IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 197
3201659

	BETWEEN	FONTERRA BRANDS (NEW ZEALAND) LIMITED Applicant
	AND	MICHAEL PAUL LANIGAN Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Rebecca Rendle and Mary Breckon, counsel for the Applicant Philip Skelton KC and Cherie Hainsworth-Powrie, counsel for the Respondent
Investigation Meeting:	5 April 2023
Determination:	20 April 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Fonterra Brands (New Zealand) Ltd (FBNZ) is an entity owned by the Fonterra Co-operative Group Ltd (Fonterra).

[2] FBNZ employs workers including the respondent Michael Lanigan who works in the Maintenance Team at FBNZ's Takanini plant. He has served FBNZ since April 2014.

[3] Mr Lanigan's work is covered by the Maintenance Technicians' Collective Employment Agreement (the CEA) negotiated between FBNZ and the union E tū.Inc, of which Mr Lanigan is an elected delegate. The CEA is binding on Mr Lanigan.

[4] He and about 30 other maintenance workers at Takanini, have rejected a requirement of FBNZ for them to use a time keeping and attendance system deploying fingerprint scanning technology (FST). Because fingerprints are a unique biological characteristic of a person, they have long been recognised as an effective and accurate way of identifying someone. FST is not new and is in widespread use in New Zealand and overseas, as a medium for timekeeping and attendance systems.

[5] The automated recognition of individuals based on biological or behavioural characteristics is known as biometric recognition or biometrics.

[6] By using biometrics FBNZ aims to reduce the administration time needed to support the collection of timekeeping and attendance data required by law to be kept, eliminate or reduce the opportunity to falsify or misuse information about timekeeping and attendance, and improve accuracy and consistency generally in computing employees' pay, leave and other statutory and contractual entitlements.

[7] Fonterra purchased a timekeeping and attendance system from Kronos in 2016 and prepared to introduce it at the Takanini site in 2018. Dairy workers began using it there with FST in November 2019. The Covid pandemic in and after 2020 required hygiene measures to be taken which limited the use of systems needing to be physically touched by different persons.

[8] As change took place in the way Covid was combated nationally, FBNZ was in a position by about March 2022 to request that all workers at Takanini use Kronos with FST. Approximately 8000 employees of Fonterra are now doing so companywide. Only workers in the Takanini Maintenance Team are not.

[9] For Mr Lanigan and anyone else to use Kronos with FST, first he would need to offer his fingerprints for electronic mapping or scanning. This will register or enrol him in the Kronos system, so that each time he clocks in or out using his fingerprint he can be recognised or verified by his biometric information.

[10] The Authority accepts from the evidence given that the biometric information needed for FST to be used is released only momentarily, for perhaps a few seconds or even less. The original image is transient and not kept or stored as a fingerprint. When received, the information is instantaneously and irreversibly converted to a mathematical representation, using an algorithm. It is encrypted before it can be used in the Kronos kiosks, which have been programmed to recognise the fingerprints of workers as they clock in and out.

[11] The evidence is that the Kronos FST offers a very high level of protection for the security of an employee's biometric data. The risk of decrypting or reverse-engineering a fingerprint from binary data is extremely low.

[12] Mr Lanigan has not consented to offering his fingerprints to enable his registration for using the FST technology. He considers that by doing so his privacy will be intruded upon. Furthermore he does not consider his employer is legally able to impose FST on him by direction or instruction.

[13] Mr Lanigan is not opposed to FBNZ monitoring and recording his start and finish times for usual and necessary payroll purposes. He and others have to date and for over nine months, been using Kronos with an alternative non-FST application, although FBNZ regards this only as a temporary measure while its dispute with Mr Lanigan is being resolved.

[14] Mr Lanigan considers the CEA must be varied before FST is used and his agreement must be obtained before any variation can be made. He considers that before FST can be used, Privacy Principles require it to be shown by FBNZ that the breach of his privacy cannot be avoided by using other systems which do not require him to surrender his biometric information. He has explored and proposed alternative systems to Kronos using FST.

[15] FBNZ agrees that Mr Lanigan's privacy will be intruded upon if FST is used but differs from him as to the degree of infringement there will be. FBNZ disputes that agreement is required under the CEA before FST can be introduced. The evidence for FBNZ is that it has been unable to find any reasonably effective and practicable alternatives and FTS is therefore considered necessary for it to achieve its objectives for the system.

[16] Discussions have taken place over several months between FBNZ, Mr Lanigan and some 30 other affected workers Mr Lanigan speaks for. There has been mediation, but without resolution of the employment relationship problem so far.

Requirement made of Mr Lanigan to register with finger scan

[17] On 15 November 2022 by email, the Takanini Site Manager of FBNZ confirmed to Mr Lanigan that he was required to register on a Kronos kiosk by having a finger scan. He was asked to advise if he might not comply with that requirement and in that case give his reasons.

[18] Through his solicitor Mr Lanigan replied the same day to the email, confirming that he would not be providing FBNZ with his fingerprints.

[19] It appears therefore that Mr Lanigan has been given an instruction by FBNZ which, he has advised, will not be complied with by him.

Disputes procedure

[20] In these circumstances FBNZ applied with urgency to the Authority on 25 November, to have a dispute resolved under s 129 of the Employment Relations Act 2000 (the ER Act). There is no issue between the parties that the statutory procedure has been appropriately invoked in this case.

[21] FBNZ seeks a declaration that it may lawfully and reasonably instruct Mr Lanigan, and by extension other affected employees, to register and use fingerprint scanning technology for the purposes of recording time and attendance on any day they work.

[22] As required by s 129(2) of the ER Act, E tū the union party to the CEA, has been given notice of the existence of the dispute. The union did not ask to be heard in the Authority's investigation and seems to have taken a neutral stance in the matter.

[23] This determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority, or submissions received.

Lawful and reasonable instructions

[24] There is a term implied in law in every employment agreement, requiring an employee to comply with the lawful and reasonable directions of their employer. The term is necessary to give practical effect to the right of an employer to exercise control over an employee. The scope of that control allows an employer to direct what is to be done and how it is to be done, provided the direction is confined to the course of the employment or activities reasonably connected to that. The direction must not be inconsistent with any express term of the employment agreement and must also be reasonable and lawful in terms of general or domestic law.

[25] Failure to follow such instructions without a good or sufficient reason, may expose an employee to disciplinary action taken by the employer.

[26] No disciplinary action appears to have been commenced against Mr Lanigan, following his rejection of the 15 November 2022 requirement to register on a Kronos FST kiosk.

[27] Submissions made by the parties have focussed on three principal sources of legal guidance available to the Authority in considering the declaration sought by FBNZ.

- Employment Court judgment in the *OCS* case
- Privacy Act Principles
- The CEA

***OCS* case**

[28] The Employment Court judgment in *OCS Ltd v Service and Food Workers Union Nga Ringa Tota Inc and another*[1] resulted from a case the Court heard in 2006, after the employer had directed its employees to attend training for the use of a new timekeeping system requiring them to have their fingerprints scanned. The employees and their union objected, arguing, amongst other things, that *OCS* had not obtained the

[1] [2006] ERNZ 762

informed consent of the employees to the scanning, failed to consult, breached the statutory duty of good faith, and breached the employees' privacy.

[29] In considering whether the employer's instructions were lawful and reasonable, the Court found that the employer had not followed the statutory disputes procedure for resolving a dispute about the interpretation, application or operation of an employment agreement, and for that reason was not acting in accordance with law.

[30] That is not a finding open to be made against FBNZ, which has initiated the disputes procedure and brought the matter before the Authority for determination, following an earlier attempt to mediate a resolution. This has been done before any enforcement of the 15 November instruction has been attempted.

[31] The Court in *OCS* examined express and implied material provisions of the CEA between the parties. It found that there was a complete absence of direct reference in the CEA to methods of regular timekeeping and there was nothing that contemplated electronic methods.

[32] The Court found that none of the terms were sufficiently specific to answer the question whether the request to undergo finger scanning was lawful and reasonable.

[33] Regarding a general requirement to consult under s 4 of the ER Act, the Court found the employer had an obligation to precede changes in workplace practices with consultation. It found the employer had not met the legal standards required.

[34] The Court found consultation should have taken place with the employees' union, their recognised representative.

[35] In the present case the union has not put forward any views it may have about consultation, whether there was any or whether it was adequate.

[36] The Court in *OCS* found the employer decided to install and introduce the new system before consulting the union. In those circumstances the employees had been denied an opportunity to be heard on the issue of cultural values, which arose from the employer's workforce comprised of mainly Samoan employees. Adequate consultation needed sensitive spiritual concepts to be explained to the employer, and the employer also needed to explain its intent and motives in introducing the technology. In the health

sector where the *OCS* employment occurred, a good employer is expressly required by statute to recognise cultural differences of ethnic or minority groups.

[37] Although this element is not at the fore of the dispute between FBNZ and Mr Lanigan, the overall point made by the Court is relevant. Where consultation is required it must be adequate and real, otherwise a direction given by the employer will not be in accordance with law and the instruction or direction will not be enforceable.

[38] Turning to the Privacy Act 1993 (the current Act is 2020), the Court accepted that finger scanning technology had been approved in other jurisdictions such as Australia, the UK and Canada and that principles could be extracted from judgments, rulings and recommendations of different privacy related bodies and courts, as follows

- Is the technology compatible with the contractual obligations of the parties?
- There is to be a balance between the need for the technology and the level of personal intrusiveness involved for the individual concerned.
- The employer has the right to introduce different systems of timekeeping technology subject only to reasonable consideration of valid concerns raised by the union and/or employees.
- The employer must take appropriate steps to inform employees of the new measures and to obtain their consent.

[39] In applying these principles in *OCS,* the Court concluded

- The employer was justified in wanting to introduce the fingerprint scanning technology as a matter of practicality
- As the CEA was silent on the method of timekeeping, the technology should be introduced by agreement with the union as a party to the CEA
- The technology was at the lower end of intrusiveness when compared with eye or face scanning. Actual fingerprints are not recorded or

stored by the system once they have been scanned and converted to an electronic mark (similar to the Kronos kiosk system)

- The employer had an obligation as a good employer to introduce the technology in a planned, consultative and educative manner

- The employer had been obliged to obtain the employee's consent because the designers or suppliers of the OCS system had required that as part of enrolment protocols

- The employer should have been alert to cultural sensitivities raised by the new technology

[40] Overall, the Court concluded that the employer's decision to implement the new technology would of itself have been an adequate basis for giving a lawful and reasonable instruction, but only if the employer had complied with its obligations to consult in a timely and appropriate way with its staff. A failure to meet that requirement rendered the employer's instruction unlawful. It had been given in breach of contractual and statutory obligations.

[41] In the present case both parties have relied on the 2006 judgment in *OCS,* although different parts of it.

[42] FBNZ submits there is no aspect of its case which falls outside the principles extracted by the Court, or which must lead to a conclusion that its requirement made of Mr Lanigan is unlawful or unreasonable.

[43] The provisions of the CEA in this case must be examined carefully as they are not identical to those in the *OCS* case.

Privacy Act 2020

[44] In October 2021 the Office of the Privacy Commissioner (OPC) published a paper setting out its position on how the Privacy Act regulates biometrics.

[45] The intention of the paper is to provide information to public and private sector agencies and declare the OPC's expectations of agencies using or proposing to use

biometrics and biometric information, such as a fingerprint pattern or a digital template of that pattern.

[46] The paper highlights the sensitivity of biometric information, because it is based on the human body and is intrinsically connected to an individual's identity and personhood. Misuse of such information or unfair collection of it, infringes against personal privacy and offends the inherent dignity of individuals.

[47] The OPC considers that significant benefits can be had from biometric systems. One use noted in the paper is verification or identification, where the identity of an individual can be confirmed by comparing the individual's biometric characteristic to data about the individual held in a system. The OPC notes monitoring attendance in workplaces, as one of many specific applications of biometrics.

[48] Some systems using biometrics, the OPC notes, convert raw biometric data into templates and only templates are stored, not raw biometrics. Those systems may offer greater security against unauthorised access to a person's biometrics. The OPC cautions that a breach of security may not be remediable, because a biometric characteristic such as a fingerprint cannot be revoked or reissued as a security measure, being a permanent and immutable part of a person.

[49] The protection of encryption is offered by FBNZ's system which instantaneously converts raw data (the fingerprints) to a numerical code. Once encrypted the scan data cannot be decrypted. Fingerprints are not copied or stored but are converted to a binary code from which a fingerprint cannot be recreated.

[50] Given the constant advance of technology, it is not possible to say that the security measures will never be defeated, but the risk seems very slight. It is 20 years since the Privacy Commissioner examined a particular finger scanning proposal for recording employees' attendance, and concluded it would not interfere with the privacy of the employees[2]. In that time it seems likely that technological advance and refinement of the recording system, would have further improved the protection given to the private information required to be collected.

[2] Case Note 33623 [2003] NZPrivCmr 5

[51] The OPC views intrusiveness into a person's privacy as a matter of degree, depending on the circumstances. Intrusiveness may reach a higher level when a system is used to make decisions that could adversely affect individuals or groups. FBNZ's system used for timekeeping does not make value judgements about individuals or make any decisions about them at all. It simply records an empirical or independently verifiable fact, that a person was at the workplace at a particular time on a particular day. This can be likened to the use of speed-cameras.

Information Privacy Principle Number 1

[52] In its paper the OPC refers to the information privacy principles on which the Privacy Act is based. They set out the way agencies must handle personal information. The OPC notes that agencies must take the sensitivity of biometric information into account when considering the application of the privacy principles to biometrics.

[53] Principle 1, the parties are agreed, is of particular relevance to the situation between FBNZ and Mr Lanigan. It provides

> Personal information shall not be collected by any agency unless –
>
> (a) The information is collected for a lawful purpose connected with a function or activity of the agency; and
>
> (b) the collection of the information is necessary for that purpose.

[54] The OPC paper at section 4.1 expands on Principle 1

> When deciding whether the collection is necessary, agencies must consider what other options are realistically available. Could the same objective be achieved in ways that do not require the collection of biometric information? If so, the practicality of those other methods must be examined before deciding to proceed with a biometric solution. If the collection and use of biometric information will best meet the agency's purpose, the agency must collect no more biometric information than necessary for that purpose.

[55] Although the CEA does not require maintenance workers to clock on or off, Mr Lanigan and other Maintenance Team employees have habitually been using FBNZ's

time recording system, no doubt acknowledging by doing so that the system benefits them as well as FBNZ, for example when payment for non-standard hours worked needs to be calculated and made.

[56] There is no issue in this case that FBNZ has a lawful purpose connected with its function or activity as an employer, in wanting to collect biometric information from Mr Lanigan and other workers.

Test of necessity

[57] The Authority accepts the submission made for Mr Lanigan, that for something to be necessary requires more than just being desirable or convenient.

[58] In considering the necessity for using biometrics in the system FBNZ seeks to introduce for Mr Lanigan and others, the Authority has been guided by the decision of the Human Rights Review Tribunal in *Lehmann v Canwest Radioworks Ltd* [3].

[59] In the decision at paragraph [47], the Tribunal considered that 'necessary' was not intended to impose the very highest standard for agencies to achieve before it could be said that the collection of personal information was justified within Principle 1. The Tribunal said 'necessary' did not convey a sense of that which is essential nor, as it was put, a sense of something without which the purpose cannot possibly be achieved.

[60] The Tribunal concluded

> [50] ….. Principle 1 is intended to set a standard that is workable and achievable, having regard to the circumstances of each case.
> ….. Principle 1 should be approached as setting a standard of reasonable rather than absolute necessity.

Privacy Impact Assessment

[61] In its paper at section 5.2, the OPC stated its expectation that agencies will undertake a Privacy Impact Assessment (PIA) for any project in which the use of

[3] [2006] NZHRRT 35

biometrics is being considered. The OPC's expectation is clearly that the PIA will be made before, not after, a decision is made to use biometrics.

[62] FBNZ has prepared a PIA for the Kronos fingerprint scanning technology. The assessment was approved on 1 June 2022 and a copy provided on 9 June to E tū, which had asked FBNZ to make the PIA. In noting that the Kronos implementation process had gone live on 29 May 2022, FBNZ acknowledged the assessment as having been drafted 'retrospectively'.

[63] The PIA should have been undertaken within the expectation of the OPC, at a much earlier stage while the introduction of fingerprint technology was still under consideration. The Authority does not consider that any irregularity arising from this circumstance could have a dispositive effect on the resolution of a question about the application or operation of the employment agreement. It seems unlikely that FBNZ could be prevented from ever introducing the new technology because of the timing of the PIA.

[64] It may however provide an indication that FBNZ had a particular mind-set about the use of the system by Mr Lanigan and others, a matter the Authority considers in relation to consultation.

[65] The assessment given in the PIA that the level of risk and intrusiveness for the Kronos fingerprint scanning technology is at the lower end of the risk and intrusiveness spectrum, seems well founded and supported. In particular, the feature that fingerprints are not stored or scanned in a way that would allow them to be copied or reproduced as fingerprints, indicates security is of a high level.

The collective employment agreement

[66] Although Mr Lanigan is covered and bound by the CEA, the parties to the contract are his union E tū and FBNZ.

[67] The CEA has recently expired its currency and the parties are negotiating a replacement. It appears claims have not so far been made by union or employer party for any provisions in relation to the use of FST in timekeeping and attendance recording.

[68] The outgoing CEA makes no mention, expressly or impliedly, of timekeeping and attendance technology, or any limitations on the usage of that. To this extent at least, the CEA is similar to the one considered by the Court in *OCS.*

[69] Clause 7 provides that any of the provisions of the CEA can be varied. The process for variation includes a requirement for mutual agreement between FBNZ, the union and a majority of the employees affected by any proposal for change.

[70] Clause 7 cannot be read by itself as a requirement for FBNZ to obtain Mr Lanigan's consent before FST is used in his employment. A variation to the CEA is not required if a lawful and reasonable instruction to use an FST system can be given to an employee such as Mr Lanigan. Consent is not a precondition for giving an instruction.

[71] The Authority does not view FBNZ as seeking to vary the CEA or create a new term by variation. FBNZ seeks to rely on a term it contends already exists, the term implied into every employment agreement which requires any employee to obey the lawful and reasonable directions or instructions of their employer.

[72] The CEA at clause 1.2 contains a general provision about consultation and good faith principles. Either party, FBNZ or E tū, may require the other to meet and consider any issues that have arisen in the employment relationship (between employer and union) or out of the interpretation of the CEA, and the parties must deal with each other in good faith.

[73] FBNZ has expressly committed in clause 1.2 to ensuring that consultation and co-operation are the basis for relationships with employees. Employees can under clause 1.2 initiate discussion on employment related matters. FBNZ has also expressly undertaken to act as a good employer in all dealings with employees.

[74] There is no complaint by the union made to the Authority that clause 1.2 has not been observed. FBNZ maintains that it has consulted and acted in good faith in relation to FST under the statutory requirements to do so.

[75] The Authority finds it is clear from clause 1.2 that FBNZ must under the CEA ensure that requirements for consultation and good faith behaviour are met with

employees as well as their union. The ability of FBNZ to give lawful and reasonable instructions about the use of FST by Mr Lanigan, is limited or qualified by those requirements for consultation and good faith behaviour.

Consultation

[76] The nature of consultation was described by the Court of Appeal in *Wellington International Airport Ltd and others v Air New Zealand* [4], a case the Employment Court has from time to time applied in proceedings before it.

[77] The following part of the judgment provides a standard against which the Authority has reviewed the consultation process adopted by FBNZ in this case

> "Consultation must allow sufficient time, and a genuine effort must be made. It is a reality not a charade. The concept is grasped most clearly by an approach in principle. To "consult" is not merely to tell or present. Nor, at the other extreme, is it to agree. Consultation does not necessarily involve negotiation towards an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion.
>
> …….
>
> 'Consultation involves the statement of a proposal not yet fully decided upon, listening to what others have to say, considering their responses and then deciding what will be done.'
>
> Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan in mind, must keep its mind open and be ready to change and even to start afresh. Beyond that, there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone

[4] [1993] 1 NZLR 671, at page 675

> call. In other contexts, it might require years of formal meetings. Generalities are not helpful."

[78] Evidence of FBNZ's consultation process has been given for the employer by Rowan Cowie, Human Resources Business Partner. In her affidavit she outlined in detail the steps taken

- Providing employees and their union with information about the Kronos system
- Meeting with the employees to discuss the introduction of the system
- Considering and responding to their feedback, before any final decision was made

[79] The Authority considers the process did allow for full expression by Mr Lanigan and others of their views about the use of FST. Adequate consideration of those views was also allowed for and was given. The pace was not hurried. Exigencies such as Covid had to be worked around as they arose, and interim alternative arrangements have remained in operation over 9 months after introduction. Although a requirement has been made of Mr Lanigan, on 15 November 2022, FBNZ has so far not sought to enforce it.

[80] It is obvious and unsurprising given the size of Fonterra's workforce and its likely financial investment in Kronos, that FBNZ had a working plan clearly in mind while at the same time it consulted. Realistically, even with an open mind, some persuasion would be needed to have FBNZ leave a very small percentage of the total work force with their own special arrangement.

[81] The Authority finds that FBNZ did genuinely endeavour to balance the interests of Mr Lanigan and others in preserving their privacy against the benefits of FST in achieving and maintaining accuracy, security and confidentiality in the collection of payroll data and in the protection of any biometric information given by employees. As the Court found in the *OCS* case, the level of intrusiveness into the privacy of employees is at the lower end.

[82] The PIA retrospectively carried out in June 2022 does not indicate that FBNZ had closed its mind to the objections of Mr Lanigan and others to FST. In September 2022 FBNZ undertook mediation to try and resolve matters consensually with him, it approved the use of an interim timekeeping and attendance system, and generally over several months showed considerable forbearance before instructing Mr Lanigan to register.

[83] The Authority finds that there was no failure in the consultation process and consultation was real and adequate. Neither is there any lack of good faith evident. Arising from these considerations, there is no bar to a lawful or reasonable instruction being given.

[84] The question of alternatives to using FST was bound up in the consultation and decision making.

Was FST necessary for access to the Kronos kiosks?

[85] In his affidavit Christopher Greenhough, Director of Global Service Operations for Fonterra, has extensively discussed alternative access methods which do not use FST. They include Badge punching, Auto-clocking, Proximity cards, Mobile app/on-line access, and the manual alternative currently in use as an interim measure.

[86] The Authority is satisfied that these alternatives were viewed objectively as to their attributes and potential to meet FBNZ's performance requirements. Fonterra had good business reasons to do with suitability for purpose, cost, functionality, maintenance and other operational considerations, why it chose the Kronos system to begin with. It cannot be said that Kronos using FST was merely an arbitrary choice of system where others are available to do the same job to the same standards.

[87] Mr Greenhough's evidence was that although the Takanini Maintenance Team were consulted and their views considered, it made no sense financially or as a matter of practicality to offer a second time and attendance solution for a relatively small group.

[88] FBNZ does have discretion when selecting a system and may exercise its business judgement as to what will best meet its needs. That discretion appears to have been properly applied within the boundaries drawn by the Privacy Act. The relatively slight intrusion on the privacy of Mr Lanigan and others was weighed up fairly and accurately alongside FBNZ's business needs. In the result FBNZ's decision was a reasonable one and was based on the standard of necessity set by the Human Rights Review Tribunal in the *Canwest* case, the Authority finds.

Declaration

[89] The legal framework which FBNZ now seeks to have itself placed within, was approved by the Employment Court in its *OCS* judgment of 2006. The Court concluded at paragraph [97] that the employer's decision to implement a timekeeping and attendance system using biometric data terminals to scan fingers, would itself have been 'an adequate basis for a lawful and reasonable instruction to its employees', although only if it complied with its obligations to consult.

[90] The Authority is satisfied that FBNZ has met the requirement to consult which it had in this case under the CEA. As required by s 4 of the ER Act the employer has also been responsive and communicative, active and constructive, in maintaining a productive employment relationship with Mr Lanigan and other affected employees. FBNZ has acted in good faith.

[91] Further, the Authority finds that FBNZ has met the restriction on gathering personal information from Mr Lanigan and other employees placed on it by Principle 1 of the Privacy Act 2020. It may gather that information because collection is for a lawful purpose arising from the employment relationship and collection is necessary. FBNZ intentions do not go any further, the Authority finds.

[92] Accordingly, the Authority determines this dispute with a declaration that FBNZ may lawfully and reasonably instruct Mr Lanigan to use the Kronos system operated by means of FST, for the purposes of recording time and attendance at work.

Costs

[93] FBNZ and Mr Lanigan have acknowledged there is no issue between them as to costs.

[94] In practice, the Authority's discretion to award costs in disputes under s 129 of the ER Act, is exercised on a presumption that parties bear their own costs. This is because of the nature of the remedy as usually having some benefit for all parties involved, and because, as in this case, the employment relationship between the parties is often on-going.

Alastair Dumbleton
Member of the Employment Relations Authority