

**NOTE: This determination  
contains an order prohibiting  
publication of certain  
information at paragraph [56]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 444  
3251139

BETWEEN	LEESA ROBINSON Applicant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT TE MANATU WHAKAHIATO ORA Respondent

Member of Authority:	Claire English
Representatives:	Leesa Robinson in person Hamish Kynaston, counsel for the Respondent
Investigation Meeting:	23 and 24 April 2024 in Wellington
Submissions received:	5 June 2024 from Applicant 15 May and 19 June 2024 from Respondent
Determination:	24 July 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant Ms Leesa Robinson, was employed by the respondent (MSD). Ms Robinson became aware of a situation where she became concerned a colleague had acted inappropriately. Ms Robinson raised her concerns with her secondment manager, on the grounds that she was acting on behalf of her female colleagues. Ms Robinson says this was a protected disclosure, and raises grievances that MSD did not report back to her in a timely or detailed way about this matter.

[2] Ms Robinson applied for another role within MSD. Despite her manager at the time indicating that he was not entirely comfortable being a referee, Ms Robinson provided him as a referee. When she was not successful in obtaining the role she had applied for, she raised concerns that she had suffered retaliation. She asked for mediation in a particular form, to which MSD agreed at its own cost. Ms Robinson says this took too long to organise, and is a further breach by MSD.

[3] Ms Robinson now raises claims in the Authority that she has suffered retaliation for making a protected disclosure under the Protected Disclosures (Protection of Whistleblowers) Act 2022 (Protected Disclosures Act) or alternatively, an unjustified disadvantage; and that MSD has acted in breach of its duties of good faith.

[4] MSD says that the Protected Disclosures Act does not apply, and even if it did apply, MSD's actions were appropriate. Likewise it rejects that any unjustified disadvantage occurred. MSD further says that at all times it has acted in good faith in attempting to resolve issues with Ms Robinson.

[5] In addition, MSD raises a counter-claim that Ms Robinson has received an overpayment of wages amounting to \$1,530.82 gross or \$1,118.14 net, which she should repay.

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

[6] For the Authority's investigation written witness statements were lodged from Ms Robinson and her friend Ms Rachel Shepherd. Witness statements were lodged on behalf of MSD by Ms Gagau Annandale-Stone (Regional Commissioner for Social Development, Wellington; Ms Natalie Manuel (HR Consultant); Ms Sharlene Cassidy (Senior HR Advisor, Sensitive Events Team Member); Mr Andre Tuimaseve (Ms Robinson's secondment manager); Mr Shane Carter (interviewer); and Mr Jamie Rosemergy (Ms Robinson's original manager).

[7] All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **The issues**

[9] The issues requiring investigation and determination were:

- (a) has Ms Robinson suffered retaliation for making a protected disclosure under the Protected Disclosures Act or alternatively, an unjustified disadvantage;
- (b) has MSD acted towards Ms Robinson in breach of its duties of good faith;
- (c) If MSD's actions were not justified what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act;
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Robinson that contributed to the situation giving rise to her grievance?
- (e) Should Ms Robinson be ordered to repay an overpayment of wages of \$1,530.82 gross;
- (f) Should either party contribute to the costs of representation of the other party.

## **Background**

[10] Ms Robinson's first claim is a claim in the alternative, that is, she was either retaliated against because of making a protected disclosure, or she suffered an unjustified disadvantage from the actions of MSD once she had raised issues relating to her colleagues<sup>1</sup>.

[11] Ms Robinson became aware that three or four of her colleagues had experienced what Ms Robinson considered was inappropriate conduct. Ms Robinson was not aware of this conduct directly, but was made aware of it second-hand by way of comments from her colleagues in the office after the fact. She says that she sought permission to raise the matter on their behalf with her manager, Mr Tuimaseve. They agreed, and she did so.

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<sup>1</sup> As set out in paragraphs (1)(a) and (b) of her statement of problem.

[12] Ms Robinson then sought several times over the next few weeks to “follow up” with Mr Tuimaseve, saying that this was a matter of urgency, and she sought “successful action” from Mr Tuimaseve. Mr Tuimaseve was unable to give Ms Robinson the updates she sought, so on 27 September 2022, Ms Robinson lodged a sensitive event report.

[13] It is apparent from both Ms Robinson’s written and in person evidence that what she wanted was to be kept regularly informed about progress MSD was making to investigate and resolve her colleagues’ claims, and that she was seeking to know what steps were being taken by MSD in relation to the colleague she believed to be at fault. It is also clear from the timelines given by Ms Robinson, where she says that she followed up with Mr Tuimaseve some 6 times in a two month period before filing a sensitive events claim, that she expected this to occur promptly if not sooner.

[14] Ms Robinson was clear that she was raising concerns on behalf of her colleagues, not about her own experience.

[15] Ms Gagau Annandale-Stone was Mr Tuimaseve’s manager. Her evidence was that she was the person responsible for speaking with Ms Robinson’s colleagues and managing their concerns. In November 2022, Ms Annandale-Stone met informally with Ms Robinson to advise her of the action she had taken at a high level. She also told Ms Robinson that it was for her (not Ms Robinson) to work directly with the people involved, and she had not been advised Ms Robinson was speaking on behalf of her colleagues.

[16] At the investigation meeting, Ms Annandale-Stone explained the complainants had told her that Ms Robinson was not acting on their behalf, and they were not overly interested in her views. As may be apparent from the above, the complainants themselves did not update Ms Robinson, were not further involved with Ms Robinson, and did not provide any evidence or information to the Authority.

[17] After this meeting with Ms Annandale-Stone, Ms Robinson decided to close her sensitive event claim. She also raised with Ms Annandale-Stone her feelings of stress. Ms Annandale-Stone said that well-being leave could be arranged if Ms Robinson formally asked for this. Ms Robinson did so, Ms Annandale-Stone approved the leave, and Ms Robinson took it.

[18] However, this did not mark the end of Ms Robinson's concerns. Ms Robinson says that she "noticed a negative shift" in her relationship with Mr Tuimaseve. She says that he met with her less often, and was less supportive. She says that her desk was moved while she was on sick leave<sup>2</sup>, her team were not adequately advised about her sick leave in her absence, by not meeting with her regularly enough, Mr Tuimaseve "deprived me of regular feedback and evaluation", and she objects to a change in working-from-home policies which she says was a change made by Mr Tuimaseve.

[19] In March 2023, Ms Robinson was advised that her secondment in Wellington would end on its stated date, and that her "home role" in Whangarei was open for her to return to. Ms Robinson decided that she would not return to Whangarei for personal reasons, and started looking for jobs in Wellington. She explained at the investigation meeting that she had decided to move to Wellington, and was not willing to move back to Whangarei in the short term to continue her employment and earnings while she looked for a job in Wellington. This was not a decision forced on her by MSD, which held her original role open for her in Whangarei and repeatedly made it clear that it was hers to return to.

[20] Ms Robinson began applying for roles in Wellington both in MSD and in other agencies. On 19 May 2023, Ms Robinson and Mr Tuimaseve had a conversation about Mr Tuimaseve providing a reference. Mr Tuimaseve told Ms Robinson although he considered her work performance good, he "would need to be honest" about "team culture/fit, attitude and ability to follow instructions, and her leave record". Ms Robinson asked for a meeting to discuss this. Mr Tuimaseve agreed and a meeting was scheduled for 26 May 2023.

[21] In the interim, Ms Robinson was asked if Mr Tuimaseve would provide her with a reference for a role she had interviewed for within MSD. She told the reference checker, Mr Carter, that he would and Mr Carter then contacted Mr Tuimaseve, and also Ms Robinson's previous manager in Whangarei Mr Jamie Rosemergy.

[22] Following these reference checks, Ms Robinson was not offered the role. Mr Carter gave evidence at the investigation meeting. He said that both Mr Tuimaseve and Mr Rosemergy had given overall positive references for Ms Robinson. However, he considered that they had both identified similar areas for development, and those areas

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<sup>2</sup> Ms Robinson was hospitalised unexpectedly for unrelated reasons in January 2023.

of development were “crucial” elements for the role he was appointing into. Therefore, he decided not to appoint Ms Robinson to the role.

[23] Ms Robinson claims that the reference given by Mr Tuimaseve was “whistleblowing retaliation<sup>3</sup>” for the complaints she had raised. She had no concerns with Mr Rosemergy’s reference.

### **Claim of Retaliation**

[24] When considering this claim, Ms Robinson’s position is that Mr Tuimaseve retaliated against her for filing a sensitive events claim by giving her a reference that prevented her from being appointed to another role.

[25] I will first consider the reference. Ms Robinson was given two references, one by Mr Tuimaseve as her secondment manager and one by Mr Rosemergy as her “home” manager.

[26] An employer does not owe any duty to an employee to provide a reference. Employers will often expressly agree to do so, but there is no general obligation for an employer to provide a reference.

[27] In this instance, both Mr Rosemergy and Mr Tuimaseve agreed to provide Ms Robinson a reference. However, neither of them went so far as to agree to provide a “positive” reference, or to provide a reference that would ensure Ms Robinson was offered the role she was hoping for. Mr Rosemergy indicated he agreed to provide an honest reference, and Ms Robinson takes no issue with this. Mr Tuimaseve said something slightly different, in that he told Ms Robinson he was reluctant to provide her with a reference, and while could and would speak well of her work ethic, he would be honest about what are often referred to as “soft skills” such as “cultural fit”.

[28] My view is that, in indicating to Ms Robinson that they would provide a reference, both Mr Rosemergy and Mr Tuimaseve were obliged to provide her with an honest and accurate reference. This is consistent with their general obligations at law and does not guarantee any certain outcome to Ms Robinson as a result.

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<sup>3</sup> At page 5, paragraph (g) on that page of Ms Robinson’s witness statement.

[29] Both references were similar. The notes from Mr Rosemergy's reference show that he was complimentary about Ms Robinson's work ethic, honesty, commitment, and punctuality. Mr Rosemergy also made other comments about Ms Robinson's way of working, including that she:

- a. Can be like a steam train and needs to temper this;
- b. Gets frustrated when things [are] not progressing as she would like them to;
- c. Can be impatient to makes things happen;
- d. Was either loved or people were weary [sic] of her; and
- e. Is a strong personality and not good at backing down<sup>4</sup>.

[30] Mr Tuimaseve's evidence was that when he spoke with Mr Carter, he indicated that:

- a. Leesa was creative and clever, good at thinking outside the box, brings competitors together and had great external relationships;
- b. Leesa's strong personality clashed with people at times;
- c. There were multiple meetings where I would be giving direction that Leesa did not agree with which resulted in her arguing with me;
- d. Leesa did not seem to be able to resolve issues without my intervention<sup>5</sup>.

[31] Neither of these references could be said to be negative. It is significant that the reference checker, Mr Carter, did not describe them as such, but described them as being positive and balanced. There is also no indication that Mr Tuimaseve was acting in a retaliatory or untoward manner or that any of his comments were directed at Ms Robinson's raising of a complaint on behalf of her colleagues. The evidence indicates that both managers did what they told Ms Robinson they would do, at her request. They gave an honest reference, covering both strengths and weaknesses. Ms Robinson cannot expect more.

[32] Having received references, Mr Carter was also fully entitled not to appoint Ms Robinson. His evidence was that he made a careful judgement about this, as it related to the key elements of the role he was hiring for. Ms Robinson cannot expect more

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<sup>4</sup> Quotes taken from the second page of Mr Carter's interview notes.

<sup>5</sup> Paragraphs 46, 48, 49, and 50 of Mr Tuimaseve's witness statement.

from Mr Carter either. She was simply not entitled to be appointed to the role for which she interviewed.

[33] As will be apparent from the above, I do not accept that in giving the reference that he did, Mr Tuimaseve was acting in a retaliatory manner, or in any manner not consistent with his obligations. It is also significant that Mr Rosemergy's reference was very similar to Mr Tuimaseve's reference, yet Ms Robinson takes no issue with it, even where Mr Carter's evidence was that it was the combined feedback from both managers that he found significant. This tends to undermine Ms Robinson's claim that Mr Tuimaseve was acting in a "retaliatory" manner.

[34] Having found this, my view is that there has been no breach by MSD of the protections from retaliation set out in the Protected Disclosures Act. In order to succeed in such a claim, Ms Robinson would need to establish that she has been subject to a detriment or disadvantage in circumstances where other employees in a similar situation are not subject to such treatment, or that she has been refused the same terms of employment or conditions of work and opportunities that are available for other employees in substantially similar circumstances<sup>6</sup>. Ms Robinson was never entitled to be appointed to the role she applied for and nor was she entitled to a reference that would ensure she was appointed to any particular role. She has suffered no detriment or disadvantage by way of the reference/s she received.

[35] Having found that no retaliatory conduct exists, Ms Robinson's claim that MSD breached its obligations to her under the Protected Disclosure Act must fail.

[36] Her claim in the alternative, that she suffered an unjustified disadvantage, must also fail, for the same lack of disadvantage. Section 103 of the Act defines an unjustified disadvantage as where an employee's employment or one of more of the conditions of employment is affected to the employee's disadvantage by an unjustified action of the employer. In the context of Ms Robinson's claim, she has suffered no unjustified disadvantage from the actions of Mr Tuimaseve. His actions in giving her an accurate reference were justified actions, and in addition Ms Robinson has suffered no disadvantage, as she was never entitled to receive a "positive" reference or a reference that ensured she was appointed to a particular role.

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<sup>6</sup> As set out in s 21 of the Protected Disclosures (Protection of Whistleblowers) Act 2022.

[37] In reaching this conclusion, I must also note that I am not fully persuaded that Ms Robinson could properly bring a claim under the Protected Disclosures Act. In raising her claim that she suffered prohibited retaliation, Ms Robinson relies on her raising of a Sensitive Event claim with MSD, as well as a more general complaint relating to what she understood to be inappropriate conduct from a colleague towards other colleagues. The evidence shows that at the time of raising these complaints with MSD, Ms Robinson did not refer, even layperson's language, to the idea that this was a "protected disclosure" or that she was a "whistleblower".

[38] Rather, she followed the procedure for a Sensitive Event, and a personal grievance claim and she consistently used that language. Section 11 of the Protected Disclosures Act clarifies that protections for disclosures apply where the disclosure is made in accordance with any internal procedures and that there should be substantial compliance with those procedures. There is no evidence before me that Ms Robinson acted in substantial compliance with MSD's policies for making a protected disclosure. She used other methods to raise other types of claims, and MSD responded accordingly to the claims as raised at the time.

[39] In addition, I am not persuaded that the concerns Ms Robinson raised were of a such a type and nature that they fit the test of "serious wrongdoing" required by s 10 of the Protected Disclosures Act. That section refers to offences, serious risks to the maintenance of the law, actions that are unlawful or corrupt, or are grossly negligent or are gross mismanagement.

[40] Ms Robinson raised concerns about what she perceived to be inappropriate actions of a colleague based on second-hand reporting to her. Those actions do not fall under any of the categories set out in s 10 of the Protected Disclosures Act<sup>7</sup>. The essence of Ms Robinson's concerns was that she did not receive what she considered to be adequate responses or reporting back about concerns she had raised on behalf of others.

[41] The evidence is clear that MSD, through one of its senior leaders, Ms Annandale-Stone, took action to respond to the underlying situation and to the complainants themselves. There was reporting back to Ms Robinson in time, however,

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<sup>7</sup> I acknowledge that Ms Robinson did suggest that the colleague about whom she complained had some contact with members of the public, however, I am not aware of any suggestion that would indicate a "serious risk to public safety" as required by the section.

the timing and detail (or lack thereof) of any reporting back to Ms Robinson was occasioned at least in part because the complainants did not report back to Ms Robinson themselves and did not authorise Ms Annandale-Stone to do so either. This is not a situation of the type and seriousness anticipated by the Protected Disclosures Act.

[42] For all the above reasons, Ms Robinson's claim is not made out. No orders are made.

### **Was there a Breach of Good Faith?**

[43] I must now consider Ms Robinson's claim that there was a breach of good faith. This is a claim that, after Ms Robinson had raised a personal grievance claim with MSD on 29 May 2023, there was undue delay and a lack of active and constructive communication.

[44] This claim stems from discussions between MSD and Ms Robinson about the potential resolution of her personal grievance claim. Ms Robinson had requested that MSD engage in mediation and had specifically requested that the mediation be conducted in accordance with tikanga, with a specialist provider, not with Mediation Services. MSD agreed to attend a tikanga-based mediation with Ms Robinson. Evidence was given by MSD that this required time to arrange.

[45] Ms Manuel was the Human Resources Consultant assigned to liaise with Ms Robinson about her personal grievance. After meeting with Ms Robinson on 12 June 2023, Ms Manuel was able to indicate MSD's willingness to engage in tikanga mediation. She gave evidence that this took time to arrange, as she had to get the necessary approvals from within MSD, locate a suitable provider, and liaise with them as to what dates they would be available to conduct such a mediation prior to going back to Ms Robinson. During this time, there was also correspondence with Ms Robinson about her grievance and other matters such as leave, the provision of a written reference (which Ms Robinson declined), and the ending of her secondment, including that MSD agreed to extend her period of employment by two months.

[46] Ms Robinson says during this time she was experiencing stress, and refers to her decision to resign and stay in Wellington rather than return to her home role in Whangarei. She also critiqued Ms Manuel for providing further information in email correspondence about ways to progress her grievance and potential options for Ms

Robinson to consider, on the grounds that this further information was not discussed at their in person meeting.

[47] Ms Robinson says that the time it took to get to mediation and the lack of what she considered to be suitable updates was an undue delay sufficient to amount to a breach of good faith. In considering this, I am mindful of the fact that the delay, such as it was, in arranging mediation was as a direct response of the special type of mediation Ms Robinson had requested (the evidence was that MSD even went as far as engaging the very person that Ms Robinson put forward as a suggested provider). Having received exactly the type of special accommodations that she had asked for, Ms Robinson remains unsatisfied with how long it took to make these special arrangements and says that this amounts to a breach of good faith. I am not persuaded that any delay occurring was undue in all the circumstances, or that it was of such a nature to amount to a breach of good faith.

[48] In reaching this conclusion, I also have regard to the communications from Ms Manuel that Ms Robinson was also unsatisfied with. These were thoughtful, substantive, and constructive. Having received responsive and meaningful communication from MSD in a way entirely consistent with its duty to be active, constructive, responsive, and communicative, Ms Robinson's criticism that the information being shared with her was somehow inconsistent with the prior face to face meeting is not a fair one.

[49] I find that no breach of good faith is made out. No orders are made.

### **Overpayment**

[50] MSD is requesting that Ms Robinson be ordered to repay a wages overpayment of \$1,530.82 gross. This overpayment came about due to the timing of Ms Robinson's resignation and last day of work. Ms Robinson effectively received an additional payment as her resignation was not processed in time for the next pay run after her last day of work to be cancelled/stopped.

[51] This was a mistake and there is no indication that Ms Robinson was entitled this money which is pay for the fortnight after her last day of employment.

[52] Ms Robinson states that she disputes this claim, on the grounds that “according to legislation, overpayments are to be collected within two months and by agreement”.<sup>8</sup> By legislation, Ms Robinson clarifies that she is referring to the Wages Protection Act 1983. She further states that repaying this amount would cause her financial hardship, although she does not say how.

[53] The Wages Protection Act 1983 sets out (at s 6(2)) requirements for how and when an employer may make deductions from an employee’s normal wages. This is not such a case. Ms Robinson is no longer an employee of MSD, and MSD does not seek to make deductions from Ms Robinson’s wages. It seeks to recover a debt from her. This means that there is no applicable time limit which would prevent MSD from seeking recovery of a debt from Ms Robinson in the form of a legal claim against her for money owed as it does now.

[54] Ms Robinson does not dispute MSD’s explanation or deny that the money was improperly paid to her. Her defence to this claim is based on a technical protection which does not apply. Although she mentions that repaying this amount would cause her financial hardship, she gave no evidence as to how that might be particularly given that it is a relatively small sum and her evidence was that she is in full time employment.

[55] I accept that the money is properly owed to MSD, and it should be repaid. However, I take the view that Ms Robinson should be required to repay the net amount of \$1,118.14 to MSD as this is what she received and MSD is arguably a better position to recover the tax proportion from the Inland Revenue. Orders are made accordingly.

### **Non-Publication**

[56] Ms Robinson has also sought that her identifying details be kept confidential under the Protected Disclosures Act. She submits that this is necessary due to the sensitivity of the information she disclosed, and there is an on-going risk of retaliation and stigma associated with whistle-blowing generally.

[57] MSD submits that the Authority does not have powers under the Protected Disclosures Act, although it acknowledges the general non-publication powers available to the Authority under its own Act. MSD opposes the application for non-publication, saying it does not meet the high threshold, which the court has expressed

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<sup>8</sup> Ms Robinson’s submissions in response to paragraph 18 of the respondent’s submissions.

as one that “generally involves pointing to specific adverse consequences which would justify a departure from the principles of open justice”.<sup>9</sup> In addition, MSD seeks orders prohibiting the publication of identifying details about the complainants, which Ms Robinson also supports.

[58] I have no hesitation in granting non-publication orders in relation to the complainants. They did not give evidence, the exact details of their complaints were not provided to me by either party, and are not necessary for Ms Robinson’s case to be properly understood. Their names and information about them and their complaints are subject to a non-publication order and this determination has been written accordingly.

[59] I have also considered Ms Robinson’s application for non-publication orders (which were only clarified at the investigation meeting). In her submissions, she refers to the importance of safeguarding whistleblowers to encourage the reporting of misconduct that could affect public interest. She has not provided any evidence relating to the impact on herself personally, or why non-publication orders might be needed in relation to her personal grievance claim.

[60] The starting point is that of open justice. There is no good reason to depart from this. Concerns about the protection of other persons involved and the need to protect whistleblowers generally can be, and have been, dealt with by way of the specific non-publication orders already made. There is no evidence before me relating to Ms Robinson’s personal grievance claim that suggests more is needed. Accordingly, no further orders are made in respect of Ms Robinson.

### **Orders**

[61] Ms Robinson’s claims of retaliation, unjustifiable disadvantage, and breach of good faith are not made out. No orders are made.

[62] Leesa Moira Robinson is ordered to pay to The Chief Executive of the Ministry of Social Development Te Manatu Whakahiato Ora within 28 days of the date of this determination the sum of \$1,118.14 in repayment of an overpayment made to her.

### **Costs**

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<sup>9</sup> *Chief Executive of New Zealand Defence Force v Darnley* [2021] NZEmpC 40.

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

[64] If the parties are unable to resolve costs, and an Authority determination on costs is needed, MSD may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Robinson will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[65] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>10</sup>

Claire English  
Member of the Employment Relations Authority

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