NOTE: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 575
3188600

	BETWEEN	OSP Applicant
	AND	THE CHIEF EXECUTIVE OF INLAND REVENUE DEPARTMENT Respondent
Member of Authority:	Helen Doyle	
Representatives:	Catherine McNamara, counsel for the Applicant Susan Hornsby-Geluk, counsel for the Respondent	
Investigation Meeting:	20 June 2023 at Christchurch	
Submissions Received:	20 June 2023 from the Applicant and 29 June 2023 application for non-publication. 20 June 2023 from the Respondent and 6 July 2023 opposition to application for non-publication.	
Date of Determination:	4 October 2023	

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] The Authority asked if any non-publication issues arose for the applicant resulting from medical information and evidence about a disability.

[2] Ms McNamara made an application for non-publication orders under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) in respect of the name of the applicant and any other identifying information and/or his medical information and disability.

[3] The application was made on the basis that publication of the identity of the applicant and/or identifiable details about his medical condition and disability could make him identifiable to others, including his previous colleagues at the Inland Revenue Department (IR) which would expose him to stress. There was a concern that future employment prospects would be negatively and unjustly impacted if details about his disability were made public.

[4] It is accepted that sound reasons must exist for making a non-publication order displacing the presumption in favour of open justice.[1]

[5] The application is opposed.

[6] Ms Hornsby-Geluk refers to a number of cases from the Employment Court that support the fundamental importance of open justice. She submits that the applicant has failed to establish the high threshold required to warrant an exception to this principle[2]:

[7] Ms Hornsby-Geluk submits that the two cases relied on in making the application are distinguishable and do not undermine the longstanding fundamental of open justice.[3] IR opposes the application for a non-publication order on the grounds that:

(a) The information that the applicant is seeking to be prohibited from publication is central to the case before the Authority;

(b) The applicant relied on his medical information disability but has no evidence in support of this, either in the substantive hearing or in support of the application for non-publication;

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[1] *Erceg v Erceg* [2016] NZSC 135 at [13].
[2] *XYZ v ABC* [2017] NZEmpC 40 at [70]; *Crimson Consulting Limited v Berry* [2017] NZEmpC 94; *GF v Controller of the New Zealand Customs Services* [2003] NZEmpC 101 and *H v A Ltd* [2014] NZEmpC 92.
[3] *WN v Auckland International Airport Limited* [2002] NZEmpC 153 and *JGD v MBC Limited* [2020] NZEmpC193.

(c) The applicant has presented no evidence of specific adverse consequences of publication to warrant a departure from the fundamental principle of open justice; and

(d) The applicant did not seek a non-publication order until prompted to do so by the Authority and after the conclusion of the substantive hearing.

[8] IR say that it would be potentially prejudiced if details of the applicant's medical condition, steps taken to manage it, actions taken to accommodate and support him and his decision not to provide medical information are not published.

[9] Further, IR say that the absence of any medical information and the fact that the applicant is now in paid employment do not support specific adverse consequences as required. IR does not accept the possible consequences referred to support and/or are sufficient to justify a non-publication order. It is of the view that the applicant has failed to meet the threshold required for non-publication of his name and/or details regarding his medical condition. Without prejudice to that, IR says that if there is to be any non-publication orders they should be limited to details regarding the applicant's specific medical condition and say it can be replaced with a broader definition if the Authority was minded to make any order.

Conclusion on non-publication

[10] The Chief Judge in *Elisara v Allianz New Zealand Limited* commented on the growing awareness of the impact of publication on the future employment prospects of individuals named in employment litigation whether as witnesses, parties or someone involved in the relevant sequence of events.[4] There was comment on the potential for perverse results in terms of access to justice and reputational ruin for future job prospects.[5]

[11] As Ms Hornsby-Geluk correctly submits that is not enough. If the applicant wishes to depart from the fundamental principle of open justice he needs to identify specific adverse consequences to have a non-publication order.

[4] *Elisara v Allianz New Zealand Limited* [2019] NZEmpC 123 at [63].
[5] Above n 4.

[12] Whilst the evidence about the applicant's disability is somewhat sparse, IR accommodated him in the workplace for about 25 years from 1996 by not requiring him to perform work that involved public facing customer contact including incoming and outgoing phone calls. The applicant refers to a diagnosis in 1996 from stressful interactions with the public resulting in permanent disability. He is 61 years of age, has spent almost his entire working life in the public service and wants to remain in employment for a few more years. In his written statement of evidence he says that he has a mortgage and young adult children. He does have a job but it is of a manual nature and the applicant may wish to seek other employment before finally retiring.

[13] This application for non-publication is not dissimilar in nature to that before the Employment Court in *QDA v EKD*. There was no clear medical diagnosis for the Court to consider about the defendant in that case, however weighed was what it knew about some interpersonal issues, together with the age of the defendant who was 62. The Court concluded that there was a distinct risk to future employment prospects if there was publication of the defendant's name.[6]

[14] I weigh in this matter what is known of the disability, the accommodation of the condition for many years by IR, the age of the applicant and that he still needs to continue to work for several more years. I conclude there is a risk to future employment prospects if there is publication of his name.

[15] I agree with Ms Hornsby-Geluk that it is important that details and circumstances of the medical condition are disclosed. That is because they inform actions taken by IR, what led to the ending of the relationship, the outcome and those who may read this determination. I do not make an order prohibiting from publication medical information, rather I intend to address the adverse consequences of this by prohibiting from publication the name of the applicant.

[16] I am satisfied that it is in the interests of justice to prohibit from publication the name of the applicant and matters that may identify him under clause 10 of the second schedule of

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[6] *QDA v EKD* [2021] NZEmpC 139.

the Act. A random online letter selection tool has been used to select the letters for the name of the applicant and it bears no resemblance to his actual name.

Employment relationship problem

[17] OSP was employed by IR for approximately 31 years, between 1992 and 2022.

[18] On 13 January 1992 he was appointed to a permanent role in IR's Child Support unit.

[19] In December 1995 OSP suffered an event which required more than a month off work, psychological assistance, and medication to deal with depression for a period of time.

[20] From 1996 onwards, OSP continued working for IR and was not required to undertake any further duties which involved interactions with members of the public. He would inform his team leaders from time to time that he was unable to perform public facing duties and the reasons why.

[21] In 2017 IR implemented a significant restructuring following a business transformation process. This process involved changes in policy, IT, roles, and processes. A consultation proposal was released to staff in May 2017.

[22] OSP was part of the change management process and was offered a customer service officer (CSO) role in 2017 after his role was disestablished. The CSO role included public contact. OSP said that at the time of accepting the role he felt reassured by what he was told by his team leader that there would continue to be other work which was not customer facing for him to do. Otherwise he said he would not have accepted the role.

[23] It took some years for the area in which OSP worked to be fully transferred to the new START database after January 2018. For that period of time OSP's disability could be accommodated and he continued to undertake work that did not require customer interaction. From about late 2020 IR had discussions with OSP about concerns in continuing to accommodate him with non-customer interaction work when the CSO roles were fully transferred. Medical retirement was proposed informally as a solution from in or about April 2021. From late October 2021 IR said there was no longer any ability to accommodate OSP

with work that did not involve customer interaction as the area in which OSP worked was fully transferred across after Labour weekend 2021. Medical retirement was proposed formally by IR.

[24] OSP said medical retirement was inappropriate because his position was redundant.

[25] After discussions and exploration of any alternatives, IR ended the employment relationship with OSP for reason of medical retirement. This was confirmed in a letter dated 4 August 2022.

[26] OSP says that the dismissal was unjustified because it was not what a fair and reasonable employer could do in all the circumstances, the process was not fair and reasonable, and OSP's circumstances were not considered. Further, that the dismissal breached the provisions of the collective agreement which covered his work. Ms McNamara confirmed at the start of the investigation meeting that discrimination was not pursued as a separate grievance.

[27] OSP seeks a determination that his dismissal was unjust; that he was made redundant; and that redundancy compensation and leave is payable together with compensation for humiliation and loss of dignity.

[28] IR says that the decision to end OSP's employment on medical grounds was what a fair and reasonable employer could have done in all the circumstances, and that OSP was paid a medical retirement payment of 89 days salary, one month's pay in lieu of notice, and the balance of his leave entitlements.

The Authority investigation

[29] The Authority held an investigation meeting on 20 June 2023. At the investigation meeting the Authority heard evidence from OSP and from his team leader at the material time who I shall refer to as "D". The Authority heard evidence from Susan Gillies who is employed as Segment Leader for the Families segment. Ms Gillies has delegated authority from the Commissioner of IR in that role to end an employee's employment on medical grounds. She

was the decision maker in this matter. The Authority also heard from Christopher Thomson who is employed as Group Lead in the Families segment.

[30] At the end of the evidence there was an opportunity for submissions and the Authority then received the application for non-publication and the opposition to that.

The issues

[31] The issue before the Authority is the justification of the decision to medically retire OSP.

The Authority will need to determine in answering that issue the following:

(i) Was OSP, in accepting a permanent CSO role, able to reasonably conclude that he would not be required to perform the duties in the customer service officer role description and/or that a bespoke role would be created for him.

(ii) Once the child support tax area was fully integrated into new database system START was OSP able to perform the full requirements of the role?

(iii) If he was not able to perform the full requirements of the work then could his inability to have customer contact be reasonably accommodated on an ongoing basis by IR.

(iv) Was the ending of OSP's employment with IR properly characterised as a medical retirement or should it have been treated as a redundancy situation?

(v) If OSP is successful with his claim, what remedies is he entitled to?

Was OSP able to reasonably conclude that he would not be required to perform the duties in the customer service officer role description and/or that a bespoke role would be created for him.

[32] In 2017 IR undertook a business transformation program to change its operating model and ways of working. It affected a large number of employees and was intended to create a

more agile organisation built around customer needs. As part of the first stage of the change process employees working in nine roles with distinct tasks were offered or confirmed into an overarching CSO role.

[33] OSP was working in the child support role with distinct tasks. OSP was told that his position was being disestablished from February 2018.

[34] In a letter dated 16 October 2017 from an IR chief people officer, OSP received an offer to appoint him into a new CSO role. Attached to the letter was a copy of the role description that made it clear the purpose of the role was to improve customer experience and compliance. One of the key outcomes was to provide customer service and help customers to "get it right."

[35] OSP was concerned that there was public contact required and about how that would affect him. The letter provided that he could seek independent advice and that if there were aspects of the offer that he wanted to discuss he could raise them with his Leader.

[36] OSP went and talked to his team leader D about the offer and I'll refer to the evidence about those discussions shortly.

[37] OSP accepted the offer of appointment to the CSO role on 1 December 2017 by initialling each page of the letter, the role description and signing an employee acknowledgement and acceptance of the offer. On its face acceptance was unconditional.

[38] As set out earlier, there had been some informal discussion between PSA and IR about OSP and the ending of employment by way of medical retirement from in or about 2021. During that time and when matters became more formal, the PSA referred to promises that OSP would always have a job. When matters became more formal a PSA organiser wrote to IR on behalf of OSP in a letter dated 14 June 2022 and advised about the discussion with the team leader as follows:

> - In 2017 OSP was required to sign an inaccurate job description however there was agreement with his Team Leader "D" that IR would amend OSP's role because of his inability to perform customer facing tasks.

- OSP was never appointed to the full CSO role.

[39] There was further reference by the union organiser in a letter dated 15 July 2022 to IR that verbal agreement had been reached with D that OSP could continue with non-customer facing tasks and that OSP had a bespoke role and was not in fact appointed to the full CSO position. The PSA position was they considered OSP was in a redundancy situation.

[40] The evidence from OSP and D as to what was discussed in 2017 is different.

[41] OSP said that he told D that if he was "put on the phones" he would be gone. He said that D told him the job would not exist in its current form but there would still be work for him to do that was not customer facing. OSP said that there was reference to reports to do and other work and that he may end up in "another segment as a jack of all trades."

[42] D said that he recalled speaking to his manager about the CSO job offer and that they both thought there would be a job for OSP for the foreseeable future. His evidence was that by "foreseeable future" he was thinking in terms of several years. He said that he talked to OSP about ways in which he could take opportunities to "future proof" himself.

[43] OSP said that he was asking D about his future in the new environment on a permanent basis and not a temporary basis. His evidence was that he was reassured by what D said and he signed the letter accepting the offer on that basis.

[44] Ms McNamara submits that OSP reasonably understood from the assurances that he was accepting a permanent role and would not be required to perform the customer facing aspect of the role and not just for a temporary period.

[45] IR looked for any information, when this was raised, that may support there was variation of the role or OSP's view that he had accepted a CSO role that did not require him to perform customer facing work. Nothing was found. D accepted that there was no discussion with OSP about variation of the existing role. Ms Gillies gave evidence that D would not in any event have had delegated authority to agree to such a variation. The letter accepting the offer was unconditional.

[46] There was knowledge by both OSP and D that the CSO role changed the way of work and that it was new and different. It was a change directed to the application of skills and abilities more broadly with a focus on seamless customer service. The IR consultation proposal had been clear that the changes to working in the new way would build over time from the proposed implementation of the process in January 2018 to the full implementation that was proposed to have started in 2020 but was impacted and delayed by COVID. It was intended that skills in working more broadly would be developed before full implementation and the gradual change was deliberate. The transition to START occurred gradually by tax product and child support was the last area to be fully implemented across in October 2021.

[47] That background must be weighed and considered with D's evidence that OSP had a role for the foreseeable future without performing the customer facing aspects. Changes being implemented over time provides context as to why D would have considered for the foreseeable future (several years) OSP could still undertake the non-customer facing aspects of the role.

[48] OSP continued in employment from February 2018 until August 2022. File notes from OSP's then team leader H from December 2020 referred to discussions between her and OSP that work was diminishing for him and some upskilling would be appropriate. The Authority did not hear from H who has since left IR. Ms McNamara in an email dated 22 July 2022 to IR took issue with this file note and the reference to work drying up and said it was re-allocated to other employees prior to and after the move of child support to the START system. A file note dated 10 December 2020 from H records OSP's response to a question about what was going to happen the following year. His response is recorded as:

> He also said that he is not silly and that there may come a time where there is no work left for him here and therefore no job and that would be that.

[49] OSP said that he understood from H that IR's position was that it would not reserve work for him and he was referring to redundancy.

[50] I do not find that the evidence supports that OSP was appointed to a permanent or bespoke CSO role that did not require him to perform customer facing aspects. Rather, for a period of time before child support work was fully transitioned to the START, he was able to still perform work that was not customer facing.

Once the child support tax area was fully integrated into START was OSP able to perform the full requirements of the role?

[51] There is no real dispute that OSP was unable to fulfil the requirement of the CSO position when full transitioned to START.

[52] There had been discussion between OSP and his team leader prior to and in anticipation of the full transition across of child support to START about his medical needs, upskilling and training options. The PSA was involved in some of these preliminary discussions. Some information about medical retirement was provided in or about April 2021 by IR, however it became clear that OSP regarded himself as redundant in his role and did not view medical retirement favourably.

[53] OSP provided a medical certificate in October 2021 that detailed severe symptoms of anxiety when in situations where he has contact with the public on phone or in person. IR explored the possibility of OSP seeing a medical specialist. This is the usual approach in these situations. No further information was provided in addition to the medical certificate. It was expressed by the PSA that IR should already have information on file although if there was it would be dated. The evidence supported that there was psychological assessment in or about 1996. Thereafter OSP consulted his doctor about any issues that arose.

[54] Mr Thomson was at the material time Group Lead from February 2018. The team leader H, reported to Mr Thomson in her role between February 2018 and late 2021. Mr Thomson was aware of the situation with OSP and from time to time gave H advice. Mr Thomson became directly involved in October 2021 after the transition to START. Mr Thomson asked a team leader to put together a list of tasks that could be performed by a CSO to assess whether they all required customer interaction. A review of the work and tasks was duly undertaken.

[55] Between 25 October 2021 and 13 February 2022 OSP suffered an unrelated injury and was on ACC for that period and did not return to work until March 2022.

[56] The review of work and tasks was provided to the PSA by Mr Thomson as an attachment to an email dated 4 February 2022. It shows twenty-nine work items and of those there is only one that does not require phone contact with a customer. Analysts were considering removing that piece of work altogether. The team leader was unable to conclude there was any work item that OSP would be able to action as they all involved an element of customer contact to ensure the whole job was completed.

[57] An email from a new team leader, who replaced H, to Mr Thomson dated 2 March 2022 confirms in discussion with OSP he advised that he could do "none of the work" as it involved some aspect of customer contact.

[58] In conclusion, when the child support tax area was fully integrated into START OSP was not able to perform the full requirements of the role. He was placed on special leave from 26 May 2022 as there was no other work for him to perform and then options were discussed with him.

Was OSP's disability able to be reasonably accommodated?

[59] Ms Hornsby-Geluk refers to statutory and other guidelines, including from case law, against which to assess what is reasonable in respect of accommodations.

[60] Section 104 of the Act provides that an employee is discriminated against, if by reason directly or indirectly of any of the prohibited grounds of discrimination, the employer:

> "..(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by the employer on work of that description are not or would not be dismissed or subjected to such detriment; or
>
> (c) retires that employee, or requires or causes that employee to retire or resign…."

[61] Section 104 is subject to the exceptions in s 106 of the Act and that section refers to s 29 of the Human Rights Act 1993 which provides:

29 Further exceptions in relation to disability

(1) Nothing in section 22 of this Act shall prevent different treatment based on disability where—

(a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or

(b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

(2) Nothing in subsection (1)(b) of this section shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

(3) Nothing in section 22 of this Act shall apply to terms of employment or conditions of work that are set or varied after taking into account—

(a) any special limitations that the disability of a person imposes on his or her capacity to carry out the work; and

(b) any special services or facilities that are provided to enable or facilitate the carrying out of the work.

[62] The Court of Appeal in *Smith v Air New Zealand Limited* considered the requirements under the Human Rights Act 1993 to treat those with disabilities not less favourably unless it was reasonable not to do so.[7] This is not a case in the employment area but concerned a situation where a passenger needed supplementary oxygen when she flew and was required to provide her own extra oxygen on domestic flights and charged for extra oxygen on international flights.

[63] It provides some useful guidance about the reasonableness of a response. The Court of Appeal stated that what is required is "an evaluative analysis of the proportionality or reasonableness of the provider's response."[8]

[7] *Smith v Air NZ Ltd* [2011] NZCA 20.
[8] Above n 7 at [61].

[64] Ms Hornsby-Geluk provided other guidance about reasonable accommodations from the United Nations convention on the rights of persons with disabilities, the Office of the Ombudsman and Employment New Zealand. When all of these are considered an obligation to accommodate a person's disability includes weighing of other factors such as practicality, costs and extent of disruption.

[65] The whole purpose of the CSO role was to provide enhanced customer service and customer contact. Having an organisation built around the needs of the customers was a significant driver for the change process in 2017. The CSO role description supported that.

[66] The Authority heard evidence from Ms Gillies and Mr Thomson about why it was not possible to carve up parts of the CSO role to avoid customer contact after child support had fully transitioned to START. An analysis of the tasks of the role discussed with OSP confirmed that nearly every task required or could require engaging with customers.

[67] OSP referred to the possibility of a special queue relating to prisoners. This has to be considered in the new structure which was intended to reduce the number of work queues. In any event, the evidence supported it would only be a limited amount of work. I could not conclude IR could reasonably be required to accommodate this.

[68] There was consideration as set out in the letter of termination dated 4 August 2020 of redeployment by Ms Gillies. It did not however seem that there were other vacant positions not requiring inbound or outbound voice requirements for which OSP had the necessary skills or experience.

[69] I do not conclude that IR was able to continue to reasonably accommodate OSP's disability.

Was the ending of OSP's employment with IRD properly characterised as a medical retirement or should it have been treated as a redundancy situation?

[70] Ms McNamara submits that OSP's role no longer existed as a result of the full transition of child support to START on Labour weekend 2021 and IR should have applied the management of change framework in the collective agreement. She submits that medical

retirement requires the agreement of both employer and employee and OSP did not seek or agree to that and in fact opposed it.

[71] Both counsel set out the provision of clause 10.1 of the applicable collective agreement. That provides a framework for managing change. Ms McNamara places emphasis on the aspects of the clause that requires IR ensure "that the needs of employees are recognised, and their rights and entitlements are observed."

[72] Change is stated to occur in clause 10.1 when:

- Changes are being made to organisational structures; or
- Employees positions no longer exist; or
- The nature of the work employees do is different; or
- Changes to the location of position(s) need to take place.

[73] There is no definition of redundancy in the collective agreement although I accept as Ms Hornsby-Geluk submits, the definition in *Hale* is often used.[9]

[74] I have not found that OSP accepted a permanent and/or a bespoke CSO role that did not involve customer contact in 2017. His acceptance of the role was unconditional. Customer contact was a key component of the role.

[75] The position of CSO did not change after Labour weekend 2021 but OSP could not perform the requirements of the role once child support had been fully transitioned across to START. The way the work tasks were dealt with in the START database meant that OSP could not continue to be accommodated in the way that he had been by having work separated out to enable him not to have customer contact.

[9] *G N Hale & Sons Ltd v Wellington Caretakers IUW* [1991] 1 NZLR 151 (CA) at [158].

[76] Ms McNamara says that OSP should receive redundancy compensation. I do not conclude this is a redundancy situation. That is because the CSO position still remains and is not surplus to requirements.

[77] OSP was unable to perform the CSO role because of a medical condition. Clause 4.6 of the collective agreement provides for ending employment on medical grounds:

> Where Inland Revenue approves that employment is to end due to medical reasons, the employee will be granted 65 days pay in addition to any outstanding annual leave. This clause does not apply if the employee is to receive a greater entitlement in accordance with any grand parented entitled in Appendix 1.

[78] OSP was entitled to a greater entitlement and that was set out in appendix 1 (g) of the collective agreement. That clause provided:

> An employee who has established eligibility to retire on medical grounds shall be granted a minimum of 65 working days' retiring leave regardless of length of service, with the exception that an employee with more than 25 years' service may be granted additional leave in accordance with (c) above.

[79] Ms McNamara said that agreement to be medically retired was required. I accept that often there will be a meeting of the minds about medical retirement however the clauses which I set out above do not expressly require agreement. As Ms Gillies said in her evidence there was some benefit to OSP in treating the situation as a medical retirement to enable access to a medical retirement payment. OSP received 89 days salary because of the leave accrual for those eligible to retire in (c) of appendix 1.

[80] I find that a fair and reasonable employer could have ended the relationship on the basis of medical retirement. The process was not unfair. IR was responsive and communicative with the PSA and issues raised were addressed over a period of about ten weeks. There had been reference to a possibility of medical retirement informally from early 2021. The main issue in the communication over this period on behalf of OSP was whether the relationship should end by way of redundancy or medical retirement.

[81] OSP was disappointed that there was no farewell function for him. Ms Gillies said that whilst the medical retirement process was undertaken OSP was on special leave for ten weeks

and she did not feel a farewell morning tea seemed appropriate. Further, that she had heard he did not want a farewell. OSP did not agree this was said. It is unfortunate after many years of service OSP was disappointed about this. I do not find however that the fact there was no farewell function vitiates an otherwise justified dismissal.

[82] There is nothing further I can do to assist OSP.

Costs

[83] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Hornsby-Geluk may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Ms McNamara 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.

[84] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[10]

Helen Doyle
Member of the Employment Relations Authority

[10] For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1