IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 387
3131956

BETWEEN	MICHAEL BYRNE First Applicant
	JOEL BYRNE Second Applicant
AND	KANALOA HAWAII SPORTS ENTERTAINMENT LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Gerrard Brimble and Warren Alcock, counsel for the Applicants Tracy Atiga for the Respondent
Investigation Meeting:	19 April 2023
Submissions received:	20 April 2023 from the Applicants
Determination:	19 July 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Father and son, Michael (Mick) and Joel Byrne, were respectively employed by Kanaloa Hawaii Sports Entertainment Limited (Kanaloa or the company) as Head Coach and as Director of Strength and Conditioning for the Kanaloa Hawaii Rugby team which the company intended to participate in an American rugby competition known as Major League Rugby (MLR).

[2] The applicants have asked the Authority to investigate their claims of unpaid wages for which they have been unjustifiably disadvantaged. They also bring claims of unjustified dismissal for which they seek compensation.

Application for permanent non-publication order is declined

[3] Mick and Joel seek the continuation of the Authority's interim non-publication order (granted 18 June 2021) on the ground that there is potential for publication of the details of their case to detrimentally impact their future career prospects. It was submitted that the professional coaching industry is high profile and competitive and that there will be media interest with the Authority's determination. It was submitted that any association with an employment dispute would be of interest to a prospective employer and in a highly competitive industry with limited employment opportunities, that could be the difference between securing a position or not.

[4] The Authority's ability to order non-publication derives from cl 10 sch 2 of the Employment Relations Act 2000 (the Act) which reads:

> The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[5] In determining whether the applicants particular circumstances justify the grant of a permanent non-publication order, I adopt as my starting point the principle of open justice which is fundamental to our common law system of civil and criminal justice.[1] This is underscored by the Supreme Court's description of the principle of open justice as being of "an almost priceless inheritance."[2]

[6] In *Crimson Consulting Ltd v Berry,* the Employment Court looked at cl 12 of schedule 3 of the Act; the equivalent of cl 10 sch 2 above.[3] In that case the court held that cl 12 did not require the party seeking non-publication to establish exceptional circumstances exist to justify an order being made, although the standard for departing from the fundamental principle of open justice is high. The court further stated that a case-specific balancing of the competing factors is required and that the position may be different at the interim stage.[4]

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[1] *Erceg v Erceg* [2016] NZSC 135.
[2] *Erceg* at [2].
[3] *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94; [2017] ERNA 511.
[4] Above at [96].

[7] In this case, although the applicants are concerned as to how publication might affect their future job prospects, those concerns are speculative and not based on evidence of specific adverse consequences. If a potential impact on future employment was of itself enough for a permanent non-publication order, the priceless inheritance of open justice would in short order lose all value.

[8] Although Kanaloa does not oppose the application for permanent non-publication, the Authority is a creature of statute and when applying its discretion under cl 10, it must do so on a principled basis and according to law. Given the tentative risk to future employment for the applicants posed by publication of their names and details, I do not consider this sufficient to displace the principle of open justice which is of fundamental importance. The application is declined.

How did the Authority investigate?

[9] Mick and Joel commenced proceedings by lodging a Statement of Problem with the Authority to which Kanaloa responded by lodging a Statement in Reply. On 18 June 2021, a duty Authority Member granted an interim non-publication order because Kanaloa had in an email (18 May 2021) stated that if the applicants continued to pursue legal action, it would have no option but to publicise its position in relation to their summary dismissal.

[10] This was considered by the Member (rightly in my view) as a threat to use publicity as a means of deterring the other party from proceeding with its claim before the Authority. Put differently, this was an access to justice issue which required an interim non-publication order to be made. That order has since served its purpose and is discharged.

[11] During my investigation of this employment problem, I have resolved in the applicants' favour that their personal grievances were raised in time with Kanaloa within the 90-day period under s 114.[5] Costs for that preliminary matter were reserved.

[12] For the Authority's investigation, written witness statements were lodged from the applicants and Ms Atiga for Kanaloa. All witnesses answered questions under oath

[5] *ANA& IHS v RRG* [2022] NZERA 479.

or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[13] 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

[14] Having resolved the issue of non-publication, the remaining issues that require investigating and determining are set out in a minute from the Authority of 8 December 2022, which relevantly states:

> (a) Were Mick and Joel unjustifiably disadvantaged by Kanaloa's actions in the non-payment of their wages, and in Mick's case, the non-payment also of an agreed sign-on payment of USD21,666.67?
>
> (b) Were there any breaches of any minimum entitlements to the applicants?
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> (c) Was Mick and Joel unjustifiably dismissed by Kanaloa or was their dismissal for serious misconduct both substantively and procedurally justified?
>
> (d) If the respondent's actions were not justified (in respect of either of the claims of unjustified disadvantage or unjustified dismissal) what remedies should be awarded?
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> (e) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by either applicant that contributed to the situation giving rise to their grievance?
>
> (f) Should either party contribute to the costs of representation of the other party?

Relevant facts

[15] In the beginning of 2020, Mick was the Director of Rugby for an American rugby team in Austin, Texas that was part of the MLR rugby competition. However, due to the COVID-19 pandemic, the MLR competition was cancelled in mid-March after round four and Mick returned to his home in Australia. He was subsequently approached by (then) director and rugby manager of Kanaloa, Cam Kilgour, and was

invited to apply for a vacant head coaching role for a new rugby team that Kanaloa wished to enter into the 2021 MLR competition.

[16] Mick was interviewed by Ms Atiga, Kanaloa's CEO, and Matt Atiga, who was introduced to Mick as Kanaloa's High Performance Manager. Mick stated that during the interview, Ms Atiga had told him that Kanaloa had $5M of the $10M they needed for MLR's licence fee and that they were continuing to look for other investors and sponsors to acquire the remaining $5M.

[17] Mick was successful for the role of Head Coach and was offered the position on 18 May 2020. The position had a start date of 1 July 2020 which was when it was expected that the Commissioner of the MLR would announce Kanaloa's entry into the 2021 competition.

[18] Despite the future start date of employment, Mick began work almost immediately as Ms and Mr Atiga and Mr Kilgour were very keen for him to get ahead. There was a significant amount of work that needed to be done as a completely new rugby team and team infrastructure was effectively being created "from scratch." Due to the pandemic, a fair amount of that work would have to be done remotely via Zoom and Facebook.

[19] In addition to employing Mick, Kanaloa employed his son Joel as Director of Strength and Conditioning for the team. He was interviewed by Ms Atiga and Mr Kilgour during which time he was advised by Ms Atiga that Kanaloa had $5M in the bank. Similarly, Joel started work as soon as he accepted the role despite the fact that the start date of his employment was 1 July 2020 also. There was a considerable amount of work for him to do to prepare players physically which included monitoring and working with players based in various countries such as New Zealand, Australia, Hawaii, and Canada.

[20] The applicants were not immediately provided with written employment agreements because of a delay with the MLR making its decision regarding Kanaloa's application for a licence to compete in the 2021 competition. Because of the delay, Ms Atiga advised Mick and Joel that their contracts would be provided at a later date.

[21] The applicants were eventually provided with written employment agreements dated 30 July 2020 which they both signed. For the work Mick had done already for Kanaloa, the company agreed to pay him a sign-on payment valued at US$21,666.67.

[22] On 4 September 2020, it was reported in MLR news that its Exclusive Negotiating Agreement (ENA) with Kanaloa had expired and that an agreement had not been reached for Kanaloa to join the MLR for the 2021 season. On 5 September 2020, Ms Atiga, emailed several people connected with the club that Kanaloa had decided to exit its plans to join the MLR. This was news to the applicants who were hearing this for the first time. Ms Atiga further stated that her priority was for Kanaloa to honour its current contracts and programmes it had in place with its staff and players.

[23] On 1 October 2020, Mick and Joel were advised in an email from Ms Atiga that Kanaloa had insufficient funds to make its payroll payments. In spite of this however she stated that she would find a solution to compensate them "as I had given you both my word." In the same email, Ms Atiga stated:

> I have been advised by Cam (Mr Kilgour) that he would like to take Kanaloa Hawaii forward with Thomas Wagner (who was an initial investor). I have informed Cam that I will step away if he does this *as I have no interest in the MLR* (emphasis added).

[24] In the early hours of 5 October 2020, Mick was copied into an email from Ms Atiga which was sent to her (now) former director Mr Kilgour, two other directors and Matt Atiga. Joel was not copied into the email which stated that Mr Kilgour had been summarily dismissed for serious misconduct for carrying on business on behalf of Kanaloa without the consent of its CEO or its board of directors. Ms Atiga further stated in her email that Mr Kilgour's actions had directly impacted on Mick and another member of the team (not Joel) and that she would be speaking to them as well.

[25] News of this came as a surprise to Mick who had not been previously advised by Kanaloa that it had any concerns regarding his actions or behaviour. It was Mick's evidence that after reading the email of 5 October above, he had a telephone conversation with Ms Atiga emphasising that she had told him in her email of 1 October that Mr Kilgour and Mr Wagner would be taking Kanaloa forward and that she would be stepping away as she had no interest in the MLR. Ms Atiga accepted the explanation

and later sent Mick and the other staff member concerned a formal written retraction of her earlier comments which gave Mick the impression that the matter was resolved.

[26] By late October 2020 the applicants had not received any payments from Kanaloa and they contacted their sports agent, Mr Alcock, who emailed Ms Atiga on 23 October to ask when the payments would be made. There then followed a series of emails where Ms Atiga questioned Mr Alcock's status as the applicants' representative and asked him to advise if he had been instructed in his legal capacity to represent them or not. Mr Alcock responded by way of email on 26 October stating:

> I am an accredited agent and a barrister and solicitor of the high court. I'd like to think the answer to the question about when Mick and Joel were to be paid would be the same irrespective of the capacity in which I represent them.

[27] On 29 October Mr Alcock emailed Ms Atiga raising a personal grievance on the applicants' behalf stating:

> Please take this email as formal notice of a personal grievance for a failure to pay money owing in terms of the Agreements for both and Mick and Joel Byrne and for unpaid sign on money agreed to be paid to Mick Byrne.

[28] Without notice, on 2 November, Mr Alcock received letters from Ms Atiga addressed to Mick and Joel which stated that their employment with Kanaloa had been terminated for serious misconduct. The letters alleged that they had colluded with Mr Kilgour to form a new entity under new leadership without the knowledge or approval of the CEO or the board.

[29] Mick's letter of dismissal stated that there was "strong evidence" confirming his "actions of subordination" among professional colleagues that discredited and/or challenged management personnel and/or management decisions.

[30] It was further alleged in both Mick and Joel's letters of dismissal that "critical information" had been withheld by Mr Kilgour concerning their professional involvement with their previous employer which compromised the genuine nature of their appointments.

[31] The termination letters referred to telephone calls the applicants purportedly had with Ms Atiga on 1 October 2020 during which time they were suspended effective

immediately. The letters also referred to subsequent emails from Ms Atiga to Mick (1 and 5 October) and Joel (1 October) confirming their suspension and that the first date of their misconduct was 21 September 2020. Because of their "collusion with Mr Kilgour and his associates" and the company's accumulated losses as a result, Ms Atiga stated that Kanaloa did not need to compensate either of them in any way. The penultimate paragraph for each of the applicants' letters of termination stated:

> In keeping with our Kaupapa, we do not intend to officially announce our findings and subsequent decision to issue a summary dismissal, but should legal matters proceed; this may not be possible.

[32] Neither Mick nor Joel have any idea what Ms Atiga meant by "strong evidence" of subordination, collusion or fraud. They have no knowledge of being suspended or of any misconduct raised with them. Moreover, neither applicant has received any payment for their work and neither were given an opportunity to respond to Ms Atiga's concerns before being dismissed. Further, Mick regards the above penultimate paragraph to be a clear threat to publicise the fact of his dismissal.

[33] On 12 November, Mr Alcock requested a copy from Ms Atiga of her email of 1 October 2020 to Mick and Joel in which she claimed that they had been suspended. That information has never been provided. The only email the applicants received on 1 October is noted above at [23] in which Ms Atiga confirms that she will compensate the pair as she had given them both her word and had informed Mr Kilgour that she would step away as she had no interest in pursuing the MLR.

[34] Mr Alcock emailed Ms Atiga again on 12 November 2020 to remind her of Kanaloa's good faith obligations to provide the applicants with information relevant to the decision to terminate their employment as well as being given the opportunity to respond to that information. Mr Alcock's email noted that Kanaloa had not carried out an appropriate investigation process, that its decision to terminate the applicants' employment was not consistent with their individual employment agreements, and that if Ms Atiga continued to say that Kanaloa did not need to respond to the applicants they would be left with no alternative but to file proceedings in the Authority. Mr Alcock requested that the company attend mediation but this was declined by Ms Atiga.

[35] On 5 February 2021, the applicants lodged their Statement of Problem in the Authority.

Were Mick and Joel unjustifiably disadvantaged by Kanaloa's actions in the non-payment of their wages, and in Mick's case, the non-payment of an agreed sign-on payment?

[36] An unjustified disadvantage is a personal grievance whereby one or more conditions of an employee's employment is affected to the employee's disadvantage by some unjustifiable action by their employer.[6] The applicants must therefore establish that either one or more conditions of their employment has been affected to their disadvantage through an action or actions by Kanaloa.

[37] At the start of the investigation meeting, Mr Brimble advised that Mick and Joel wished to limit their claim of wage arrears to four months only. Both men started working for Kanaloa in mid-to-late May 2020 and they were terminated from their roles on 2 November 2020 some five-and-a-half months later. As a Hawaiian-based rugby franchise, the applicants were to be paid in American dollars which Mr Brimble has calculated into NZD. He submits that NZD69,709 and NZD40,753 are owed to Mick and Joel Byrne, respectively.

[38] It is not in dispute that the applicants were never paid by Kanaloa for the work they did. The respondent has argued that its losses far outweigh what is owed to the applicants. However, that argument has no substance. The losses were never quantified and no evidence was provided that the applicants caused loss to Kanaloa (if any). If the company had purportedly suffered a loss, it must prove the cause of that loss and quantity the same, neither of which it has done and it has had ample opportunity to do so.

[39] Even if the company had suffered damages as a result of the applicants actions (which is denied) that is a separate matter for Kanaloa to raise with them for another time. The company cannot, as it has done here, offset their wages unilaterally when it has both a contractual and a statutory obligation (under the Wages Protection Act 1983) to pay them. It is noted that Ms Atiga had assured the pair in emails (5 September and 1 October 2020) that her priority was to honour the current contracts and programmes her business had in place with staff and players and that she intended to find a solution to fully compensate them after giving them her word. While that representation may

[6] The Act, s103(1)(b).

have been reassuring for the applicants, in the end the solution that was found was not what either could have expected.

[40] Mick and Joel both stated that, during their respective job interviews for their roles, they both understood Kanaloa to have $5M in the bank which I find is a specific sum that represents precisely half of what Kanaloa was required to pay by way of a franchise fee to join the MLR 2021 competition.

[41] I find Mick and Joel's evidence credible. While they both appreciated that they were working essentially for a start-up franchise and that they could not expect to receive their first wage payment until 1 July 2020 (at the earliest), they were under the reasonable impression that Kanaloa had access to $5M and was therefore could financially sustain their wages. However, unbeknownst to them, that was never the case.

[42] During the investigation meeting, Ms Atiga stated that her company had been valued at $32M by a large accounting firm but Kanaloa did not have $5M in its bank account. In reality, the company was relying on a refund of USD200,000 from the MLR being the balance of a deposit paid to it by Kanaloa's initial investor, Mr Wagner. For reasons that remain unclear, the USD200,000 deposit was never refunded to Kanaloa which it was relying on to pay its staff and players including the applicants until it received its MLR licence and could use that to attract other investors to invest.

[43] When it was announced by the MLR on 4 September 2020 that Kanaloa's ENA had expired, the company found itself without a licence and its pool of potential investors dried up. In my view, I cannot see how Kanaloa could reasonably have expected to have raised the necessary MLR licence fee of $10M if it did not have sizeable funds of its own to contribute. Its apparent valuation of $32M appears to exist on paper only.

[44] The applicants wage arrears claim is established on the facts. The Authority orders Kanaloa Hawaii Sports Entertainment Ltd to pay Mick Byrne NZD69,709 and Joel Byrne NZD40,753 no later than 4 pm Thursday 17 August 2023.

[45] The Authority has the power under cl 11 sch 2 of the Act to award interest if it thinks fit to do so. This is an appropriate case for the award of interest as the applicants have been deprived of the use of their wages for 32-and-a-half months. Kanaloa is ordered to pay interest on the above sums relating to each applicant from 2 November 2020 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator.[7]

Were the applicants unjustifiably dismissed?

[46] Kanaloa's actions in dismissing the applicants must be assessed against the test of justification set out at s 103A of the Act, that is, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[47] In applying the test of justification, s 103A(3) of the Act requires the Authority to consider four procedural fairness factors which are whether having regard to the resources available to the employer: the allegations against the employee were sufficiently investigated; whether the employer raised the concerns with the employee; whether the employer gave the employee a reasonable opportunity to respond to the concerns; and whether the employer genuinely considered the employee's explanations (if any) before dismissing or taking action against the employee. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of minor defects in the process that did not result in the employee being treated unfairly.

[48] Ms Atiga states in her written witness statement to the Authority that both applicants clearly were dismissed for serious misconduct by engaging and contributing to an attempted and illegitimate takeover of her company. This is denied by both Mick and Joel who adamantly state they have "not a clue" of what Ms Atiga is talking about. In particular, Mick stated he did not know what the "strong evidence" was that (allegedly) confirmed his actions of subordination with others as that information was not provided to him. Further, neither Mick nor Joel understand what Ms Atiga meant by them (allegedly) withholding "critical information" pertaining to their continued involvement with their previous employer. This is because that information was not

[7] www.justice.govt.nz/fines/civil-debt-interest-calculator

provided to them either. The first time the applicants heard of this particular concern was in their letters of dismissal.

[49] During the course of the investigation meeting, Ms Atiga did apologise to the applicants stating that she now understands how Mick may have got the impression from her email of 1 October 2020 that Mr Kilgour and Mr Wagner would be taking Kanaloa forward without her. However, while Ms Atiga's apology was heartfelt it comes too late and minimises the fact that Mick had already explained how her email led him to believe that she was comfortable with Mr Kilgour and Mr Wagner taking Kanaloa further with the MLR. I find Mick to have conducted himself in good faith relying genuinely on the plain words of Ms Atiga's email as a reasonable person in his position could have done in all the circumstances.

[50] There was no justification behind the applicants dismissal from employment especially for Joel who was dismissed because, being Mick's son and living in the same house with him, Ms Atiga simply assumed that he was "guilty by association." However, that assumption was unsubstantiated and ignored evidence of Joel's loyalty to Kanaloa and to Ms Atiga. It was he who alerted her of an unauthorised change to the company's Facebook page and Mick had told him to call Ms Atiga about it, which he did. Upon receiving that information, Ms Atiga thanked Joel for letting her know and she was appreciative of his loyalty. If Joel had colluded with others to take over Kanaloa, which was not the case for either him or his father, he would not have telephoned Ms Atiga at Mick's behest.

[51] Not only do I find Kanaloa's decision to dismiss the applicants was substantively unjustified, the way the company acted in terms of due process is deserving of its own red card. Ms Atiga's investigation lacked transparency, the applicants were not given information relevant to the continuation of their employment, and they were deprived of an opportunity to respond to serious allegations that went towards their reputation and general standing in the rugby community. The procedural errors were not minor and the applicants' employment rights were unfairly prejudiced as a result.

[52] I find that Mick and Joel's claims of unjustified dismissal is established on the facts and that they are entitled to remedies.

Compensation

[53] The applicants seek compensation for unjustified disadvantage (the non-payment of their wages) and unjustified dismissal. Rather than award compensation under separate causes of action, an award of compensation on a totality basis is appropriate in the circumstances. Compensation is for the effects on the employee of the grievance. It is not intended to be a penalty imposed on the employer to indicate the Authority's disapproval of their conduct.

[54] The impact of Kanaloa's actions in failing to pay the applicants their wages, and then unjustifiably dismissing them, has had a significant impact on them. Both were left very upset about how their employment ended after they had worked hard for Kanaloa for several months without payment. Both applicants relied on personal savings to get by. Being less well-established financially, the financial impact was greater for Joel who had savings of AUS16,500 in his personal bank account which he intended to use to buy some land. However, those savings evaporated as a result of Kanaloa not paying his wages. Joel has not financially recovered from his experience.

[55] For Mick, he had to sell his vehicle to meet his financial commitments and he had to negotiate changes to his mortgage payments with his bank to reduce his monthly payments. Ultimately, he was forced to sell his house because he could not meet his mortgage repayments. Working for Kanaloa placed a strain on Mick's relationship with Joel who would ask him when he would be paid. However, Mick would tell him to get back to his room and keep working. In hindsight, Mick regrets having prioritised his job over his family relationships. The financial strain affected Mick's marriage also. His wife left the family home because he and Joel were always working from home but were not being paid.

[56] Compounding matters further for the applicants was an internet news article in May 2021 which reported that Kanaloa had offered financial support to a Fijian-based rugby team. That added insult to injury to the applicants because Ms Atiga's offer of financial support was made when they were still owed wages. Lastly, I take into account the veiled threat by Kanaloa to publicise the fact that the applicants had been summarily dismissed if they were to pursue legal action against it. This penultimate paragraph in the applicants' dismissal letters has caused Mick and Joel to be

understandably worried about their reputation and their ability to secure work in the future.

[57] The applicants will be disappointed by my decision not to grant them a permanent non-publication order. However, if it is any consolation to them, any prospective employer reading this determination should see it as a vindication of the employment rights of two hardworking men who have done nothing wrong and who have been unjustifiably dismissed and have not been paid the fruits of their labours.

[58] Standing back and looking at matters holistically, I am satisfied that the applicants suffered humiliation, loss of dignity, and injury to feelings as a result of being unjustifiably disadvantaged and unjustifiably dismissed. The Authority orders Kanaloa to pay Michael Byrne and Joel Byrne the sum of $18,000 each for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1)(c)(i) of the Act.

Contribution

[59] Having awarded compensation to the applicants, the Authority is required under s 124 of the Act to consider the extent to which their actions may have contributed towards the personal grievance. The Authority finds that there are none. A reduction in remedies is not warranted.

Conclusion and summary of orders made

[60] The Authority makes the following orders. Kanaloa Hawaii Sports Entertainment Limited is ordered to pay the following amounts to the applicants no later than 4 pm Thursday 17 August 2023:

(a) $69,709 (gross) to Michael Byrne in wage arrears under s 131 of the Act;

(b) $40,753 (gross) to Joel Byrne in wage arrears;

(c) interest on the above sums of money to each applicant from 2 November 2020 to date of payment using the civil debt interest calculator; and

(d) $18,000 to each applicant in compensation under s 123(1)(c)(i) for humiliation, loss of dignity and injury to feelings.

Costs

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

[62] If they are not able to do so and an Authority determination on costs is needed the applicants 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 respondent 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.

[63] 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.[8]

Peter Fuiava
Member of the Employment Relations Authority

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