IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 212
3082072

	BETWEEN	CONCRETEC NEW ZEALAND LIMITED Applicant
	AND	MAKALOFI MAVAE First Respondent
	AND	PRECAST HQ LIMITED Second Respondent

Member of Authority:	Claire English
Representatives:	Phil Ahern, counsel for the Applicant Gary Pollak, counsel for the First Respondent Ray Parmenter, counsel for the Second Respondent
Investigation Meeting:	23 February 2022 at Auckland
Submissions received:	7 March and 25 March 2022 from Applicant 8 March from First Respondent 16 March 2022 from Second Respondent
Determination:	24 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The first respondent, Mr Makalofi Mavae, was employed by the applicant, Concretec New Zealand Limited (Concretec), as a draughtsman on a full-time permanent basis. In July 2019, Concretec became aware that Mr Mavae was also performing work for a direct competitor, the second respondent, Precast HQ Limited (Precast).

[2] Concretec investigated and dismissed Mr Mavae for breach of his employment obligations. Concretec now brings a claim against Mr Mavae, for penalties for breaching the terms of Mr Mavae's employment agreement, and against Precast, for inciting, aiding, or abetting, such a breach.

[3] Mr Mavae does not deny performing work for Precast, but says that it was done mainly in his own time, and for money. Precast says that it had no direct knowledge of Mr Mavae's contractual arrangements with Concretec New Zealand Limited as it never asked Mr Mavae about his arrangements with Concretec, and this is entirely a matter as between Mr Mavae and Concretec.

[4] Both Mr Mavae and Precast say that no penalties should be awarded against them.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Mr James Rooney, the General Manager of Concretec, Mr Mavae himself, and Mr Guy Quaife, Project Director for Precast. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[6] 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.

The issues

[7] The issues requiring investigation and determination were:

(a) Did Mr Mavae breach his employment agreement with Concretec?
(b) If so, do such breaches warrant a penalty being awarded against Mr Mavae, and quantum of any such penalty?
(c) Did Precast incite, aid, or abet any breaches of the employment agreement between Mr Mavae and Concretec?
(d) If so, does such action warrant a penalty being awarded against Precast?

Background

[8] Mr Mavae was a long term full-time salaried employee of Concretec. He had been employed by Concretec since 2008. His most recent employment agreement was dated October 2014.

[9] The evidence was that he was valued by Concretec, who provided him with benefits in addition to his annual salary, including a vehicle, a phone, and a generous monthly fuel allowance. In addition, Mr Mavae would habitually work overtime, for which he was paid by the hour in addition to his salary payments. Mr Mavae gave evidence that he worked and was paid overtime most weekends. Concretec agreed that it was happy to pay extra for his time, as his work was valued.

[10] Mr Mavae's employment agreement included a specific term at clause 15 relating to "other work", which provided:

> The employee shall not, during the term of employment, establish him/herself or engage in private business or undertake other employment in competition with the employer or which in any way conflicts with the employer's business without the express written consent of the employer.

[11] In around January 2020, Mr Mavae was approached by Precast. He met with Mr Guy Quaife and another employee of Precast, who knew Mr Mavae as they had both previously worked together at Concretec.

[12] Mr Quaife and Mr Mavae discussed the possibility of Mr Mavae coming to work for Precast. Mr Mavae said that he was not yet ready to leave Concretec. Mr Quaife explained that he wanted Mr Mavae to work for Precast. He went further and said that he knew of Mr Mavae because Mr Mavae was well known in the industry, and:

> We were keen to have Mak on board, but Mak wasn't ready to move on from Concretec yet, no trial was needed, Mak had nothing to prove to us.

[13] At the investigation meeting there was some discussion about this, as Mr Quaife rejected the idea that he had approached Mr Mavae or arranged the work Mr Mavae subsequently performed for Precast. It became clear that it was the other employee of Precast, who had previously worked with Mr Mavae, who had arranged the initial meeting between Mr Mavae and Mr Quaife. Mr Quaife attempted to down-play this.

He suggested that Precast had not approached Mr Mavae, on the grounds that he personally had not approached Mr Mavae, but had simply attended the meeting with Mr Mavae set up for this purpose by another employee of Precast.

[14] In relation to this meeting, Mr Quaife explained that:

> Mak had taken Steelecrete to a big firm, set up their whole drafting team. [I] wanted him to do that for us, I spoke with him about how he would set up a team, picked his brains, [Precast] wanted that.

[15] As a result of this meeting, Mr Mavae in the end agreed to perform drafting work for Precast.

[16] Specifically, Mr Mavae agreed to perform drafting work that Precast sent to him. He would be paid at the rate of $50 per "sheet" drafted, and would invoice Precast for the work that he performed as it was completed.

[17] The records show that Mr Mavae invoiced Precast as follows:

a. 30 January 2019 - $1,200
b. 26 February 2019 - $1,440
c. 21 May 2019 - $2,520
d. 26 June 2019 - $3,400

[18] Mr Mavae freely admits that he performed work for Precast from January 2019 onwards, without disclosing this to Concretec, or seeking Concretec's permission as required by clause 15 of his employment agreement.

[19] He says that he performed work for Precast "mostly in the evenings and at weekends". This is despite also giving evidence that he was also often busy with paid overtime for Concretec, as well as duties for his church, and driving his wife and children to activities. Mr Mavae then said that he really only did emails and phone calls with and to Precast during his working day with Concretec, for only about 30 minutes or an hour a day. He clarified that he mostly did the drafting for Precast at home in the evenings and weekends.

[20] In addition, Mr Mavae admits that he was using his Concretec email address, Concretec mobile phone, and Concretec computer and CAD licences to perform work for Precast. During the course of the investigation meeting, it became clear that Mr

Mavae had been doing printing of Precast work while he was at the Concretec offices, as he had left Precast documents behind which had been discovered on Concretec files that he had previously been responsible for.

[21] Throughout, Mr Mavae emphasised that he did not do "much" work for Precast during his usual working day with Concretec. He also emphasised that he had taken on additional work for Precast because he wanted to earn more money to support his children and his wife who did not work for remuneration.

[22] Despite maintaining that he did not do "much" work for Precast, in response to evidence about the number of "sheets" he had drafted for Precast, Mr Mavae refused to answer questions about how long it took him to perform the work, saying that he would not do this because then I would "convert this into hours worked", and it would not be fair. However, he did give various inconsistent suggestions as to how long it might take him to complete a sheet, ranging from 2 to 4 hours per sheet, with some exceptions if no or few changes needed to be made to a certain sheet.

[23] Matters came to a head in July, when Concretec received client complaints about Mr Mavae's timeliness and lack of responsiveness, and in addition, another employee noticed that Mr Mavae was communicating with Precast without a good business reason to do so. I note that these client complaints occurred as the number of sheets Mr Mavae was invoicing Precast for (and therefore the volume of work Mr Mavae was performing for Precast) had substantially increased.

[24] A check of Mr Mavae's Concretec email address showed that he had been in regular communication with Precast, often exchanging multiple emails with Precast about Precast work in the course of a single working day.

[25] When asked, Mr Mavae admitted to performing work for Precast without Concretec's knowledge or authorisation, to having done work for Precast in Concretec time, and using Concretec tools, as set out above.

[26] Concretec also formed the view that Mr Mavae had taken some of its intellectual property, namely a quotation document with drafting notes, and was using this in his work for Precast, thus effectively having given Precast Concretec's intellectual property. I note this allegation was denied by Precast, on the grounds that it had its own

quotation documents which it used. For the sake of completeness, I do not find that this allegation is made out on the evidence before me.

[27] On 26 July 2019, Mr Mavae was dismissed, on the grounds that his admitted conduct was in serious breach of his obligations of good faith and fidelity, and also in breach of the express provision in his employment agreement which precluded him from carrying out secondary work without Concretec's approval. The letter conveying the termination of employment also advised:

> We will likely be applying to the Employment Relations Authority to impose penalties against him in relation to those breaches.

[28] Ten calendar days after Mr Mavae was dismissed from Concretec, he commenced full time employment with Precast.

[29] Concretec now claims penalties against Mr Mavae for breaching his employment agreement, and also claims against Precast for inciting, aiding, and abetting breaches of Mr Mavae's employment agreement.

Findings

[30] Section 134 of the Act states:

> **134 Penalties for breach of employment agreement**
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> (1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.
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> (2) Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[31] Accordingly, I must first determine whether Mr Mavae breached his employment agreement.

[32] If I find that he did so, I must then determine whether the nature and extent of that breach was such that a penalty should be awarded against him, and the amount of that penalty.

[33] In addition, if I find that Mr Mavae breached his employment agreement, I must determine if Precast incited, aided, or abetted, Mr Mavae's breach of his employment agreement.

[34] If I find that it did so, I must then determine whether the nature and extent of that breach was such that a penalty should be awarded against it, and the amount of that penalty.

[35] I note at this point that at the investigation meeting, it was suggested by Mr Mavae's representative that there was no jurisdiction for the Authority to investigate this matter, on the grounds that the Statement of Problem did not refer explicitly to clause 15 of Mr Mavae's employment agreement. This argument was not well-developed, and when read against the statement of problem and statements of reply as a whole, can have no force. There was no dispute between the parties that the potential breach in question was of clause 15 of Mr Mavae's employment agreement, as not only was it the only clause in the employment agreement of relevance, correspondence between the parties made it clear that a breach of clause 15 of Mr Mavae's employment agreement was the basis on which Mr Mavae had been dismissed, and was the genesis of these proceedings. Both respondents were fairly on notice of the basis of the applicant's claim against them, and had in fact already filed witness statements directed at this question. The Authority is to resolve employment relationship problems without regard to technicalities[1]. The claim falls within the Authority's exclusive jurisdiction to make determinations about employment relationship problems generally, including matters related to a breach of an employment agreement, as set out in section 161(1)(b) of the Act.

[36] In written submissions filed following the investigation meeting, this point was not raised, and instead it was argued on behalf of Mr Mavae that because Concretec had not specified a precise monetary amount of penalties it was seeking in its Statement of Problem, none should be awarded. This is not a correct statement of the law relating to penalties, which are confined to maximum amounts set out in section 135 of the Act.

[1] Section 157(1) of the Employment Relations Act 2000.

Did Mr Mavae Breach his Employment Agreement ?

[37] I find that Mr Mavae was in breach of clause 15 of his employment agreement. The requirements of that clause are clear – Mr Mavae is not to establish himself in private business, in competition with Concretec or which in any way conflicts with Concretec's business, with Concretec's express written consent. These requirements are reasonable, and enforceable. They identify an interest which Concretec has a legitimate interest in protecting, the restrictions protecting that interest are appropriately limited, and are consistent with Mr Mavae's full time permanent position, and with Mr Mavae's underlying employment obligations towards Concretec of fidelity and loyalty[2].

[38] Mr Mavae admits, and the evidence shows, that he did establish himself in private business, in that he set himself up as an independent contractor and routinely and repeatedly carried out paid work for Precast, for which he invoiced and was paid, for a period of some 6 months before this was discovered.

[39] The work that Mr Mavae performed was in competition with Concretec, in that Mr Mavae was providing his time and expertise as a draughtsman, to a firm who was Precast's direct competitor in the same market. In addition, it is clear from the evidence that the work Mr Mavae performed did conflict with Concretec's business generally, in that Mr Mavae was less available to perform work for Concretec during the working day, was using Concretec tools and supplies to perform work for its competitor both during and after the working day, and this work was impacting on his ability to perform his work for Concretec.

[40] Concretec did not give express written consent, or any form of consent, as Mr Mavae did not ask permission to undertake other work, let alone other work for Precast.

[41] Mr Mavae's conduct is a serious breach warranting a penalty.

[42] Having found that Mr Mavae was in breach of clause 15 of his employment agreement, he is liable to a penalty under section 134(1) of the Act.

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[2] See the recognition of the fundamental common-law duties of fidelity and loyalty including in section 4 of the Act, and which includes the duty not to undermine the employer's business, and imposes the obligation to at at all times in the interests of the employer, re *PCA of New Zealand Ltd v Evans* (1987) 1 NZELC 95,412 (HC).

[43] Section 135 of the Act deals with the recovery of penalties[3]. Subsection (2) provides that:

> Every person who is liable to a penalty under this Act is liable,—
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> (a) in the case of an individual, to a penalty not exceeding $10,000:
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> (b) in the case of a company or other corporation, to a penalty not exceeding $20,000.

[44] Accordingly, Mr Mavae is liable for a penalty not exceeding $10,000 for each breach of his employment agreement.

[45] I need to note issues raised by both Concretec and Mr Mavae at this point. Mr Mavae says that he should not be liable for penalties at all, on the grounds that he was dismissed for (among other reasons) his breach of clause 15 of his employment agreement. In other words, he has already paid the price for his actions in performing other work for Precast, and he should not be punished twice for the same offence. He further says that no penalty is warranted (and if one is warranted, this should be in the range of $300 to $500) on the grounds that he performed very little work for Precast, and did it mostly in his own time, thus the impact on Concretec was limited.

[46] Concretec says that Mr Mavae should be liable for a penalty as the breaches committed by Mr Mavae were "extensive and deliberate" and occurred "over a significant timeframe". In addition, Concretec suffered financial loss including the costs of fuel, phone bills, and the real possibility that Mr Mavae was in fact working for Precast when claiming paid overtime or paid sick leave from Concretec (Mr Mavae has been unclear in his responses to this proposition).

[47] Section 134 of the Act provides that Mr Mavae is potentially liable to penalties for breaching his employment agreement. I do not agree that his dismissal is automatically the end of the matter. The corollary of this would mean that an employer could not seek penalties against an employee who was in breach, unless they retained that employee in employment. This would then lead to the incongruous situation where the only actions that could render an employee liable for a penalty would also be actions

[3] Section 135(1) provides that where an employment agreement has been breached, any party to that employment agreement who is affected by the breach can bring an action for the recovery of a penalty.

which were of such light weight that the employer was amenable to continuing the employment relationship, which is inconsistent with the underlying aims and objects of the penalty regime itself.[4]Whether an employer is entitled to dismiss for a breach, (which is not in question here) and whether a breach should properly give rise to penalties are two separate matters.

[48] The requirement of clause 15 of Mr Mavae's employment agreement is a fundamental one – that, during his employment, his employer should be able to rely on him to use his skills, time, knowledge and expertise for the benefit of the employer rather than for the benefit of himself or others in competition with the employer. The requirement is not absolute, but leaves open the prospect that Concretec might consent to Mr Mavae performing other work, as long as this is with Concretec's express written consent. It is appropriate that Mr Mavae should face the prospect of penalties for breaching such fundamental obligations. The Authority has held that where breaches are not technical or made inadvertently, a penalty is required[5].

[49] There was a breach by Mr Mavae of a single clause of the employment agreement, and his actions over time amount to a single course of conduct. Thus, Mr Mavae is liable for a single penalty of up to $10,000. Concretec submits that due to the various aggravating factors of Mr Mavae's conduct, the full amount of $10,000 should be awarded against him.

[50] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited,*[6] *A Labour Inspector v Prabh*[7] and *A Labour Inspector v Daleson Investment*.[8] Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[51] The considerations in regard to penalties[9] are as follows:

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[4] Similarly, the minimum standards regime, where penalties are also available, could be undermined by delayed payments.
[5] *Nova Energy Ltd v Mitchell (No 6),* [2015] NZERA Auckland 337, at [70].
[6] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.
[7] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.
[8] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.
[9] *Nicholson v Ford,* [2018] NZEmpC 132.

a. The object of the Act – this is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour". Mr Mavae's conduct falls well short of meeting his obligations of mutual trust and confidence. His actions have not worked to build a productive employment relationship, but to undermine the relationship;

b. The nature and extent of the breach – the nature of the breach strikes at the heart of the employment relationship itself. The extent of the breach is significant, with deliberate and repeated conduct extending over a period of months, with every indication that it would have continued had Concretec not taken steps to investigate.

c. Whether the breach was intentional, inadvertent, or negligent – the breach was at best negligent, in that Mr Mavae gave evidence that he had simply never turned his mind to the operation of clause 15 of his employment agreement, however, he also gave repeated and consistent evidence that his overriding motivation was to gain additional money, and he acted without having any regard for his obligations to Concretec.

d. The nature and extent of any loss or damage – the applicant has suffered real financial loss, and has suffered this loss in circumstances where its direct competitor has been the benefactor;

e. Compensation or other steps in mitigation – Mr Mavae has not taken responsibility for his actions, and throughout the investigation meeting, consistently downplayed the true extent of his work for Precast, and emphasised his monetary motivation;

f. The circumstances of the breach – Mr Mavae was a long-serving and trusted employee;

g. Any similar conduct – there is no issue of past similar conduct;

h. Deterrence – there is a need for deterrence on both a general and a specific basis, as all parties to an agreement are entitled to be able to rely on its provisions and them being upheld;

i. Degree of culpability – it is relevant that Mr Mavae appears to have acted in a way that was more opportunistic than calculated;

j. Consistency – it is a well accepted principle that employees may be liable for their breaches;

k. Ability to pay – Mr Mavae continues to be in full employment with Precast;

l. Proportionality – although the total amounts involved may appear relatively small on some measures, by comparison, they suggest that Mr Mavae was spending a not-insignificant proportion of his time and energy on his other work, when the number of "sheets" each invoice represented, as well as the comparison to Mr Mavae's Concretec salary is taken into account.

[52] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question[10], or failed to take reasonable steps to fulfil their legal obligations.[11] Here the evidence leads to a conclusion Mr Mavae acted with intention. If his concern was as he said it was, about a desire to earn more, he could have asked Concretec for a pay increase, or to pay more frequently than monthly. He accepted he did neither, and could not explain why. In addition, he was also claiming paid overtime from Concretec on a weekly (or almost weekly) basis. Given that he admitted to working for Precast for between 30 minutes and an hour every day during normal working hours, it is hard to escape the conclusion that at least some of the overtime Mr Mavae charged to Concretec was in fact covering time spent doing Precast's work.

[10] *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383
[11] *El-Agez v Comprede Limited,* TT 4121553, at para 18

[53] Having weighed these factors, I conclude Mr Mavae should be required to pay a penalty of $10,000. The final issue is then to whom the penalty should be paid, in accordance with section 136 of the Act, which provides that:

> The Authority or the court may order that the whole or any part of any penalty recovered must be paid to any person.

[54] Here I refer back to the additional costs incurred by Concretec by Mr Mavae's performance of Precast work. It should therefore share in the penalty and I consider half to be appropriate.

Did Precast incite, aid, or abet, Mr Mavae's breach?

[55] Having found that Mr Mavae was in breach of his employment agreement, I must now consider the actions of Precast.

[56] Mr Mavae was approached by Precast to work for them. Mr Mavae declined to accept, on the grounds he was "not ready to leave" Concretec. Precast then offered Mr Mavae work on an independent contractor basis, paying him by "the sheet", which is a form of piecework.

[57] Mr Quaife for Precast emphasised that he did not approach Mr Mavae. I have already found this response avoided the point, as the initial meeting between Mr Quaife and Mr Mavae was set up (and attended and it appears facilitated by) another employee of Precast, who was a member of Precast's senior management team, and who knew Mr Mavae from working with him at Concretec. If Mr Quaife did not personally know of Mr Mavae's employment status, this other person did. This knowledge is imputed to Precast.

[58] Precast, through Mr Quaife and a second employee, approached Mr Mavae, and when Mr Mavae did not agree to immediately become an employee of Precast because he was not willing to give up his existing relationship with Concretec, offered an alternative solution.

[59] Section 134(2) requires that, once a breach of an employment agreement has been found, then any person who has "incited", "aided", or "abetted"[12], that breach is liable for a penalty. Inciting means urging or encouraging another to act. Aiding is to

[12] Noting that Concretec has not claimed that Precast "instigated" the breach.

help or give material support to, although the aid provided need not be critical. Abetting is typically associated with encouragement, and implies support for a course of action[13].

[60] When weighed against these definitions, it is clear that Precast did incite, aid, and abet Mr Mavae's breach of his employment agreement. Precast sought out Mr Mavae, and in the face of his initial refusal to leave Concretec, put a different offer of "piecework" to him, allowing him to perform work in a more flexible manner that would ensure he could work for Precast until he was "ready to leave" Concretec. This involves the necessary elements of urging, encouraging, and offering material support, whereby Precast provided a solution to ensure that Mr Mavae could perform work for Precast regardless of, and without having to sever, his existing relationship with Concretec.

[61] Despite the above, it was submitted for Precast that in order for Precast to be properly liable for a penalty, it must also know not only that Mr Mavae was employed by Concretec (which I have found it did), but also that hiring Mr Mavae as an independent contractor would put Mr Mavae in breach of his contractual obligations to Concretec. In contrast, Concretec argued that once it was established that Precast knew of Mr Mavae's employment with Concretec, it also follows that, given the type, nature, and extent of the work that Mr Mavae was performing for Precast as well as the fact that Precast and Concretec are competitors in the same industry, this was sufficient to infer that Mr Mavae could not satisfactorily fulfil his obligations as an employee to Concretec while performing the work he was for Precast.

[62] Although I have found that Precast did know that Mr Mavae was employed by Concretec, and did take actions which would qualify as inciting, aiding, and/or abetting, Mr Mavae's breach of his employment agreement, there is insufficient evidence before me to conclude that Precast knew that its actions were assisting Mr Mavae to breach Mr Mavae's contractual obligations to Concretec. Precast was not in a position to know what Mr Mavae's contractual obligations to Concretec were, and was not in a position to know that Mr Mavae was in breach of them. It is not enough to talk about knowledge of the obligations of employment more generally, as section 134 of the Act provides that a penalty is only available for the breach of an employment agreement.

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[13] See Westlaw's Criminal Law of New Zealand, at 20.6.4., and CA66.01.

[63] Mr Mavae might have been able to perform the work he performed for Precast in a way that was entirely consistent with meeting his contractual obligations to Concretec, eg by agreeing to work fewer hours for Concretec, or by having obtained Concretec's agreement to other work. Precast was not in a position to know.

[64] Accordingly, my view is that no penalty can be properly awarded against Precast.

Costs

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed the applicant 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 respondents 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.

[66] 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.[14]

Claire English
Member of the Employment Relations Authority

[14] *https://www.era.govt.nz/determinations/awarding-costs-remedies/*