

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 255
3075573

BETWEEN CARL ELLISH
 Applicant

AND NETWORK SERVICE
 PROVIDERS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Simon Greening, counsel for the Applicant
 William Fussey, counsel for the Respondent

Investigation Meeting: 18 June 2020

Submissions and/or further 18 June 2020 from the Applicant and the Respondent
evidence

Determination: 26 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Carl Elish, claims that he was unjustifiably dismissed by the Respondent, Network Service Providers Limited (NSP).

[2] NSP denies that Mr Elish was unjustifiably dismissed and claims that his employment ended as a result of mutual consent.

[3] NSP claims repayment of an amount paid to Mr Elish in respect of holiday pay taken but not earned.

The Authority's investigation

[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. It has not recorded all evidence and submissions received.

Issues

[5] The issues requiring investigation are whether or not:

- Mr Elish was unjustifiably dismissed by NSP.
- Mr Elish owes NSP monies in respect of annual leave taken but not earned.

Background

[6] NSP provides IT solutions to businesses in the areas of security, networking, architecture and design. Mr Brent Larson, who formed NSP in 2002, is the Owner and Managing Director. NSP employs approximately twenty one employees including three Commercial Managers.

[7] Mr Elish commenced employment with NSP in November 2018 as a Commercial Manager. Mr Elish said he had extensive previous sales experience before he applied to NSP to which he had been attracted by the database and training he believed it offered.

[8] Mr Larson said that generating new business was a fundamental part of a Commercial Manager's role and during Mr Elish's interview he had asked Mr Elish if he had a network upon which he could call to introduce NSP products and services. This was important to NSP because it required its Commercial Managers to leverage existing and growing networks to make sales, and he had made it clear to Mr Elish that this would form a significant part of his role.

[9] Mr Elish said that when he commenced employment at NSP there had never been any indication that he would have to rely solely on his own networks, although he recognised that 'cold calling' was a fundamental part of a sales role, and he had been lead to believe that there would be some leads generated from vendors and referrals from existing customers.

[10] Mr Steve Hurst, Commercial Manager, commenced employment with NSP shortly before Mr Elish commenced employment. He said that during his interview he had been asked by Mr Larson what networks he could actively reach out to in order to generate sales.

[11] He had discussed with Mr Larsen the extent of his networks and said it had been made clear to him that his role would predominantly involve generating new business, whether through his existing networks or by establishing new relationships with businesses.

[12] During his first two weeks of employment Mr Hurst said Mr Elish had told him that he hoped Mr Larsen did not expect him to do 'cold calling' because: "that's not what I do". He had been surprised by this comment because his understanding, as communicated to him during his interview and reiterated during his induction, was that cold calling was a fundamental part of a Commercial Manager position.

[13] Mr Hurst said that the Commercial Manager role was a pressurised one, there was the pressure externally to make sales but the main pressure was that which he laid upon himself to achieve sales.

Lead Generation and sales processes

[14] Mr Larsen said he had provided Mr Elish with several lists of leads he could approach to help him achieve sales. In addition, Mr Elish was able to review and utilise unassigned leads within NSP's online Customer Relationship Management (CRM) system.

[15] Mr Hurst confirmed that NSP has lists and databases that can be used by the Commercial Managers but that it is mainly the Commercial Managers' relationships that enable sales to be achieved. Whilst customer referrals do occur on occasion, these are referrals from customers the Commercial Manager had introduced to NSP.

[16] Mr Elish said that the Commercial Managers had been informed shortly after he had joined NSP that a telesales lead generator person would be hired to help generate sales, but this had not materialised.

[17] Mr Hurst confirmed that Mr Larsen had discussed with them the prospect of a telesales lead generation person being hired. However, this was only ever presented to the Commercial Managers as a possibility and Mr Hurst said ultimately NSP decided against it.

[18] Mr Larsen said that NSP implemented a specific sales procedure process to verify and qualify leads that the sales team were targeting with the details included in the Microsoft Team Sales Report. He added that all leads, prospects and opportunities were entered into NSP's Customer Relationship Management (CRM) system. The report and CRM system were reviewed at the weekly sales team meetings and during separate individual sessions. The purpose of this was to understand the status of opportunities and the projected revenue of the following three months.

[19] Mr Elish said that NSP advocated a collegial approach to new sales but that in practice it was: "a free for all". There were no formally communicated opportunity management systems other than the weekly sales team meeting where it was decided who would move forward with an opportunity, which often led to internal poaching.

[20] Mr Hurst said that there had been a competitive spirit in the weekly sales team meetings including between him and Mr Elish. There would be an opportunity to discuss opportunities if they were focused on the same customer, but not poaching to the extent indicated by Mr Elish.

Image Centre Group

[21] Mr Elish said that on one occasion NSP management poached one of his biggest opportunities, Image Centre Group (ICG), and totally excluded him from this deal. Mr Elish said that during a weekly sales team meeting Mr Larsen had told him that ICG was being taken over and his cousin was involved. Mr Larsen had told him that he would: “get this deal over the line for me”.

[22] However, Mr Elish said he became aware that he had been totally excluded from a meeting in which he had seen the ICG client he had been dealing with at a meeting with NSP from which he had been excluded.

[23] When he had the ICG proposal ready, he had included it in his sales forecast where it remained for three weeks until Mr Larsen told him he would not be getting any recognition for it because he had not done any work in relation to it. He said he had become upset by this and Mr Larsen had reprimanded him.

[24] Mr Larsen said that there had been an opportunity that arose from ICG’s initial contact with NSP’s Procurement Manager which had occurred about two months prior to the commencement of Mr Elish’s employment. He said that although at one stage Mr Elish and a colleague attended a meeting with ICG, NSP were also invited to present a managed services solution to ICG in which Mr Elish had no involvement.

[25] Ultimately a successful outcome did not eventuate for NSP due to the relationship the managing director of ICG had with the IT incumbent. Mr Larsen denied that it had been a big opportunity for Mr Elish or that he had been deliberately excluded from the deal.

Team meetings and learning and development

[26] Mr Larsen said that NSP took a realistic approach to the expectation on Mr Elish to generate new business, affording him three months in which to build his pipeline of sales, with a view to him securing and closing sales from February or March 2019. However, he said Mr Elish failed to complete any sales for the period from November 2018 to June 2019 and he had no firm sales opportunities identified.

[27] Although other employees had also struggled to reach sales targets at times, Mr Larsen said it was highly unusual for an employee to make no sales at all in the first eight months of employment with NSP.

[28] In terms of assistance provided to Mr Elish by NSP, Mr Larsen said Mr Elish participated in the weekly sales team meetings with the other Commercial Managers in which he went through a variety of matters regarding their weekly performance with respect to activity associated with the number of calls made, leads converted, prospects generated, customers secured, meetings booked, meetings held and success ratios achieved.

[29] Secured sales for the month, future sales, the status of sales, and what barriers (if any) were preventing the Commercial Managers from securing the sale would also be discussed at the meetings. Mr Larsen said the metrics were all reflected in an Excel spreadsheet (a Microsoft Team sales report) which was presented and updated at these meetings.

[30] Mr Larsen said that during the weekly team meetings he would also often provide group coaching on topics such as cold call structures, products and elevated pitch, even occasionally bringing in outside expertise including on one occasion a sales specialist from Australia.

[31] Mr Larsen said he also held regular one-on-one sessions with the Commercial Managers.

[32] Mr Hurst confirmed that some form of coaching would be provided at the weekly team meetings and said that during his employment this had included coaching on particular products, cold calling techniques, elevated pitches and relationship building. He said that Mr Elish had been an active participant in the meetings.

[33] In addition he would have one-on-one meetings regularly with Mr Larsen in which they would discuss strategy and how they could work collaboratively. His understanding was that all the Commercial Managers had these one-on-one meetings with Mr Larsen.

[34] Mr Hurst said that he initially struggled to achieve a significant number of sales after he had commenced employment with NSP. However, Mr Larsen had told him that it would take time to get used to new products and technology, developing a pipeline of sales would not happen overnight, and that it would not always be possible to meet targets.

[35] Nevertheless, despite a slow start, he said he was ultimately able to achieve reasonable progress, recording \$150,444.00 in secured sales by 8 August 2019, as well as a pipeline of \$1.3m with a 50% probability of success.

Meeting 10 June 2019

[36] By the beginning of June Mr Elish had been employed for over six months but had not secured any sales during his period of employment which he attributed to his trying to secure larger sales opportunities. In addition he had few opportunities in his pipeline, and said he had been concerned at the situation.

[37] On 10 June 2019 Mr Larsen called him into a meeting. Before this meeting Mr Elish said that he had only had one previous one-on-one meeting with Mr Larsen.

[38] Mr Elish said he had been expecting some discussion about his lack of sales performance, but not before the eight month date of the commencement of his employment with NSP.

[39] At the time of the meeting he was due to commence a period of agreed annual leave. During the meeting he said that Mr Larsen had told him that it was like: “the end of the road” and that he did not need to return to work after his holiday.

[40] Mr Elish said he believed he was close to securing a deal and just needed more time, so he told Mr Larsen his decision was premature because he was leaving for a holiday and would not have time to achieve any sales before then.

[41] Mr Larsen had asked him what would change if he had more time and said that he had the other employees to consider. Mr Larsen had told him there was nothing he could do to salvage the situation and added that he could go through the normal procedures associated with employment termination, but the outcome would be the same.

[42] Mr Elish said up to this point there had been no indication of a performance management cause of action, although he had been anticipating this, or an indication that he could be dismissed.

[43] Mr Larsen said that on or about 10 June 2019 he had a ‘catch-up’ meeting with Mr Elish in which they had discussed his performance and lack of sales. Mr Larsen said this was not a formal meeting or a meeting designed to propose a performance management plan. Rather the meetings were regular ‘catch-up’ meetings which he held with all three Commercial Managers to discuss how they were finding the role and what further support NSP could provide for them.

[44] Accordingly, Mr Larsen had not considered it necessary to provide Mr Elish with information prior to the meeting or to give him the opportunity to bring a support person.

[45] Mr Larsen said that during this meeting Mr Elish said that he was finding his poor performance very stressful and this was affecting his health. This in turn led to a decision about how the role was not working out as either of them had expected. Mr Larsen said they had discussed the prospect of performance management but it was considered that this might be even more stressful for Mr Elish. Mr Larsen said they had both talked openly about the possibility of Mr Elish choosing to leave NSP.

[46] Mr Larsen said it had been agreed that they would both think about that prospect overnight and discuss it again the following day, 11 June 2019.

Meeting 11 June 2019

[47] Mr Elish said that the following day Mr Larsen had called him into another meeting and made him sign a letter dated 11 June 2019 which confirmed a termination date of 31 July 2019.

[48] Mr Larsen said that on the following day, 11 June 2019, it had been agreed that resignation was the appropriate course of action, and he and Mr Elish had then engaged in some negotiations about the terms of the resignation, including when would be an appropriate termination date for the employment to end.

[49] Mr Larsen said Mr Elish stated an interest in having an extended notice period which he requested for two reasons. Firstly, he wanted the notice period to encompass his pre-arranged annual leave from 17 June to 5 July 2019 and, secondly, he wanted time to get his affairs in order and to be able to seek new employment whilst still employed and working for NSP.

[50] Mr Larsen said NSP agreed to accommodate Mr Elish's request for an extended notice period and as such a termination of 31 July 2019 was agreed upon.

[51] Mr Elish said that he had felt under pressure to agree to Mr Larsen's proposal. He was not given any time to think things through or seek advice. He felt that his options were that he either agreed with Mr Larsen's proposal to end his employment or he would be dismissed for poor performance.

[52] Mr Larsen said he had drafted the letter dated 11 June 2019 setting out the resignation terms that had been agreed, and provided it to Mr Elish for his consideration. Mr Elish took the letter away with him to consider overnight.

[53] During the Investigation Meeting Mr Elish agreed when questioned that he might have taken the letter dated 11 June 2019 away with him to consider overnight.

[54] The letter dated 11 June 2019 stated:

Further to our meeting on 10th June 2019 and our subsequent meeting on the 11th June 2019 whereby we mutually agreed to terminate your employment with Network Service Providers Limited (NSP) on 31st July 2019.

NSP will continue to pay your weekly salary until the 31st July 2019 including your planned annual leave from the 17th June 2019 through to 5 July 2019 even though you have insufficient accumulated annual leave for this period. We agreed that we would review what was potentially owing to NSP from the advanced annual leave when your final pay was calculated on the 31st July 2019 to determine what you had accrued to offset the cost of the advanced leave difference. In addition NSP would take into consideration any potential gross profit generated from any sales achieved from the 11th June 2019 to the 31st July 2019 to offset the shortfall.

We also agreed that you would continue to perform your normal duties including generating and closing sales from the 11th June 2019 through to the 31st July 2019. It is expected that you would also attend all required client sales and company meetings as required by NSP.

[55] The following day, 12 June 2019, Mr Larsen said Mr Elish had approached him saying he was happy with the letter that had been put together and was keen for them both to sign it. As a result Mr Larsen said they both voluntarily signed the agreement.

[56] Mr Larsen said Mr Elish made no protest as to its contents, nor did he signal that he wanted more time to consider it or obtain further advice.

[57] The letter had been signed by Mr Larsen and by Mr Elish but the signatures were not dated.

Events 8 July 2019 onwards

[58] Mr Elish said when he returned to work from leave on 8 July 2019 he was looking for a sales presentation file which had been given by Mr Larsen at one of the previous sales meetings. Using his computer he had clicked on some computer files which he found to be locked and could not be opened.

[59] Mr Larsen explained that NSP receives daily automatically generated security reports from its Security Information Event Management (SIEM) system showing the documents that have been accessed by all NSP employees and which highlighted any unusual behaviour that might be of concern to the business.

[60] On 12 July 2019 Mr Larsen received an automatically generated SIEM report showing that Mr Elish had both accessed and attempted to access a significant number of documents which he could not see any legitimate business reason for him to do. The documents Mr Elish both accessed and attempted to access included directors' files, HR files, accounting files, admin files, board meeting minutes, contract master documents and numerous client files with which Mr Elish had no association. Some of these had been clearly restricted confidential files.

[61] Mr Elish said that Mr Larsen had called him into a meeting and asked him why he had been trying to access files to which he did not have access and also told him said he had observed him having coffee with a former NSP employee who was currently working for a competitor of NSP.

[62] Mr Larsen told him it was highly coincidental that he had been trying to access files to which he had no authority to access and meeting with the ex-employee. Mr Elish said he was very upset by the implication of dishonesty and asked Mr Larsen whether he was accusing him of trading company secrets, to which Mr Larsen had replied in the negative, but said that his behaviour was: "highly suspicious".

[63] Mr Larsen explained that after he had discovered the unauthorised attempt to access information, and examined the concerns which had been highlighted by NSP security analysts, he had approached Mr Elish to raise his concerns and to ask him what his purpose had been in attempting to access the documents. Initially Mr Elish denied that he had attempted to access these documents. However, after showing him the report, Mr Elish accepted he had clicked on these documents but he did not provide a reason why he had done so.

[64] Mr Larsen said Mr Elish had not provided the explanation that he was searching for a sales presentation at the time he spoke to him. Moreover, this would not explain why he had been opening documents such as director files and customer files.

[65] There was no further action taken in respect to this matter.

[66] On 24 July 2019 Mr Larsen sent an email to all employees advising them that Mr Elish had decided to explore other career options and would be leaving NSP on Wednesday 31 July 2019. The email stated:

This is to advise that Carl has decided to explore other career options and will be leaving us on Wednesday 31 July.

I would like to thank Carl for his contribution during the time he has been with us and wish him well for the future.

[67] Mr Elish said he had been upset by the wording of the email because he had no other career options at that time.

Final pay

[68] Mr Elish said that approximately a week before he completed his notice period Mr Larsen had called him into a meeting to discuss his final pay. During this meeting Mr Larsen had told him he owed the company money in respect of holidays taken in advance but not earned and this would be deducted from his final pay.

[69] Mr Elish said he was highly distressed by this information and immediately after the discussion with Mr Larsen he had called a lawyer who advised him not to return to work and to obtain a medical certificate. Mr Elish said he did not return to work because it was too stressful and provided a medical certificate to say he was unwell.

[70] Mr Larsen said on 25 July 2019 he met with Mr Elish to advise him that as a result of the annual leave taken, in advance which it had been agreed that he could take, he owed the company the sum of \$2,119.65.

[71] It had been clearly stated in the 11 June 2019 letter which Mr Elish had signed that Mr Elish had not accrued sufficient annual leave to cover his approved annual leave in advance and that the amount he owed NSP would be reviewed when the final pay was calculated in respect of any shortfall, after taking into consideration any gross profit he may have generated from any sales achieved. By the final date of his employment, however, Mr Elish had not generated any sales to offset the amount he owed NSP.

[72] As a result, he had explained to Mr Elish during the meeting on 25 July 2019 that the \$2,119.65 was outstanding and that one way of resolving this would be to deduct the money owed from his regular wages or final pay.

[73] Mr Larsen said Mr Elish had reacted badly to the conversation and said that he did not agree he owed the company any money. He then added that he intended to seek legal advice and that he would come back later to discuss the matter.

[74] Mr Larsen said his expectation had been that Mr Elish would continue working and come back to him on the matter, however he did not hear from him. In fact he discovered that Mr Elish had left the office shortly after the meeting and he did not return to work before the termination date of his employment on 31 July 2019.

[75] Mr Elish subsequently provided a medical certificate for his absence for the period 25 to 31 July 2019.

[76] On the basis that Mr Elish had not provided him with agreement to deducting holiday taken but not earned from his final pay, Mr Larsen said that he ensured NSP paid Mr Elish his final pay without the deduction.

Was Mr Elish unjustifiably dismissed by NSP or did his employment end by way of mutual consent?

[77] Mr Elish's evidence is that Mr Larsen gave him no alternative but to sign the letter dated 11 June 2019. Mr Larsen's evidence is that the decision to terminate the employment was the result of mutual agreement.

[78] Mr Elish was an experienced sales person whose evidence was that prior to joining NSP he had been successful in achieving sales. By the time of the meeting on 10 June 2019 Mr Elish confirmed that he had achieved no actual sales and there were no definite prospects of future sales in his pipeline. Mr Hurst, who was also employed as a Commercial Manager, gave evidence that, as a sales person, he felt a need to achieve sales.

[79] Both Mr Elish and Mr Larsen confirmed that by 10 June 2019 Mr Elish had been suffering from stress as a result of his lack of success in achieving sales.

[80] Mr Elish claims that his resignation was the result of Mr Larsen providing him with no alternative but to sign the letter of resignation written by Mr Larsen and dated 11 June 2019 i.e. he was dismissed by NSP.

[81] Dismissal has been held to be the unilateral act of the employer which terminates the employment agreement.¹ Providing an employee with no alternative but to resign would be held to be dismissal.

[82] NSP's evidence is that the termination of employment came about by way of mutual consent i.e. that that discussion of Mr Elish's performance resulted in both parties reaching an understanding that Mr Elish's employment would end on mutually negotiated and agreed terms.

[83] In considering whether or not the agreement that Mr Elish's employment should end by mutual agreement as a result of good faith discussion and negotiation, or whether NSP overrode Mr Elish's free will such that he felt compelled to sign the letter dated 11 June 2019, I note the following as significant:

¹ *EN Ramsbottom Ltd v Chambers* [2007] NZCA 183 at [19] – [20]; *porirua Whanau Centre Trust v Ngawarau* [2015] NZCA 585 at [7] – [8].

- a) Mr Elish was suffering significant stress by 10 June 2019 caused primarily by his lack of sales achievement. This was some six months after he had commenced working at NSP and some three months after sales could be expected to be materialising, at least in the pipeline. He agreed that he had openly discussed his stress with Mr Larsen;
- b) Mr Elish had the opportunity to consider his options, including the taking of legal advice, overnight on 10 June 2019;
- c) Mr Larsen's evidence was that the letter dated 11 June 2019 had been given to Mr Elish on 11 June 2019 for him to consider overnight and was not signed until the following day, 12 June 2019. During the Investigation Meeting Mr Elish confirmed that this might be correct. This would have provided Mr Elish with further opportunity to consider his options and/or to seek legal advice;
- d) When Mr Larsen spoke to Mr Elish on 27 July 2019 about the final pay, Mr Elish sought and obtained legal advice by telephone immediately following the meeting which implies that there was no lack of knowledge on his part about how he could obtain such advice in a timely manner;
- e) The letter dated 11 June 2019 sets out the terms which include a termination date beyond the contractual notice period and the agreement of NSP to continue paying Mr Elish's weekly salary until that date. Mr Elish was also able to take paid annual leave in advance, and remain in employment after his return from holiday whilst looking for alternative employment. These were benefits only to Mr Elish;
- f) There was a significant amount of time following Mr Elish's return from leave in early July until the termination date of 31 July 2019 for him to raise an objection to the letter dated 11 June 2019 and the prospective termination of his employment, however he did not do so. In fact Mr Elish did not raise a personal grievance with NSP until 30 July 2019.

[84] Moreover I find that there were no signs that NSP acted in a way indicating disapproval to Mr Elish during the period from 5 July to 31 July 2019. Whilst there had been a discussion about Mr Elish apparently accessing confidential computer files on 12 July 2019, there was no action taken by NSP in respect of this and Mr Elish's employment continued as normal after this date.

[85] The email sent by Mr Larsen to the employees on 24 July 2019 sets out the fact of Mr Elish's impending departure and I do not find the wording to be inaccurate given that Mr Elish

wanted to extend his leaving date in order that he could seek alternative employment whilst still in employment with NSP. Nor do I find the letter to be demeaning or derogatory towards Mr Elish.

[86] In all the circumstances I determine that Mr Elish's employment with NSP ended by way of mutual consent.

Is NSP entitled to payment from Mr Elish in respect of annual leave taken but not earned?

[87] Mr Elish had applied to take annual leave from the period 17 June until 5 July 2019, a total of fifteen working days.

[88] At the time of taking the agreed annual leave Mr Elish had not earned the amount of annual leave taken in advance.

[89] When Mr Larsen raised the subject of the leave deduction from his final pay on 25 July 2019, Mr Elish disputed the leave amount as being owed by him.

[90] NSP paid the final monies owed to Mr Elish without deduction in respect of annual leave taken but not earned because Mr Larsen said he had not received agreement from Mr Elish to the deduction.

[91] In the clause headed 'Annual Holidays' in the Employment Agreement, leave taken in advance would be deducted from the employee's entitlement or from any final payment on termination of employment as stated:

Leave in advance shall be at the discretion of the employer and deducted later from the employee's entitlement or, where applicable, from any final payment on termination of employment.

[92] I find that Mr Elish had agreed to this term and condition of employment when he signed the Employment Agreement on 15 October 2018 below the statement: "The employee accepts and agrees to comply with and abide by the terms and conditions of employment contained in this Agreement".

[93] Moreover Mr Elish signed the letter dated 11 June 2019 in which he agreed that the amount owing to NSP in respect of the advanced annual leave would be reviewed when his final pay was calculated on 31 July 2019.

[94] I determine that Mr Elish owed NSP monies in respect of annual leave taken in advance but not earned at the date his employment with NSP terminated.

[95] NSP seeks repayment of the amount of \$2,119.65 paid to Mr Elish in respect of annual leave taken but not earned at the date of termination of employment.

[96] Section 6 of the Wages Protection Act 1093 (WPA) governs the circumstances in which an overpayment of wages may be recovered by an employer. The circumstances relate only to recovery of overpaid wages in respect of what the WPA defines as a recoverable period. In this case I find that none of the elements of the recoverable period apply to apply in this case, and that the circumstances fall outside of s 6 of the WPA.

[97] In *New Zealand Fire Service Commissions v Warner* Chief Judge Colgan stated:

The Employment Relations Authority is the appropriate institution at first instance (and is empowered accordingly) in which to determine whether employees are required to repay to their employers monies overpaid mistakenly in the course of their employment relationship. If liability is established, the usual remedies for such causes of action are available in the Authority.

[98] In this case the monies paid to Mr Elish by NSP in respect of holiday taken but not earned appear to have arisen because Mr Larsen considered that Mr Elish had not provided written agreement to deduct the payment, from his final pay.

[99] However I find that Mr Elish had provided written agreement to the overpayment in respect of annual leave taken but not earned being deducted from his final monies by signing the Employment Agreement.

[100] On that basis I find that NSP made the overpayment as the result of a mistake which is one of the qualifying factors activating a claim of unjust enrichment and as such gives rise to the right of restitution.

[101] Accordingly I order that Mr Elish is to repay to NSP the sum of \$2,119.65 in respect of holidays he had taken but not earned at the date of the termination of his employment with NSP.

Costs

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

[103] If they are not able to do so and an Authority determination on costs is needed the Respondent 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 the Applicant 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.

[104] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[105] 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.²

Eleanor Robinson
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].