

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 358  
3185839

BETWEEN	RANDEEP KAUR Applicant
AND	GERGOZ LIMITED First Respondent
AND	MUSTAFA GERGOZ Second Respondent

Member of Authority:	Claire English
Representatives:	John Wood, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	19 May 2023 at Rotorua
Submissions received:	19 May 2023 from Applicant None from Respondent
Determination:	6 July 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Ms Randeep Kaur, worked for Mr Gergoz in his store, from 17 January 2016 to 2 August 2021.

[2] When she left her employment on 2 August 2021, she says that Gergoz Limited, her employer, and Mr Gergoz, did not pay her what she was owed under the Holidays Act 2003 (Holidays Act). She hired a representative to assist her, who wrote to Gergoz Limited requesting payment of Ms Kaur's entitlements, and wage and time records in

accordance with section 130 of the Employment Relations Act 2000 (Act), and section 82 of the Holidays Act.

[3] Gergoz Limited and Mr Gergoz did not respond. When contacted, the accountant for Gergoz Limited stated in an email that he had advised Mr Gergoz to pay what was owed to Ms Kaur, but that he was otherwise unable to progress the matter.

[4] Ms Kaur then received payments of \$1,500, \$1,000, and \$1,000. She received no response to her other claims or the request for wage and time records.

[5] Ms Kaur has brought her claims to the Employment Relations Authority. She claims against her employer Gergoz Limited payment for annual leave entitlements payable on the termination of employment, payment for certain public holidays worked at the rate of time-and-a-half, payment for alternative holidays, interest on unpaid moneys, penalties for failures to produce wages and time records on request and failures to pay holiday entitlements when due, costs, and the filing fee. She also claims that Mr Gergoz is a person involved in a breach, and seeks orders that any arrears awarded to her that are not paid to her by the company, should be payable by Mr Gergoz in his personal capacity.

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

[6] Neither Gergoz Limited, nor Mr Gergoz, has responded to the claims in any way. Neither Mr Gergoz nor any representative of the company attended the investigation meeting as scheduled.

[7] This raises the question of whether or not to proceed with the investigation. The answer is "yes" as I am satisfied that Gergoz Limited and Mr Gergoz were made aware of the claims against them and were also made aware of the investigation meeting.

[8] Gergoz Limited is registered on the companies register, and has a registered office for the service of documents. Copies of all relevant documents have been sent to Gergoz Limited's registered address, which is also the same as its address for service, and is the address of the kabab shop that is the business run by Mr Gergoz. Copies of the statement of problem and attachments were signed for by "Fatma Gergoz" on 21 December 2022. Mrs Fatma Gergoz is a 50% shareholder in Gergoz Limited, and Ms Kaur gave evidence that she would work in the store during the day with Mr Gergoz. The Direction of the Authority setting out the applicant's claims and timetabling dates,

were signed for by Mrs Gergoz on 17 January 2023. A copy of the Notice of Hearing was also signed for by Mrs Gergoz on 8 March 2023. Calls made by the Authority Office to the phone number provided for Mr Gergoz, including on the day of the investigation meeting, were not answered.

[9] Included in the Notice of Hearing was advice that, should the respondents fail to attend the investigation meeting, the Authority may proceed and issue a determination in favour of the applicant<sup>1</sup>.

[10] I am satisfied that Gergoz Limited and Mr Gergoz were made aware of these proceedings and the consequences of non-attendance, and that it is appropriate to proceed.

[11] For the Authority's investigation written witness statements were lodged from Ms Kaur, together with various documents and calculations in support of her claims. At the investigation meeting, she answered questions under affirmation from me and her representative. The representative also gave closing submissions.

[12] As permitted by s 174E of 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**

[13] The issues requiring investigation and determination were:

- a. Is Ms Kaur owed payment for annual leave not paid on the ending of her employment, and if so, the amount;
- b. Is Ms Kaur owed payment for public holidays worked, and if so the amount;
- c. Is Ms Kaur owed payment for alternative days, and if so the amount;
- d. Is it appropriate to award penalties for failures by Gergoz Limited to comply with section 130 of the Act by failing to provide wage and time records and/or failing to comply with the Holidays Act by not paying for annual leave not taken and public holiday entitlements on the ending of Ms Kaur's employment;

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<sup>1</sup> Note 2 to Form 8 of the Employment Relations Authority Regulations 2000.

- e. If the Authority finds that minimum standards have been breached, breached, should there be a declaration that Mustafa Gergoz as the sole director of the employer company, is a person involved in a breach;
- f. Should leave be granted to Ms Kaur to recover arrears of holiday pay from Mustafa Gergoz personally in accordance with re s 142Y of the Act;
- g. Payment of interest on any outstanding monies;
- h. Reimbursement of the filing fee; and
- i. Costs.

## **Background**

[14] Ms Kaur commenced employment on 17 January 2016. She worked in the kebab store owned and operated by Mr and Mrs Gergoz.

[15] She worked in the store six days per week, from 11.00 am in the mornings, until closing at 10.00 pm. Mrs Gergoz also worked in the store, preparing food for the lunch run. In the evenings, Mr Gergoz would work in the store. In addition, he would commonly come and go from the store during the day.

[16] Ms Kaur gave evidence that Mr Gergoz was responsible for setting her hours of work and paying her wages. He would pay her by cheque, and would write out the cheques at the store and hand them to her for her to bank. Ms Kaur should have been paid on a weekly basis, but she gave evidence that her pay was often a couple of days late, or sometimes late by as much as two or even three weeks. Her bank statements demonstrate this. When Ms Kaur's payments were late, she would ask Mr Gergoz about it, when he was in the store and it was quiet. He would then write out a cheque for her at his convenience.

[17] Ms Kaur routinely worked on public holidays, and gave evidence that the shop was open all the time even opening on Christmas Day. The only public holidays she did not work were any holidays that fell on her Sundays off, and any holidays that fell while she was taking leave. Over these periods, she received her usual pay. She asked Mr Gergoz about additional payment for working on public holidays, and at first he asked what that was. He then said that he "did not believe in that stuff", and he "did not pay attention to it".

[18] During her employment, Ms Kaur took 3 periods of annual leave, being 4 weeks in 2017, 4 weeks in 2019, and 6 weeks in 2020. She recalls the relevant dates, because she used that time to fly to India to visit her family. She asked Mr Gergoz for time off in advance, but there were no other processes or procedures she had to follow. She asked Mr Gergoz about holiday pay, and he told her that she did not get this. This is despite Ms Kaur's employment agreements providing for her to receive annual leave in accordance with the Holidays Act in the normal way. During her periods of annual leave, Ms Kaur was unpaid. Her bank records and IRD statements demonstrate this.

[19] She has provided bank statements showing she received a set weekly payment from Gergoz Limited. This payment did not vary even over periods when Ms Kaur said she worked on public holidays, which fell on her ordinary days of work. Occasionally over the years, the weekly payment would increase, as Ms Kaur was granted an increase in wages, and then remain steady at the new rate. Ms Kaur was able to demonstrate the agreed increases to her remuneration as recorded in her employment agreements with Gergoz Limited.

[20] Ms Kaur's employment came to an end on 2 August 2021, and she produced a final payslip dated 3 August 2021. This payslip showed a final pay of \$4,235.76 in holiday pay. Her bank statements show that this was not in fact paid to her.

[21] Ms Kaur then says that, over October and November 2021, Mr Gergoz paid an additional \$3,500 into her bank account without otherwise contacting her or her representative.

[22] Despite her representative making a written request for details of Ms Kaur's wage and time records with reference to section 130 of the Act on 25 November 2021, no records were ever received.

[23] In addition, Ms Kaur's representative made a request for holiday and leave records in accordance with section 82 of the Holidays Act, on 16 May 2022. No records were ever received. However, on that same date, Mr Gergoz's accountant emailed Ms Kaur's representative, saying:

You need to correspond with Mustafa only about this, it pre-dates my involvement with Gergoz Limited, I advised Mustafa to pay out Randeep what she is entitled, so please leave me out of the loop of correspondence as I can't add any value.

### **Arrears Owed**

[24] Ms Kaur and her representative have proceeded to calculate the annual leave and public holiday entitlements owing to her. Ms Kaur has calculated that she is owed the sum of \$23,840 as at the ending of her employment. From that, she has deducted the sum of \$4,200 gross, as representing the net amount of the \$3,500 she was belatedly paid. This leaves a total of \$19,640 owing as annual leave outstanding calculated as at the ending of Ms Kaur's employment.

[25] Out of an abundance of caution, I will also deduct from this amount the further sum of \$35.76 which is shown on the final payslip, which I am advised was provided to Ms Kaur after the original calculations had been performed. This leaves a sum of \$19,604.24.

[26] Gergoz Limited has had since 25 November 2021 (or arguably earlier, since the ending of Ms Kaur's employment) to provide wage and time records, and/or holiday and leave records to dispute this claim. It has not done so, even though it is required by both section 130 of the Act, and section 81 of the Holidays Act to do so.

[27] Where an employer fails to keep or produce wage and time records, section 132 of the Act provides that, where this failure prejudices the employee's ability to bring an accurate claim for arrears, the Authority may accept as proven all claims made by the employee.

[28] The absence of wage and time records makes it impossible for Ms Kaur to particularise her claim further than she has already done. In addition, having regard to the evidence she has given me about her work patterns, and the leave she took, as well as having viewed the calculations she has prepared, I am satisfied that Ms Kaur's claims are fair and reasonable, and the calculations have been performed in accordance with the relevant statutes to the best of her ability to do so.

[29] I therefore accept as proven Ms Kaur's claims for unpaid annual leave owing as at the end of her employment, as I am entitled to do. Gergoz Limited is ordered to make payment of \$19,604.24 accordingly.

[30] Ms Kaur also makes claim for payment at the statutory rate of time-and-a-half, for work performed on public holidays, in accordance with section 50 of the Holidays

Act. Ms Kaur gives evidence that she worked on certain public holidays that fell on ordinary days of work for her, being: 9 public holidays in 2016; 10 days in 2017 (taking into account the leave she took in June of that year; 11 public holidays in 2018; 10 public holidays in 2019 (taking into account the leave she took in February of that year); 9 public holidays in 2020 (taking into account the leave she took in January and February of that year; and 4 days in 2021, being a partial year of work, and the year she began to have Mondays off work.

[31] Ms Kaur's bank statements show that she continued to receive her normal weekly pay even in weeks in which she worked on a public holiday. Accordingly, she has claimed for the unpaid "half" pay she was entitled to for these days in accordance with section 50 of the Holidays Act, plus payment for the alternative holidays she was also entitled to for working on a public holiday in accordance with section 60 of the Holidays Act. There is no reference in any of the financial information provided that would suggest payment for either "time-and-a-half" or for alternative holidays has been made.

[32] Given the evidence Ms Kaur has provided as to her work patterns, and the payments made to her, I have no hesitation accepting her evidence as to the payments still owing to her, as I am entitled to do in accordance with section 83 of the Holidays Act. I am satisfied that these claims are fair and reasonable, and the calculations have been performed in accordance with the relevant statutes to the best of her ability to do so.

[33] I therefore accept as proven Ms Kaur's claims for unpaid public holiday entitlements as at the end of her employment. Gergoz Limited is ordered to make payment of \$5,724.00 gross accordingly. I also accept as proven Ms Kaur's claims for unpaid alternative holidays owing as at the end of her employment. Gergoz Limited is ordered to make payment of \$11,448.00 gross accordingly.

### **Interest**

[34] Ms Kaur has raised a claim for interest on unpaid monies.

[35] The Interest on Money Claims Act 2016 provides for a mandatory award of interest, as compensation for a delay in the payment of money, at section 10 of that Act.

[36] The amount of interest owing is to be calculated in accordance with that Act<sup>2</sup>, and an interest site calculator is provided for the purposes of calculation<sup>3</sup>, known as the Civil Debt Interest Calculator.

[37] These monies should have been paid to Ms Kaur on or before the ending of her employment. They represent statutory minimum entitlements, and payment cannot be reduced or avoided. Ms Kaur has been deprived of the use of her money that she has earned through her labour for some considerable time.

[38] These monies amount to \$36,776.24. They have been outstanding since 2 August 2021, being the last day of Ms Kaur's employment.

[39] The amount of interest owing up to the date of this determination is \$1,810.08. This sum is also to be paid to Ms Kaur, in recognition of her loss of the use of the monies that should have been paid to her.

**Penalties – failure to provide wage and time records, and failures to make payment when due**

[40] Ms Kaur also claims that penalties should be awarded for Gergoz Limited's failure to either keep or to provide wage and time records, and holiday and leave records. Ms Kaur is not in a position to know for sure if Gergoz Limited failed to keep these records as it was obliged to do, or whether Gergoz Limited and Mr Gergoz have simply chosen not to respond to her request, which is also a breach of the relevant section.

[41] I have viewed the letters sent to Gergoz Limited requesting wage and time records, and holiday and leave records, and I accept Ms Kaur's evidence that none were provided. It is apparent that they were received, as this was what prompted Gergoz Limited's accountant to state that he had advised Mr Gergoz to pay what was owed to Ms Kaur. If Gergoz Limited kept these records, it was obliged to provide them to Ms Kaur. If Gergoz Limited did not keep these records in the first place, then this is also a breach of its obligations to do so. In either case, I find that a breach of section 130 of the Employment Relations Act is made out.

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<sup>2</sup> See section 12 of the Interest on Money Claims Act 2016.

<sup>3</sup> See section 13 of the Interest on Money Claims Act 2016.

[42] Ms Kaur has also claimed that a penalty should be awarded against Gergoz Limited for its failure to pay her entitlements under the Holidays Act when due. Specifically, section 27 of the Holidays Act requires payment for annual holidays to be made in full in the pay that relates to the employee's final period of employment. As Ms Kaur's final day of employment was 2 August 2021, her annual leave should have been paid in full by that date, and she has demonstrated that it was not.

[43] In addition, section 60 of the Holidays Act requires that payment for any alternative holidays that have not been taken during employment is made in the pay that relates to the employee's final period of employment. She has demonstrated that these payments were not made to her. Section 55 of the Holidays Act requires payment for work done on public holidays to be made in the pay that relates to the pay period in which the holiday occurs. These payments were not made at the relevant time either.

[44] I have no hesitation in finding that Gergoz Limited breached the requirements of the Holidays Act which require payments of entitlements under that Act to be made to an employee no later than the ending of employment.

[45] Accordingly, I must now consider whether penalties should be awarded against Gergoz Limited for a breach of the Act and a breach of the Holidays Act. I consider that, properly viewed, there is one breach, that is, the failure to pay entitlements owed on the ending of employment. I shall therefore approach this from the perspective of two breaches, which gives total maximum starting point of a penalty of \$20,000.

[46] 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*,<sup>4</sup> *A Labour Inspector v Prabh*<sup>5</sup> and *A Labour Inspector v Daleson Investment*.<sup>6</sup> 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.

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<sup>4</sup> *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

<sup>5</sup> *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

<sup>6</sup> *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

[47] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances *involving a distinct power imbalance*.<sup>7</sup> That would appear the case here. Ms Kaur was a migrant worker, with limited support. She relied on Mr Gergoz for her entitlements.

[48] The failure by Gergoz Limited to provide Ms Kaur with her minimum entitlements, or information about them, directly undermines the protections set out in both the Act and the Holidays Act. In addition, the failures of Gergoz Limited to pay Ms Kaur her holiday pay when she took leave, and again on the ending of her employment, placed her under financial strain.

[49] 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<sup>8</sup>, or failed to take reasonable steps to fulfil their legal obligations.<sup>9</sup> Here the evidence leads to a conclusion the failure is deliberate given the following factors, first, the attempts by Ms Kaur to raise issues of payment for various type of holidays with Mr Gergoz, to which he said he “did not pay attention to it”, second that Ms Kaur’s own employment agreement promised her her lawful entitlements under the Holidays Act, but Mr Gergoz told her that she “did not get this”, and finally, the evidence that Gergoz Limited’s accountant told Mr Gergoz to pay Ms Kaur what she was owed, which he has not.

[50] With respect to the breaches severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 70%.<sup>10</sup> In this case, the sums withheld are significant, and they have been withheld consistently throughout employment, and for some years afterwards despite efforts to seek redress. This factor suggests only a small a reduction should be applied.

[51] There is no evidence of similar previous conduct by the respondents and finally I have to be cognisant of issue such as consistency and proportionality. This includes being mindful that the first respondent is a small business. That, when combined with

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<sup>7</sup> *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

<sup>8</sup> *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

<sup>9</sup> *El-Agez v Comprede Limited*, TT 4121553, at para 18

<sup>10</sup> See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

a perusal of recent penalties would also suggest 70% would lead to an improperly high figure, and a reasonable discount would be appropriate.

[52] Having weighed these factors I conclude the respondent should be required to pay a penalty of \$10,000. The final issue is then to whom the penalty should be paid and here I note Ms Kaur has, by the inaction of the respondents, been forced to inordinate lengths to get what was rightfully hers and should never have been withheld in the first place given these monies all relate to minimum entitlements. Ms Kaur should therefore share in the penalty and I consider two-thirds an appropriate portion.

### **Is Mr Gergoz a Person Involved in a Breach?**

[53] Finally, I have been asked to make a declaration that Mr Gergoz was a person involved in a breach, and to make orders in accordance with section 142Y of the Act that, in the event Gergoz Limited does not pay all of the wages or other money payable to Ms Kaur, then she may recover any unpaid amounts from Mr Gergoz in his personal capacity.

[54] In order to make such an order, section 142Y of the Act requires that:

- a. there has been a default in the payment of wages or other money payable to the employee; and
- b. the default is due to a breach of employment standards; and
- c. the person is a person involved in the breach within the meaning of section 142W of the Act.

[55] It is helpful to work through these requirements in turn. I have found, as a matter of fact, that there has been a default in the wages or other money payable to Ms Kaur as an employee. For the purposes of this section, I note that although Ms Kaur has claimed (and I have found that) monies are owing to her in accordance with the Holidays Act, section 86 of that Act provides that holiday pay and leave pay payable by an employer to an employee is to be treated as salary or wages earned by the employee. Accordingly, section 142Y(1)(a) is satisfied.

[56] The default – that is, the failure to pay monies due – is due to a breach of employment standards. Employment standards are defined in section 5 of the Act. They include the minimum entitlements and payment for those under the Holidays Act,

as well as the requirements of section 130 of the Act and sections 81 and 82 of the Holidays Act. Accordingly, section 142Y(1)(b) is satisfied.

[57] The final question is whether Mr Gergoz is a person involved in a breach within the meaning of section 142W of the Act. Section 142W requires three things:

- a. The person in question must be an officer of the employer entity.
- b. The breach must be a breach of employment standards.
- c. The person in question must have taken certain actions that lead to the breach.

[58] Again, I will work through these tests in turn. The employer is a company, Gergoz Limited. Section 142W(3)(a) requires that, in relation to a company, an “officer” is a director of that company. The Companies Office register confirms that Mr Gergoz is the sole director of Gergoz Limited. Therefore, he is an officer of the employer, and meets this test.

[59] The next question is if the breaches were breaches of employment standards. As I have set out above, the answer to this question must be “yes”. The requirements for payment to employees under the Holidays Act are minimum employment standards as defined in the Act.

[60] The officer, that is, Mr Gergoz, must have taken certain actions that led to the breach. Ms Kaur claims that Mr Gergoz’s actions in failing to pay her Holidays Act entitlements when they fell due, amount to Mr Gergoz being, “in any way, directly or indirectly, knowingly concerned in, or party to, the breach<sup>11</sup>”. I find that Mr Gergoz was directly party to the breaches. This is because of Ms Kaur’s evidence that he personally made up her pay on a weekly basis, and had first-hand knowledge of when she worked as he was also working in the business with her on a daily basis. He provided her with an employment agreement setting out her correct entitlements to annual leave and in exchange for working on public holidays, and was reminded of these obligations by Ms Kaur herself, and by his accountant. Yet he decided that he would not pay Ms Kaur, because he “did not believe in that stuff” and he “didn’t pay attention to that stuff”.

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<sup>11</sup> Section 142W(1)(c).

[61] These actions show that Mr Gergoz was aware of the obligations to pay Ms Kaur, and that he was in control of making such payments to her. They also demonstrate that he decided not to make those payments to her, as he did not wish to. This makes him a party to the breaches by Gergoz Limited, when the company failed in its obligations to pay Ms Kaur when due.

[62] Accordingly, I find that on the facts before me, Mr Gergoz was a person involved in a breach.

[63] If Gergoz Limited defaults in the payment of wages or other money due to Ms Kaur in accordance with this determination, then Ms Kaur may recover any shortfall from Mr Gergoz personally, to the extent that Gergoz Limited is unable to pay the arrears in wages or other money, in accordance with section 142Y of the Act.

[64] Overall, Ms Kaur has been successful in her claims. She is entitled to the reimbursement of the filing fee of \$71.56.

### **Orders**

[65] Gergoz Limited is to pay to Randeep Kaur within 28 days of this determination:

- a. The sum of \$19,604.24 gross, being annual leave owing at the end of Ms Kaur's employment;
- b. The sum of \$5,724.00 gross, being payment for work done on public holidays;
- c. The sum of \$11,448.00 gross, being payment for alternative holidays not taken;
- d. \$1,810.08 without deduction, being interest on unpaid monies.
- e. The sum of \$7,500, being Ms Kaur's share of penalties for breaches of the Employment Relations Act 2000 and the Holidays Act, with a further \$2,500 to be paid to the Crown Account;
- f. \$71.56 without deduction, being the reimbursement of the filing fee.

[66] Mr Mustafa Gergoz is a person involved in a breach as defined in section 142W of the Employment Relations Act 2000.

[67] If Gergoz Limited defaults in the payment of wages or other money due to Ms Kaur in accordance with this determination, then Ms Kaur may recover any shortfall

from Mr Gergoz personally, to the extent that Gergoz Limited is unable to pay the arrears in wages or other money, in accordance with section 142Y of the Employment Relations Act 2000.

### **Costs**

[68] Costs are reserved.

[69] If the parties are not able to resolve the issue of costs between themselves, 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.

[70] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>12</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>12</sup> Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>