

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 48
3028277

BETWEEN SCOTT CUNNINGHAM
Applicant

AND ANGUS FORSYTHE
Respondent

CLAUDIA FORSYTHE
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Gregory Bennett, Advocate for the Applicant
Paul Fisher, Counsel for the Respondent

Investigation Meeting: 13 September 2018 and 1 November 2018

Submissions Received: 30 January 2019 from the Applicant
29 January 2019 from the Respondent

Date of Determination: 1 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Angus and Claudia Forsyth run a dairy farm located in Putaruru. Scott Cunningham was employed by Mr and Mrs Forsyth as a 2IC from 12 June 2017 until 6 February 2018.

[2] Mr Cunningham alleges that he was unjustifiably dismissed and suffered unjustified disadvantages to his employment. He alleges these disadvantages arose from written warnings that were issued to him on 20 November 2017, 10 December 2017 and 7 January 2018. He claims compensation for hurt and humiliation.

[3] Mr and Mrs Forsyth deny they unjustifiably dismissed Mr Cunningham and deny that he suffered a disadvantage to his employment as a result of the written

warnings he received. They say the decisions they made were justified and that any defects in the process they followed were minor. Furthermore, they point to conduct on the part of Mr Cunningham that ought to reduce or remove in its entirety any remedy to Mr Cunningham.

[4] 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 but has not recorded all evidence and submissions received.

The Authority investigation

[5] On 7 December 2018 Mr Cunningham was sentenced in the District Court to 6 months home detention in relation to charges of cultivation of cannabis, the unlawful possession of a firearm, and the unlawful possession of a pistol.

[6] Prior to Mr Cunningham's sentencing, and the investigation meetings, he provided the Authority with a copy of Judge A J S Snell's Sentencing Indication Notes dated 14 February 2018. These notes were relevant to my investigation. However, by virtue of s 63 of the Criminal Procedure Act 2011, the notes could not be published or provided to Mr and Mrs Forsythe. This was because s 63 provides that it is an offence to knowingly publish any information about a sentence indication that has been given until the person for whom it relates has been sentenced or the charge has been dismissed.

[7] For this reason, and with the consent of both parties, it was agreed that the investigation meeting would go ahead but the filing of submissions would be delayed pending Mr and Mrs Forsyth's receipt of the Sentencing Indication Notes and the Sentencing Notes of 7 December 2018. This was to provide Mr and Mrs Forsythe with an opportunity to address any matters arising out of these notes.

[8] The Sentencing Notes were received by the Authority on 21 January 2019 and these notes, together with a copy of the Sentencing Indication Notes, were forwarded to the parties that same day. Submissions were received from Mr and Mrs Forsythe's representative on 29 January 2019 and from Mr Cunningham's representative on 30 January 2019.

The issues

[9] The issues requiring investigation and determination were:

- a) Did Mr Cunningham suffer an unjustified disadvantage to one or more of his conditions of employment?
- b) Was Mr Cunningham unjustifiably dismissed?
- c) If Mr Cunningham was unjustifiably disadvantaged, or unjustifiably dismissed, what remedies should be awarded?
- d) If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Cunningham that contributed to the situation giving rise to his grievance?
- e) Should either party contribute to the costs of representation of the other party?

Background against which issues are to be determined

[10] Mr Cunningham commenced employment with Mr and Mrs Forsythe on 12 June 2017. His terms of employment were contained in the standard Federated Farmers employment agreement (IEA).

[11] Shortly after Mr Cunningham commenced work with Mr and Mrs Forsythe, they began to experience difficulties with him being late. In addition, in late July 2017, there were two occasions where he was sent home because he was intoxicated. Then on 10 August, 21 August and 10 November 2017 he crashed and damaged various farm bikes. Mr Cunningham was spoken to on each of the foregoing occasions and verbal warnings were issued.

First written warning

[12] On 10 November 2017 Mr Cunningham arrived late to work. He was intoxicated and crashed the farm bike he was driving into a fence. Mrs Forsyth told him to go home and she would talk to him later about it.

[13] On 11 November 2017 the parties met to discuss Mr Cunningham's conduct. Mr Cunningham explained why he was late.

[14] On 20 November 2017, and after consideration of the response provided by Mr Cunningham, he was issued with a first written warning. This advised (verbatim):

This letter is a written warning for turning up for work an hour late and then was sent home for being intoxicated on the morning of 10 November after driving into a gate and damaging motorbike. We had a meeting on Sunday 11 November where you were advised that your behaviour has been unsatisfactory, and that immediate improvement is required and this will not happen again! This is your first warning letter. Your employment may be terminated if your conduct does not improve sufficiently.

This warning letter will be placed in your personal file. If you have any questions about this letter please contact me directly.

The police search and the second written warning

[15] On 22 November 2017 the New Zealand Police executed a search warrant of the property that Mr Cunningham resided in on the farm. I have viewed the summary of facts relating to charges laid against Mr Cunningham, the Sentencing indication of Judge A J S Snell, and the Sentencing notes dated 7 December 2018.

[16] These documents show that on 22 November 2017 the Police found cannabis drying in a bedroom cupboard in Mr Cunningham's dwelling. On his coffee table in the lounge there were numerous utensils for the consumption of cannabis, including pipes and bongs. Outside the home they located four well grown, well cared for and healthy cannabis plants. Also inside the house were power transformers, surge protections, cabling, ducting and a large heat lamp, all items commonly used for indoor cultivation of cannabis. In addition, the police located 2 guns. One was a .22 calibre rifle with a suppressor fitted and the other was a .22 calibre rifle that had been cut down to approximately 20 centimetres in length. In Mr Cunningham's lounge, near where his cannabis utensils were located, the police located a box of .22 calibre ammunition on the floor. Two more boxes of ammunition, with a total of 73 live rounds, were found and magazines for the cut down rifle were also located with the ammunition.

[17] Mr Forsythe became aware of the Police's search of the farm property when he saw Mr Cunningham being taken away in the Police vehicle.

[18] The next day he spoke with Mr Cunningham at the implement shed. Mr Cunningham told him that the police had found 4 cannabis plants at the back of the

garage and two guns. When pressed for more information he became silent and wouldn't answer Mr Forsyth's questions.

[19] On 6 December 2017 Mr and Mrs Forsyth wrote to Mr Cunningham. This letter advised that they wished to review and investigate three incidents that had occurred over the previous month. These were:

- 1) On the 10th November you arrived at work 1 hour late and crashed the work motorbike through a gate.
- 2) The Police undertook a raid on the 22nd November 2017 on our farm and searched your house at
- 3) There were some plants removed from the back of the garage at your house by the Police on the 22nd November 2017.

[20] The letter went on to state:

All three matters are serious and we wish to get to the bottom of what happened. We would like to interview you and get your side of the story.

The incidents may amount to serious misconduct under your employment agreement. Should a finding of serious misconducts for any of the 3 incidents occur then we will need to consider your position including the potential termination of your job.

You may wish to bring along a support person or seek independent advice.

We emphasise that we are gathering information at this stage. We will also need to talk to the Police about what occurred.

We would like to meet you at the cowshed on Thursday, 7 December at 12 noon to go over the incidents and obtain your side of the story.

We look forward to discussing the matter with you.

[21] Mr Cunningham did not attend the scheduled meeting. Several days later Mr Forsyth spoke with him at the Cowshed. He asked Mr Cunningham to sign a form that would enable him to confirm the details of the events surrounding the Police search of the farm house on 22 November 2017. Mr Cunningham refused to sign this. He told Mr Forsyth that the plants weren't his and he did not take drugs.

[22] After considering his response Mr and Mrs Forsythe decided to give Mr Cunningham a second chance and issued him with a second written warning. This was dated 10 December 2017. The letter advised (verbatim):

This letter is a written warning for the incident which the police undertook a raid on the 22 November 2017 on our farm and searched your house at

You attended a meeting with me on Thursday 7 Dec and also Monday 11 December which I had reached the preliminary view that it was appropriate to terminate your employment on notice on the basis of the illegal firearms found + also cannabis plants.

However, with further discussions with you I am willing to give you another chance however I am notifying you that there could be random drug tests done in the future. Please keep us informed about any future Court dates and any other relevant updates regarding time off needed for this.

This is your second warning letter. Your employment may be terminated if your behaviour does not imp sufficiently.

Third written warning

[23] After the second warning was issued Mr Cunningham's behaviour did not improve. He was caught sleeping on the job on 6 December, was late to work on 18 December, and crashed the farm bike again on 28 December 2017. On each of these occasions Mr Cunningham was spoken to.

[24] Then, during the first week of January 2018, Mr Cunningham was viewed not wearing his motorbike helmet when riding the farm four wheeler bike. He was asked each day to put his helmet on but the following day would not be wearing it again. By the fifth day, Mr Forsyth had had enough.

[25] On 7 January 2018 a third written warning was issued to Mr Cunningham. The letter advised (verbatim):

To advise Scott Cunningham that for the week of January 1st to 7th he wasn't wearing a motorbike helmet when riding the A.T.V. bike.

This is the third written warning you have gotten in less than three months. Due to the serious nature of the first two warnings we will try and let you keep your job until 31st May 2018 that depends on you.

Your job is terminated on 31st May 2018 for sure giving you four months to find another. If you can make your job last to 31st May, might be a bit easier to get next one.

The termination

[26] Mr Cunningham's behaviour did not improve. He was again caught sleeping on the job on 17 January 2018. He was then late to work on 18 January and again on

22 January 2018. On the later occasion he was so late that Mrs Forsyth had to step in and assist the other farm worker to complete milking.

[27] When Mr Cunningham finally arrived at the Farm on 22 January 2018 Mr Forsyth told him he had missed milking so might as well take the rest of the day off. Mr Cunningham did not respond and left.

[28] That same day Mr and Mrs Forsyth prepared a termination letter. This advised (verbatim):

This letter confirms that your employment be terminated in 2 weeks (Sun 4 February) due to:

- 1) On the 17/01/18 caught sleeping in the paddock during workhours, this was 2nd occurrence seen.
- 2) On the 18/1/2018 1 hour late for morning milking.
- 3) On the 22/1/2018 2 ½ hours late for morning milking.

The house inspection will be on Tuesday 6 Feb and anything that is not up to standard at house/garage/lawn inspection will be deducted from final pay. The cost of the firewood used is \$480 – and will also be deducted.

[29] Mr and Mrs Forsyth then took the letter to Mr Cunningham's house and outlined the contents to him. Mr Cunningham did not respond.

Issue One: Unjustified Disadvantage

[30] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated, if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[31] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[32] Mr Cunningham claims his employment was disadvantaged by the three written warnings that were issued to him by Mr and Mrs Forsyth. For reasons that

will become apparent, I am satisfied that these warnings did not create an unjustified disadvantage to Mr Cunningham's employment.

[33] A fair and reasonable employer could have concluded that a written warning was justified in the circumstances known at the time each of the warnings were issued. Any defects in the process followed were minor and did not result in Mr Cunningham being treated unfairly.

First warning

[34] In terms of the first warning, Mr and Mrs Forsyth met with Mr Cunningham on 11 November 2017, raised their concerns with him and obtained his response. 7 days later, after considering his response, they issued him with the warning. Their action was one that a fair and reasonable employer could have made.

[35] Mr Cunningham accepted during the investigation meeting that he was in the wrong by being late and that he wasn't upset when he received the letter. While he denied he crashed the motorbike into the gate, it was reasonable for Mr and Mrs Forsyth to conclude that he had done this based on the circumstances known at the time. These circumstances included that the damage done to the fence matched the damage to Mr Cunningham's farm bike.

Second warning

[36] The second warning was primarily issued due to the events that unfolded on 22 November 2017. At the time the warning was issued Mr and Mrs Forsyth were not aware of the full details of the Police search. However, they were aware that the farm house had been searched, that the police had located 4 cannabis plants at the back of the garage and 2 guns and that Mr Cunningham had been charged.

[37] With this information, they met with Mr Cunningham and provided him with an opportunity to respond. At this time he told them he did not take drugs and the cannabis plants belonged to someone else. They then considered his response and decided to issue him with a second warning rather than terminating his employment. In all respects their decision was one that a fair and reasonable employer could have made based on the circumstances known at the time.

Third warning

[38] This warning was issued to Mr Cunningham for not wearing a motorbike helmet when riding the farm bike during the week of 1 January to 7 January 2018. Mr Cunningham acknowledged that he was not wearing the helmet at the beginning of the week and was told to wear this. He denied not wearing the helmet for the remainder of the week.

[39] I prefer the evidence of Mr and Mrs Forsyth. They had a clear recollection of events whereas, throughout the investigation meeting, Mr Cunningham was unable to recall important events and, where he did, these were often contradicted by the documentary or other evidence. For example:

- a) Mr Cunningham denied crashing into the fence on 10 November 2017 yet his mother's evidence was that "he told me he slept in; he was running late and forgot to put his glasses on. He bumped into the gate with the wheels of the bike".
- b) Mr Cunningham said he never smoked cannabis at the farm property. This is contrary to the evidence the Police found during the raid on his property on 22 November 2017 and his acknowledgment to the police that he had smoked cannabis every day since he was 15.

[40] I am satisfied, on balance that Mr and Mrs Forsyth each spoke to Mr Cunningham during the first week of January 2018 about the need to wear a motorbike helmet and that he did not do this.

[41] The requirement to wear a helmet was a contractual requirement set out in Mr IEA. Clause 9.5 of the IEA provided that he must wear a safety helmet at all times while driving/riding quad bikes or motorbikes. Mr Cunningham acknowledged that this was explained to him at the commencement of his employment. Mr Cunningham's refusal to do this was unreasonable and put his safety at risk. A fair and reasonable employer could in the circumstances have issued him with a written warning relating to the wearing of a helmet.

[42] I acknowledge that the 7 January 2018 letter goes on to terminate Mr Cunningham's position as at 31 May 2018. As any disadvantage arising from this

overlaps with Mr Cunningham's claim for unjustified dismissal I will consider this part of the letter when I consider that issue.¹

Finding on Issue One

[43] I find Mr Cunningham did not suffer an unjustified disadvantage to one or more of the terms of his employment.

Issue Two: Unjustified Dismissal

[44] The onus falls upon Mr and Mrs Forsythe to prove that their actions in dismissing Mr Cunningham were justified.

[45] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether Mr and Mrs Forsythe's actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[46] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Mr and Mrs Forsythe sufficiently investigated the allegations, raised the concerns with Mr Cunningham, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[47] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Cunningham being treated unfairly.²

[48] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

[49] I am satisfied the test of justification was not met by Mr and Mrs Forsythe either when they terminated Mr Cunningham on 7 January or 22 January 2018.

¹ Pursuant to the powers of the Authority under section 160(3) of the Employment Relations Act 2000.

² Section 103A(5), Employment Relations Act 2000.

The 7 January 2018 letter

[50] This letter notified Mr Cunningham that his employment would come to an end on 31 May 2018. This was contrary to the IEA that provided that his employment was for an indefinite period.

[51] Mr and Mrs Forsythe did not meet any of the mandatory considerations set out in s 103A(3) before making their decision to dismiss.

[52] Mr Cunningham was not warned that Mr and Mrs Forsyth were considering ending his employment and the reasons for this. Nor was an opportunity afforded to Mr Cunningham to respond to the proposed dismissal before a decision was made. There does not appear to have been an investigation and he was not provided with access to any information Mr and Mrs Forsyth were relying upon when making their decision to end his employment. In effect the dismissal was immediate and abrupt. These defects were not minor and did result in Mr Cunningham being treated unfairly.

The 22 January 2018 letter

[53] For the same reasons, I am satisfied that the test of justification was not met when Mr and Mrs Forsythe terminated Mr Cunningham on 22 January 2018.

[54] By the time of this letter, Mr and Mrs Forsythe were familiar with the process to be followed when misconduct was alleged as they had received advice from Federated Farmers and had been advised to use the process set out in the IEA.

[55] Clause 23 of the IEA included, as a minimum, that they would:

- a) Take action as soon as practicable after the event(s);
- b) Provide Mr Cunningham with written detailed particulars of the concerns or allegations and the seriousness;
- c) Disclose all of the facts they were relying upon;
- d) Identify whether the matter was potentially general misconduct or serious misconduct and advise the potential outcome of the investigation;
- e) Arrange a formal meeting with Mr Cunningham allowing him at least 48 hours' notice;

- f) Advise him that he was entitled to bring a support person or representative with him to the meeting;
- g) Provide him with a proper opportunity to respond to the matters of concern and the allegations at that meeting;
- h) Consider his responses and determine whether the conduct amounts to general misconduct or serious misconduct.

[56] Mr and Mrs Forsythe did not follow the process set out in Clause 23 of the IEA nor that in s 103A and s 4 of the Act.

[57] Mr Cunningham said that a reason he was late on the occasions mentioned in the 22 January letter, and why he was sleeping in the paddock, was that he was tired from working excessive hours. No opportunity was afforded to Mr Cunningham to provide this explanation before the decision was made to dismiss him. Had he been afforded this opportunity the outcome may well have been different.

Finding on Issue Two

[58] Mr and Mrs Forsythe's decision to terminate Mr Cunningham's employment on both 7 January and 22 January 2018 did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances known at the time. The defects in the procedure they followed were not minor and did result in Mr Cunningham being treated unfairly.

[59] I find Mr Cunningham was unjustifiably dismissed from his employment.

Issue Three: Remedies

The Law

[60] In *Xtreme Dining Ltd t/a Think Steel v Dewar* a full bench of the Employment Court considered circumstances where the Authority or the Court might conclude that it should not award any remedies to an applicant notwithstanding a successful finding of a personal grievance.³ The Court said:

[216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct

³ [2016] NZEmpC 136.

which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with “equity and good conscience”. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[61] If there is misconduct by Mr Cunningham that is outrageous, particularly egregious or disgraceful, I should consider whether it is appropriate to award any remedies.

Analysis

[62] Mr Cunningham owed a duty to Mr and Mrs Forsythe to deal with them in good faith and not, whether directly or indirectly, do anything to mislead or deceive them. This duty required him to be active and constructive in establishing and maintaining a productive employment relationship in which the parties were, amongst other things, responsive and communicative.⁴

[63] Notwithstanding his duty of good faith, Mr Cunningham knowingly withheld information from Mr and Mrs Forsythe and misstated facts so as to obtain and to retain his role.

[64] Mr Cunningham accepted during the investigation meeting that he was aware of the terms of his IEA, and the Drug and Alcohol Policy, relating to the prohibition on drug and alcohol use. He was also aware that he was not permitted to smoke in the farm house or allow guests to smoke in the house, and that his job description contained the requirement that he be “drug free”. He agreed he was taken through these clauses before he signed the IEA and Mr and Mrs Forsythe explained the importance of the farm being drug free.

[65] Mr Cunningham further accepted:

- a) In response to questions from Mr and Mrs Forsythe during the initial interview he told them that he did not use drugs. He said he knew that if he was truthful he would not be offered the position.

⁴ Section 4(1A)(b) of the Act.

- b) In response to questions from Mr Forsythe after the Police raided the property on 22 November 2017, he again told him that he did not use drugs. He also told Mr Forsythe that the cannabis plants were found at the back of the property and did not belong to him. He said he knew that if he told them the truth this could have jeopardised his role.

[66] Mr Cunningham's statements were false. His evidence to the Police was that he has smoked cannabis every day since he was 15. He pleaded guilty to the charge of cultivating cannabis. In addition, cannabis was not just found outside the house but inside.

[67] In addition to the foregoing, Mr Cunningham did not disclose to Mr and Mrs Forsythe that the Police found the following during their raid on 22 November 2017:

- a) Cannabis drying in a bedroom cupboard.
- b) Numerous utensils for the consumption of cannabis, including pipes and bongs.
- c) Power transformers, surge protections, cabling, ducting and a large heat lamp, all items commonly used for indoor cultivation of cannabis.
- d) The type of guns found i.e. that one was a .22 calibre rifle with a suppressor fitted and the other was a .22 calibre rifle that had been cut down to approximately 20 centimetres in length.
- e) A box of .22 calibre ammunition on the floor. Two more boxes of ammunition, with a total of 73 live rounds, were found and magazines for the takedown rifle were also located with the ammunition.

[68] These matters were material and ought to have been disclosed to Mr and Mrs Forsyth. As the Sentencing Indication Notes record:⁵

- [6] ... In my view, the firearms matters are the most serious matters. I do not believe you for a second when you say you have never seen the firearms. It would be a grave coincidence indeed that you living alone in a rural isolated house just happened to have two firearms, one cut down to a pistol within easy access and stored with your plates and you do not know about them. I simply do not accept that.

⁵ *NZ Police v Scott Colin Cunningham*, Tokoroa District Court, CRI-2017-077-001060 , 14 February 2018 at [6].

That position is reinforced on the summary of facts by the fact that the ammunition for both firearms is found in the open, in your lounge, next to drug smoking and consumption equipment that was found. That is plainly you simply making a denial at the time. I do not accept that. There is no lawful use for a cut-down firearm. A pistol is a significant aggravating feature. The fact that both firearms are found in the presence of drugs at the level that there was here also is an aggravating feature.

[69] Mr Cunningham said he didn't tell Mr and Mrs Forsythe the truth, and did not provide consent to the Police releasing information to them, because he believed that if they knew the truth it could have jeopardised his employment.

Finding on Issue Three

[70] I am satisfied, on balance that Mr Cunningham directly or indirectly misled or deceived Mr and Mrs Forsythe in relation to his drug use and the events that took place when the Police raided his property on 22 November 2017.

[71] Mr Cunningham's deception led to him retaining his job, and being given a "second chance" in December 2017 that in all likelihood would not otherwise have occurred had Mr and Mrs Forsyth known the true facts. The evidence was that Mr and Mrs Forsyth changed their preliminary view to terminate Mr Cunningham in December 2017 based on the representations he made.

[72] Mr Cunningham's conduct was egregious and cannot be condoned. It would be unconscionable for the Authority to reward Mr Cunningham's appalling conduct by an award of damages. Whilst he was unjustifiably dismissed, no award of remedies is ordered.

Issue Four: Costs

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

[74] If they are not able to do so, and an Authority determination on costs is needed, Mr and Mrs Forsythe 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 Mr Cunningham will then have 14 days to lodge any reply memorandum.

[75] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[76] 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.⁶

Outcome

[77] The Authority makes the following orders:

- a) Mr Cunningham did not suffer an unjustified disadvantage to one or more of the terms of his employment.
- b) Mr Cunningham was unjustifiably dismissed from his employment by Mr and Mrs Forsythe. However, no award of compensation is payable to him.
- c) Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].