misconduct by twice refusing to provide a face scan for a biometric time and attendance system, called Timecloud, that the company had introduced for use on the site. The new system was intended to replace a paper-based, manual system of 'sign in - sign out' sheets. KME managing director Tim Lane sent all employees a memorandum on 6 September 2018 with the heading: "New Health and Safety Policy". It announced use of the Timecloud system as "a new compulsory sign in and sign out process ... to show KME's commitment to workers' health and safety". He wrote that the scanner "will help us track employees and subcontractors in case of emergencies or site evacuation". Employees were directed to register on the system the following week as full site-wide use of the system was planned for the following fortnight.

[3] Its introduction was delayed for some weeks while the company took some steps to answer questions from its employees about how the system would operate, why it was necessary and what protections were in place for use of their biometric data.

[4] In an email sent to Mr Lane on 11 October Mr Fensom said he fully agreed with the need for accurate timekeeping and attendance on site. However he said he was disappointed at a lack of communication about the purpose of the change and was not comfortable with the use of bio-metric scans. He said measures for timekeeping and evacuation of the site could be achieved by "a less invasive alternative" such as by using a swipe card system. Mr Fensom also wrote that he had been told he would get "a first and final warning" on the first day and be removed from site on the next day if he did not comply when site wide use of the system began in the next week.

[5] Mr Lane replied to Mr Fensom by email later that day saying employees had been given an opportunity to have their concerns addressed over the previous two months and the system was to be implemented from 15 October. Mr Lane also said the reference to a first and final warning was not correct. He said Mr Fensom would

be in breach of his employment agreement if he did not follow the company's health and safety policy and he "may get a warning letter in relation to this breach".

[6] Mr Fensom was away on a two-week holiday overseas when use of the Timecloud system began on site. When he returned to work on 29 October Mr Fensom told his supervisor that he would not use the biometric system. Instead he signed in on a paper sheet and was sent to work on a floor in the site. Around mid afternoon that day his supervisor came and handed him a warning letter. In the intervening period KME's project manager had telephoned Mr Lane and told him Mr Fensom had refused to use the Timecloud system. Mr Lane instructed the manager to issue a warning letter to Mr Fensom. The letter given to Mr Fensom was in Mr Lane's name but unsigned. It said Mr Fensom was being given the warning for not following KME's new health and safety policy "in relation to sign in sign out procedure". It continued:

We expect all staff to follow the [health and safety] policies and if you require any assistance in understanding the policy please contact the undersigned.

If you wish to respond to this formal warning letter please do so by speaking with me or by replying in writing.

[7] On arrival at the work site on the following morning, 30 October, Mr Fensom was called to the supervisor's office. The supervisor asked Mr Fensom if he would agree to use the facial recognition function in the Timecloud system. He refused. The supervisor then handed Mr Fensom a letter that Mr Lane had directed be given to him if Mr Fensom refused to use the new system that day. Under the heading "Termination of employment" the unsigned letter read:

You are currently with us at KME Services NZ Pty Ltd.

I confirm that we have decided to terminate your employment for serious misconduct under clause 17.6, 20.5 and Item 15 of schedule of your employment contract. As a result, your employment will end effective 30th October 2018.

Upon termination you will be paid any entitlements that you have accrued.

Yours sincerely,  
Tim Lane  
Managing Director.

[8] The supervisor then escorted Mr Fensom to a work area to collect his tools and walked with him through the staff break room and out to the main gate of the site.

[9] In his application to the Authority Mr Fensom pursued personal grievances for unjustified disadvantage, relating to consultation about the introduction of Timecloud, and for unjustified dismissal. He sought orders for lost wages and compensation for humiliation, loss of dignity and injury to his feelings caused by KME's actions.

[10] KME's statement in reply to Mr Fensom's claim said it had consulted employees about introducing the Timecloud system "to improve the welfare of workers and to assist in accurate timekeeping". It said Mr Fensom had "unreasonable expectations".

### **The Authority's investigation**

[11] Mr Fensom and Mr Lane both provided written witness statements and, under affirmation at the Authority investigation meeting, answered questions about their evidence. The parties made closing submissions on the issues for resolution.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.<sup>1</sup>

### **The issues**

[13] The issues for determination were:

- (i) Did KME act fairly in making its decision to dismiss Mr Fensom for serious misconduct on 30 October 2020?
- (ii) Did KME have reasonable grounds to summarily dismiss Mr Fensom?
- (iii) If Mr Fensom was found to be unjustifiably dismissed and/or unjustifiably disadvantaged by KME's actions, what remedies should be awarded for his personal grievance?
- (iv) If remedies were awarded, was any reduction of those remedies required, under s 124 of the Act, for conduct of Mr Fensom contributing to the situation giving rising to his grievance?

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<sup>1</sup> Employment Relations Act 2000, s 174C(4).

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

### **The employment agreement**

[14] The following terms from the employment agreement between KME and Mr Fensom were relevant in considering those issues:

#### **Position**

- 1.2 The Employer may, from time to time, and following consultation with the Employee, make reasonable changes to the particulars of the position and the duties to be performed.

#### **Rules, policies & procedures**

- 4.1 The employer has policies and procedures that relate to the employee's job.
- 4.2 The employer will make the employee aware of the policies and procedures, and will make sure they are available to the employee. The employee must be familiar with these rules and follow them at all times.
- 4.3 The employer may introduce new policies or procedures or change or cancel existing ones, but must give reasonable notice of any changes.
- 4.4 If the employee doesn't follow the policies and procedures, the employer might take disciplinary action.

#### **Health & safety**

- 17.1 The employer and employee will meet their obligations under the Health and Safety at Work Act [2015]
- 17.2 The employer's duties include:
- providing and maintaining a safe working environment for employees and others in the workplace
  - ...
  - providing procedures to deal with work emergencies
  - making sure health and safety employee engagement and participation processes are in place
  - ...
- 17.3 The employee will follow the employer's health and safety rules and procedures. ...
- 17.4 Examples of how the employee can take reasonable care include (but are not limited to):
- following all reasonable health and safety rules and instructions.
  - participating in health and safety discussions.

- 17.6 Failure to follow reasonable health and safety rules may be considered serious misconduct.

### **Termination by Employer**

- 20.1 The Employer may terminate the Employee's employment if the Employer has sufficient reason to do so, and will treat the Employee fairly and reasonably in reaching any decision to terminate. In particular, the Employer will give the Employee a reasonable opportunity to comment on any proposal or concerns the Employer has that the Employer considers may lead to the termination of the Employee's employment. The Employee is welcome to involve a representative or support person in the process. See Schedule 1 attached to this agreement for examples of misconduct or serious misconduct, and the employer's process for dealing with such incidences.
- 20.6 If the Employer decides to investigate a matter involving possible serious misconduct, the Employer may, after consulting the Employee, suspend the Employee until the Employer decides what action to take. Normally, any suspension will be on full pay. ...

### **Schedule 1 Misconduct**

The following behaviour (or similar) constitutes serious misconduct. Behaviour of this type can result in summary/instant dismissal. This list is not exhaustive.

...

11. Refusal to perform work assigned or a lawful instruction

...

15. A refusal or serious failure to comply with any request, direction, rule, policy or procedure.

### **Failure to act fairly**

[15] An employer who believes an employee has committed serious misconduct must meet the statutory test of justification in whatever actions it takes to address those concerns, including any decision to dismiss or otherwise discipline the worker. The test considers the employer's actions on the objective standard of whether what the employer did and how it did it were what a fair and reasonable employer could have done in all the circumstances at the time.<sup>2</sup>

[16] In assessing whether the employer has met the requirements of that test the Authority must consider whether the employer sufficiently investigated its concerns about the employee's conduct and before taking any action, whether:<sup>3</sup>

- (i) the concerns were raised with the employee;

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<sup>2</sup> Employment Relations Act 2000, s 103A(1) and (2).

<sup>3</sup> Section 103A(3)

- (ii) the employee got a reasonable opportunity to respond to those concerns;  
and
- (iii) the employee's explanation was genuinely considered.

[17] If defects in that process were more than minor and resulted in the employee being treated unfairly, the Authority may find the employer's actions, including a decision to dismiss or otherwise discipline, was unjustified.<sup>4</sup>

[18] A just process includes providing the employee with notice of the allegations, the opportunity to seek advice and representation and the right to be heard by the person who is making any disciplinary decision on behalf of the employer.

[19] Clause 20.1 of KME's employment agreement with Mr Fensom referred to those obligations. It stated he would be given a reasonable opportunity to comment on any concerns that KME considered might lead to the termination of his employment and was welcome to involve a representative in the process.

[20] KME's actions, in the letters delivered to Mr Fensom on the instructions Mr Lane gave to supervisors or managers on site, clearly fell below those statutory and contractual standards of procedural fairness. As a result, KME's decisions to both issue Mr Fensom with a warning on 29 October 2018 and to dismiss him on 30 October 2018 were unjustified.

[21] On neither occasion did Mr Fensom get an opportunity to give his explanation to the person who made the decision to issue the warning and the dismissal letter. Neither did he get any notice of a disciplinary meeting or the opportunity to get advice and support before he was called to the meeting with his supervisor on 30 October. He was asked if he would comply with a direction to use the Timecloud facial recognition system, not what explanation he had for not doing so. The warning letter of 29 October told Mr Fensom he should contact Mr Lane if he wanted to respond to the warning, which got the proper process entirely the wrong way around. These were not minor defects in KME's process. Rather it treated Mr Fensom unfairly by denying him his statutory right to respond to KME's concerns and to have his responses genuinely considered before any decision was made. He had established his dismissal was unjustified on that ground alone.

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<sup>4</sup> Section 103A(5).

### **No reasonable grounds for decision**

[22] Although KME had acted unjustifiably in how it made and carried out its warning and dismissal decisions, it was also necessary to consider whether it was nevertheless substantively justified in reaching the conclusions and taking the actions that it did. This included considering whether Mr Fensom could justifiably have been dismissed in the circumstances at the time for refusing to follow instructions given to him by KME representatives. This aspect looks at how KME came to make its decision to introduce the Timecloud system and whether Mr Fensom was disobeying reasonable instructions when he said he did not want to use that system.

[23] If in making those decisions, and talking to its employees about what was happening, KME did what a fair and reasonable employer could have done, its subsequent disciplinary action against Mr Fensom could have been found reasonable.

[24] According to Mr Lane's oral evidence KME began looking at introducing the Timecloud software because the main contractor for the hospital site wanted a better system than paper-based timesheets for checking who was on the site in the event of an evacuation or other emergency. The main contractor was also building another large building at a nearby site in central Christchurch, where some KME staff also worked, and used a swipe card system to record their entries and exits at that site. However Mr Lane thought a swipe card system had drawbacks because workers sometimes lost or forgot their cards, causing additional costs and use of administrative time. Two other subcontractors providing different trades services on the hospital site used the Timecloud system so Mr Lane decided to look at using it for KME staff there too. He said he decided by the end of July 2018 that Timecloud was the software KME wanted to use. It was purchased in August. He then issued the 6 September memorandum to KME employees.

[25] Although the 6 September memorandum contemplated beginning use of the Timecloud scanning system at the site in the following fortnight, its implementation was delayed because of what KME called "questions and concerns" from employees at the hospital site.

[26] On 27 September KME issued a Questions and Answers sheet about Timecloud. It said KME and Timecloud had "a privacy statement" that would address any concerns employees had about protecting their personal information,

including from disclosure to any third party. It also said biometric data would be deleted from the “KME master scanner and account” when a worker’s employment with the company ended. It referred to clause 17.2 of the employment agreement regarding KME’s duty to provide procedures for workplace emergencies and clause 4.3 allowing it to introduce new policies if it gave reasonable notice of any such changes.

[27] The Q & A sheet said workers leaving the site would “need to sign out and sign in again when they return for evacuation purposes” but said there was “no need to sign in and sign out” if workers were taking lunch breaks off site in nearby Hagley Park, as long as they were close enough to hear the site siren.

[28] It also stated that, while KME was permitted to introduce the policy under its employment agreement, it was “still consulting” with employees as it wanted the introduction of the new policy to be a success. It ended with a hyperlink to a Privacy Commission case note about the use of biometric data in an employment setting.<sup>5</sup>

[29] Two weeks later KME also sent employees on the hospital site a document headed: “Timecloud & KME Privacy Policies”. This document stated all users who accessed the website or used the application and time tracking devices consented to the collection and disclosure of their information in accordance with the privacy policy. It stated that Timecloud could amend or update the policy from time to time, “with or without notice to users” but KME would notify individual users of changes to the policy affecting those individual users.

[30] It also said users who had to submit personal information about themselves, including “biometric identifiers”, could use only their first name to ensure their privacy. It said Timecloud would not disclose any user’s personal information to any third party “except where disclosure relates to the purposes for which the information was collected ... and as agreed in the Terms of Use”. It did not provide the content of those terms of use. It said data was protected by encryption and repeated the earlier advice that biometric data would be deleted from KME’s master scanner when a worker’s employment ended.

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<sup>5</sup> <https://www.privacy.org.nz/news-and-publications/case-notes-and-court-decisions/case-note-33623-2003-nzprivcmr-5-union-complains-of-company-s-introduction-of-finger-scanning/>

[31] For four reasons, explained below, this information revealed significant problems with the justifiability of what KME had said and done in introducing the new system.

[32] Firstly, KME's statutory good faith obligations to be active and communicative in maintaining a productive employment relationship required the company to consult its employees about the effects of changes to its business and proposals that might impact on those employees.<sup>6</sup>

[33] The requirements for consultation where an employer is subject to the obligations of good faith and acting justifiably under the Act has been summarised in this way:<sup>7</sup>

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[34] KME fell at the first hurdle of those requirements. Mr Lane's oral evidence disclosed he had considered the ins and outs of various technologies for improving timekeeping and evacuation data at the hospital, with all the challenges that came with a 62,000 square metre site and its various points for getting in and out. Options included using GPS-enabled devices, swipe cards (as already mentioned) or Timecloud's facial recognition software. But KME had not consulted its employees about those options before it decided in July to purchase the Timecloud software. There was no prospect by that point that KME's plans to use Timecloud was only a 'working plan' or that it had an 'open mind' about its use. Rather, it announced the decision on 6 September and then, in response to resulting questions from staff, sought to pass off the answers it then gave on 27 September as part of a consultation process.

[35] Failing to properly consult staff about a change that would require them to provide biometric data, in the way that KME went about it, was not what a fair and reasonable employer could have done in all the circumstances at the time. KME's failure was an unjustified action.

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<sup>6</sup> Employment Relations Act 2000, s 4(1A) and (4)(c) and (d).

<sup>7</sup> *Stormont v Peddle Thorp Aitken Limited* [2017] ERNZ 352 at [53] (footnotes omitted).

[36] Secondly, KME's attempts to answer concerns about potential privacy issues with the collection and use of the biometric data of its workers, particularly facial recognition scanning, were inadequate and to some extent misleading.

[37] KME's supposed privacy policy was open to amendment by Timecloud, on terms of use not disclosed to the workers, that meant guarantees regarding disclosure and security were subject to unforeseen change beyond their control.

[38] Further, the Privacy Commission case note referred to in KME's Q & A sheet issued on 27 September raised more concerns than it answered when, as KME suggested, Mr Fensom looked at it.

[39] The facts of that case, considered by the Commission in 2003, differed in important respects from the situation with KME.<sup>8</sup> Firstly, the employer in that case was looking to introduce finger-scanning technology but this was still at the stage of being a proposal. The commissioner found that employer had already taken sufficient prior steps to educate its workforce about use of such a system. The commissioner also reached only a "provisional" view that adequate security safeguards were in place regarding use of the information. The commission noted it had no resources to test and assess the vulnerabilities of the system. Importantly too, the commissioner's carefully-framed opinion said it could not reach any conclusions about whether the employer's proposed actions were within the scope of the express or implied terms of the employee's contractual obligations. The commissioner noted that was a matter for determination in the employment jurisdiction. This included the question of whether the company, if it had ensured employees could make an informed decision about participating in the finger scanning procedures, could impose an adverse disciplinary response if an employee then chose not to participate.

[40] On the information already canvassed in this determination, KME could not say it had reached the level of ensuring the informed consent referred to in this Privacy Commission case that KME claimed supported its approach.

[41] Thirdly, there was some real doubt that KME could say Mr Fensom was refusing to comply with a reasonable and lawful instruction at the time, on 29 and 30 October, when he declined to submit to facial recognition scanning in the Timecloud system.

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<sup>8</sup> Case Note 33623 [2003] NZPrivCmr 5.

[42] In *OCS Limited v Service and Food Workers Union* the Employment Court found an instruction given to workers to use a finger-scanning time recording system was unlawful because the employer had not met its statutory and contractual obligations to consult the workers before giving the instruction.<sup>9</sup> While Mr Fensom, and other KME employees on the same express terms of employment as him, had obligations to accept and comply with new policies introduced by KME, including health and safety measures, those obligations did not trump or replace the statutory obligations on KME to first consult them before introducing such policies.

[43] Rather than refusing to follow a reasonable instruction, Mr Fensom sought to discuss the effects and implications of the procedure that KME directed him to follow. He wanted to engage in the discussions that a reasonable employer, acting fairly, would have had with him about it. He did not refuse to do any of his normal duties while at work on 29 October and there was nothing to indicate that he would have not have continued to do so if he was not dismissed on 30 October.

[44] Fourthly, there was some reasonable doubt about the efficacy of the health and safety rationale KME advanced as the basis for introducing the Timecloud system. Its primary motivation was said to be the certainty and ease of electronically generating a list of employees on site in the event of an emergency or an evacuation. This was faster and more straightforward than compiling information from paper sheets at several locations on the site. There was no doubt that was a legitimate purpose. Christchurch's experience of earthquakes and this year's armed attack on a mosque, on the edge of Hagley Park not far from the hospital project site, confirm such measures should be in place. However the provision for workers to leave the site for lunch breaks without signing out indicated that how KME intended using the Timecloud system would not reliably achieve its declared purpose of accurately identifying who was on site at any particular time. As Mr Lane accepted in answer to a question at the Authority investigation meeting, the real benefits of the Timecloud's facial system were its potential to reduce time fraud (because, unlike a paper-based system, 'buddy sign ins' were not possible with facial recognition scanning) and it was administratively easier to electronically collate work hours information.

[45] Accordingly, for the four reasons given, KME had failed to establish that, in all the circumstances at the time, it had acted as a fair and reasonable employer could

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<sup>9</sup> [2006] ERNZ 762 at [72].

have done in introducing the Timecloud system and then dismissing Mr Fensom for not complying with instructions to use that system. He has established that his dismissal in those circumstances was unjustified.

## **Remedies**

### *Lost wages*

[46] In remedy of his grievances Mr Fensom sought reimbursement of the wages he lost from when he was dismissed until when he was able to secure further paid work through an agency four weeks later. This loss totalled \$7,128. He then received a lower pay rate for his work at the agency and no holiday pay during the Christmas period. This loss comprised \$594 for the pay differential and \$1,944 he was not paid during the holiday season. He then gained full time employment but sought lost wages of \$1,620 for a one week stand down period before he could start that new job.

[47] The total of those losses was \$11,286. Mr Fensom's evidence established that he had made reasonable efforts to mitigate his loss by working through an agency while he sought full-time, permanent employment. He was entitled to an award of that amount under s 123(1)(b) and s 128(2) of the Act. In reimbursement of remuneration lost as a result of his grievance for unjustified dismissal KME must pay Mr Fensom \$11,286, less any applicable tax, by no later than 31 January 2020.

### *Compensation*

[48] Mr Fensom sought an award of compensation for humiliation, loss of dignity and injury to feelings caused by his grievances of unjustified disadvantage and unjustified dismissal.

[49] Mr Fensom found it humiliating to be dismissed and summarily removed from the workplace in the manner he was on 30 October 2018. He was embarrassed having to tell friends and family about his circumstances and, as a result of a lack of income while he looked for work, having to borrow money from them.

[50] He said it was embarrassing that all the KME staff he had worked with knew by the end of that day he had been 'fired'. However, as disclosed in his oral evidence, the reason other workers knew was because he told them. He said that he had sent a text to "a few of the boys that I had been sacked because I did not do the scan". He accepted that KME had made no announcement about his dismissal.

[51] Mr Fensom also accepted that he had been prepared for others to know about the stance he had taken. While dignity may be harmed by unfair treatment, Mr Fensom's sense of self-respect and self-worth was maintained by what he did on what, for him, were important points of principle about KME's decision to use biometric data, without adequate consultation and, in his view, without adequate measures to guarantee its privacy and security from potential misuse.

[52] Accepting Mr Fensom's evidence about being humiliated and embarrassed as a consequence of how he was unfairly treated by KME, an appropriate award of compensation was \$12,000. KME must pay him that sum, without deduction, by no later than 31 January 2020.

#### *No reduction for contribution*

[53] When remedies are awarded, s 124 of the Act requires the Authority to consider whether the employee committed any blameworthy actions that contributed to the situation giving rise to the grievance. If such actions require, the remedies that would otherwise be awarded may be reduced.

[54] Given how KME had gone about introducing the new sign in and sign out technology, Mr Fensom's conduct was not blameworthy. As was clear from Mr Fensom's email to Mr Lane on 11 October, he had attempted to engage in a respectful way with his employer over the issues arising out of its actions. In that email he had also reasonably and presciently raised his fears, based on what his supervisor had told him, that he would be subject to arbitrary disciplinary action if he held to his views and did not comply with the system that was being imposed, as this determination has found, without the kind of consultation required of a fair and reasonable employer. No reduction of his remedies was required.

#### **Costs**

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[56] If they are not able to do so and an Authority determination on costs is needed Mr Fensom may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum KME would then have 14 days to lodge any reply

memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[57] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>10</sup> Absent such adjustments, the parties could expect a costs award of \$2,250 for this investigation meeting that was completed in a half-day.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>10</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].