IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 154
3021851

	BETWEEN	ERIN ANDREW Applicant
	A N D	ARMOURGUARD SECURITY Respondent

Member of Authority:	Peter van Keulen
Representatives:	Chrissy Gordon, Advocate for Applicant Diana Hudson, Counsel for Respondent
Investigation Meeting:	18 July 2018 at Christchurch
Submissions Received:	18 July 2018 for Applicant 18 July 2018 for Respondent
Further Documents Received:	19 July 2018
Date of Determination:	19 October 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Erin Andrew worked for Armourguard Security from 14 February 2006 until 7 April 2017. During this time, she worked solely at the Papanui site of Ministry of Social Development (MSD) as a security officer.

[2] In early April 2017, MSD requested that Ms Andrew be removed from the Papanui site. Ms Andrew then commenced working at the Pages Road site of MSD but MSD subsequently asked for her to be removed from that site and not assigned to any MSD sites.

[3] Over the course of the next few weeks Ms Andrew took sick leave and then when she returned to work she was rostered to work on shifts consisting of less hours and a different shift pattern than she had previously been working. In response to this and the events since early April 2017, Ms Andrew resigned.

[4] Ms Andrew says Armourguard was not open and communicative with her, failing to consult correctly over the issues that affected her work. Specifically she says Armourguard:

(a) Was not communicative around her removal from the MSD sites;

(b) Was not communicative around the hours of work available resulting in a unilateral variation to her hours of work; and

(c) It offered her hours of work that it knew she could not undertake.

[5] Based upon these allegations, Ms Andrew raised personal grievances for constructive dismissal arising out of her resignation and unjustified action causing disadvantage for the unilateral variation to her hours of work.

[6] Armourguard denies that it acted unjustifiably or was responsible for Ms Andrew's resignation such that it is liable for an unjustified dismissal. It says the decision to remove Ms Andrew from MSD sites was MSD's and Armourguard had no choice but to implement it. In the course of effecting this they dealt with Ms Andrew with respect and empathy attempting to find alternatives to ensure she was able to remain a valued employee of Armourguard.

The issues

Constructive dismissal

[7] The issues to be resolved in respect of the constructive dismissal claim are:

(a) Was Ms Andrew dismissed, applying the test for constructive dismissal; and

(b) If so, was the dismissal justified, with the onus resting on Armourguard to show its actions were justified in line with the test for justification and the duty of good faith set out in the Employment Relations Act 2000 (the Act)?

Unjustified action causing disadvantage

[8] The issues to be resolved in respect of the unjustified disadvantage claim are:

(a) Did Armourguard unilaterally alter Ms Andrew's hours of employment;

(b) If so, did this cause disadvantage to Ms Andrew's employment; and

(c) If so, were Armourguard's actions justifiable, again relying on the test for justification and the duty of good faith set out in the Act?

Remedies

[9] If Ms Andrew is successful with either claim I must then consider what remedies, if any, she is entitled to. If she is entitled to any remedies, I must then consider whether she contributed to her grievances in such a way that I should reduce any remedies that I award.

Constructive dismissal

[10] Constructive dismissal is a personal grievance for unjustified dismissal where an employee has resigned but says the circumstances giving rise to that resignation are such that the resignation should be treated as a dismissal.

[11] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*[1] the Court of Appeal held that the circumstances that might give rise to a constructive dismissal include, but are not limited to, resignations where:

(a) An employer gives an employee a choice between resigning or being dismissed;

(b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

[1] [1985] 2 NZLR 372 (CA) at 374-375

(c) A breach of duty by the employer causes an employee to resign.

[12] In this case, Ms Andrew asserts that her resignation arose because of circumstances that fit within the second and third limb of *Woolworths*.

Course of conduct

[13] Ms Andrew says that Armourguard's actions in failing to consult with her over the changes to her role including the hours of work and then unilaterally imposing new conditions on her, which it knew she could not accept, evidences a course of conduct which Armourguard had deliberately undertaken to cause her to resign.

[14] I do not need to analyse this aspect of Ms Andrew's claim in detail, as I am satisfied from the evidence I heard from Armourguard that it did not want Ms Andrew to resign and it did not act with the intention of causing her to resign. In fact, it wanted to keep Ms Andrew employed but it felt it was compelled to change Ms Andrew's conditions of employment because its contractual relationship with MSD meant it had no choice.

[15] The circumstances leading up to Ms Andrew's resignation did not amount to a course of conduct by Armourguard that had the deliberate and dominate purpose of coercing her to resign.

Breach of duty

[16] In *Wellington etc Clerical Workers etc IUOW v Greenwich*[2] the Court, when discussing constructive dismissal arising out of a breach of duty by an employer, stated:

> It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[17] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*[3]. The Court of Appeal stated at [172]:

> In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer.

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[2] [1983] ACJ 965
[3] [1994] 2 NZLR 415 (CA)

> To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[18] Therefore, in order to determine if Ms Andrew has been constructively dismissed I must consider:

(a) Was there a breach of duty by Armourguard;

(b) Was that breach of duty sufficiently serious – repudiatory or dismissive – such that it was reasonably foreseeable that there was a substantial risk that Ms Andrew might resign in response to that; and

(c) Did Ms Andrew resign in response to that breach of duty?

What is the obligation that Ms Andrew alleges that Armourguard breached?

[19] Ms Andrew's claim has many similarities with *Allied Investments Limited v Sharon Guise*[4], where Judge Ford stated at paragraph [56]:

> I perceive Ms Boulton's submission in this regard to be the type of breach of duty contemplated by the Court of Appeal in the *Auckland Electric Power Board* case when it was stated that an employer has an obligation not to act in a manner likely to destroy or seriously damage the relationship of trust and confidence; the obligation now embodied in the duty of good faith under s 4 of the [Employment Relations Act 2000]. The thrust of Ms Bolton's submission was that, in breach of those obligations, Allied carried out no investigation into the two incidents that allegedly caused CPIT to demand Ms Guise's removal from the site and Ms Guise was given no opportunity to have any input into the CPIT decision before it was acted upon by her employer.

[20] The breach Ms Andrew complains of is a breach of the duty of good faith, for reasons similar to those found to amount to a repudiatory breach in *Allied Investments.* A simple proposition, that is clear from s 4 of the Act, but also drawn from *Allied Investments*, is that the duty to act in good faith, which includes being active and constructive and responsive and

[4] [2015] NZEmpC 181

communicative, is an obligation imposed upon Armourguard. This obligation extends to meeting the statutory obligations set out in s 4 of the Act.

[21] The complicating factor for Armourguard and Ms Andrew is that the employment relationship was a tripartite one – whilst employed by Armourguard Ms Andrew effectively worked for MSD and was subject to MSD instruction. And Armourguard was subject to terms and conditions controlling the commercial relationship between it and MSD, so that when MSD instructed Armourguard that it no longer wanted Ms Andrew on site, Armourguard was compelled to act on this instruction.

[22] However, what is clear from *Allied Investments* and other Employment Court decisions such as *Workforce Development Limited v Hill*[5] is that the tripartite arrangement does not relieve an employer from its statutory obligations under the Act – to allow this would be to allow a party to contract out of the Act, which it cannot do[6].

Did Armourguard breach the obligation to act in good faith?

[23] In March 2017, MSD raised concerns with Armourguard over operational issues. Armourguard says these issues arose because Ms Andrew had not adapted to changes implemented to the security processes arising out of the Papanui office locating to a new site. The previous site had specific issues, which had required a bespoke security process. The new site did not have any of these issues and the appropriate security processes were Armourguard's standard operating procedures.

[24] Armourguard attended three meetings on site with MSD and Ms Andrew to address the issues. Despite these meetings the issues were not resolved. It appears to me that part of the problem was that neither MSD nor Armourguard were consistent in their requirements of the security officers. Also, they were not clear about what it was that Ms Andrew, in particular, was alleged to be doing wrong in the new office security set up.

[25] Whilst Armourguard's actions in terms of how it dealt with MSD's concerns and Ms Andrew's adherence to the standard operating procedures has not been put in issue, it is my view that Armourguard did not fulfil its obligation to act in good faith during this time. Armourguard failed to properly investigate and understand what was occurring and it failed to

[5] [2014] NZEmpC 174.
[6] Section 238 of the Act.

communicate effectively with Ms Andrew so that she could understand what was in issue and what the expectations were of her.

[26] The issues with the new office security requirements then came to a head in early April 2017, culminating in MSD advising Armourguard that it no longer wanted Ms Andrew on site at the Papanui office. MSD informed Armourguard of this on 6 April 2017.

[27] On the evening of 6 April 2017, Gary Lee-Taylor of Armourguard called Ms Andrew and told her that she was not required to attend the Papanui site. Mr Lee-Taylor also told her to attend a meeting the next day at Armourguard's Christchurch office. It is clear from Ms Andrew's evidence that no explanation was given to her in this call about why MSD had asked for her to be removed from the Papanui site nor was any information given to her about what might happen next except that she was to attend the meeting.

[28] Ms Andrew then met with Mr Lee-Taylor and Stephanie Rosenbrock on Friday, 7 April 2017. Ms Andrew was told she would no longer be working at the Papanui site for MSD. When Ms Andrew asked why, neither Mr Lee-Taylor nor Ms Rosenbrock was able to tell her nor did they offer to find out; Ms Andrew was told that everyone moves around the sites and she should not worry, it was not a "biggy". The conversation was then directed at placing Ms Andrew at a new site. She was told she could work at the Pages Road site for MSD for four days, covering absence and then possibly work at the Shirley site.

[29] In terms of Ms Andrew's removal from the Papanui site of MSD there is a clear failing to act in good faith. Armourguard simply acted in response to MSD's instruction. It did not investigate the concerns or even discuss the MSD instruction to remove Ms Andrew from site. It did not discuss this sufficiently with Ms Andrew and give her an opportunity to respond to the concerns before she was removed. I accept that it may have been difficult to accommodate both MSD's instruction to remove Ms Andrew and the obligation to consult and discuss this with Ms Andrew before it was implemented but this could have been done by a temporary suspension or temporary removal from the Papanui site pending investigation, discussion and then possible resolution.

[30] Then, in the week commencing Monday, 10 April 2017, Ms Andrew worked at the Pages Road site of MSD for four days.

[31] On Thursday 13 April 2017, MSD advised Armourguard that Ms Andrew was to be removed from all MSD sites. Ms Rosenbrock called Ms Andrew that evening and told her she had been stood down from all MSD sites. No further explanation was provided to Ms Andrew.

[32] Again there is a complete failing by Armourguard to fulfil its obligation to act in good faith – in short it failed to investigate, consult and consider Ms Andrew's views before it removed Ms Andrew from the Pages Road site.

[33] Continuing on, Ms Andrew did not work on Friday, 14 April 2017, as that was a public holiday. Then, over the weekend, Ms Rosenbrock sent a roster through to Ms Andrew with new roles for the week commencing Tuesday 18 April 2017 (Monday 17 April 2017 being a public holiday). These new roles consisted of four hour shifts on each week day with some of the shifts covering early and late evening work, which clashed with Ms Andrew's childcare commitments.

[34] This also amounts to a breach of good faith. The obligation to be active and constructive and responsive and communicative means Armourguard should have engaged more fully with Ms Andrew over roles that might be available for her, in an effort to understand what might work for both Ms Andrew and it in terms of replicating or matching the shift pattern that she had worked regularly for a number of years.

[35] When Ms Andrew considered the new roster over the weekend, she became upset and anxious, having what she described as a "total meltdown".

[36] On Tuesday 18 April 2017, Ms Andrew went to see her GP and was put on sick leave from 18 April 2017 until 26 April 2017.

[37] On Wednesday 19 April 2017, Ms Andrew then called Armourguard in a distressed state. She was unable to speak to Mr Lee-Taylor as he was on leave but a meeting was arranged with Alan Wicks, Armourguard Central & Southern South Island Regional Manager for 19 April 2017.

[38] The evidence about Ms Andrew's meeting with Mr Wicks was slightly conflicting. Mr Wicks said he discussed what he understood to be the reasons for Ms Andrew's removal from MSD sites with Ms Andrew. Ms Andrew said Mr Wicks was not able to tell her why

she was removed from the MSD sites; she said he simply undertook to speak to MSD to find out what went wrong and try and sort things out.

[39] Mr Wicks produced a file note of his meeting with Ms Andrew. This note was produced some time after that meeting, and in fact after Ms Andrew raised her grievance. When questioned about the meeting and his knowledge of why Ms Andrew was removed from the MSD sites Mr Wicks admitted he did not know the detail of what had occurred as Mr Lee-Taylor had handled this.

[40] On balance, I am not satisfied that Mr Wicks was able to provide Ms Andrew with any detailed information about why she had been removed from MSD sites. I believe he tried to explain to her what he understood from what Mr Lee-Taylor had told him but ultimately he was focussed on trying to reassure Ms Andrew that there was a role for her at Armourguard and eventually she may be able to work with MSD again.

[41] Ms Andrew left the meeting thinking there was a possibility that she might get her role back at MSD.

[42] Whilst Mr Wicks' attempts to resolve matters with Ms Andrew were admirable and better than the steps that had preceded it, it still failed to meet the obligation of good faith, particularly because nothing was done in response to the meeting.

[43] On 26 April 2017, Ms Andrew went to see her GP again and was put on sick leave from 26 April 2017 until 26 May 2017.

[44] During the time that Ms Andrew was on sick leave there was no contact from Armourguard, except that she was offered shifts for her return to work. These shifts were not suitable as they were for reduced hours and for times that did not fit with Ms Andrew's childcare arrangements.

[45] The failure to act during this time precipitated the previous breaches and compounded Ms Andrew's sense of failing by Armourguard. At the very least Armourguard should have done more to discuss Ms Andrew's return to work with her and what shifts might be available that she could undertake. It did do this to some extent but not enough to meet the duty of good faith. And, it should have done more during this time to find out what had motivated MSD to have Ms Andrew removed from its sites. It also could have explored whether

anything could be done to repair MSD's view of Ms Andrew with a view to her returning to MSD work at some point.

[46] On 10 June 2017, Ms Andrew resigned.

[47] Reflecting back on how Armourguard dealt with the removal of Ms Andrew from MSD sites and how it dealt with finding alternative roles for Ms Andrew, culminating in Ms Andrew's resignation there are several instances where Armourguard did not meet the duty of good faith.

Was it reasonably foreseeable that Ms Andrew might resign?

[48] Objectively, the breaches of good faith were sufficiently serous that it was foreseeable that there was a substantial risk that Ms Andrew might resign. The breaches of good faith by Armourguard were dismissive and repudiatory.

[49] Subjectively, it was clear to Armourguard that Ms Andrew had not reacted well to being removed from the MSD sites. It was also clear that she needed full time work and the financial implications of not being able to work full time shifts would be substantial for Ms Andrew. Therefore, it must have been foreseeable to Armourguard that failing to meet the duty of good faith as it related to Ms Andrew's removal from MSD sites and being offered alternative shifts, meant there was a substantial risk that Ms Andrew might resign.

Did Ms Andrew resign in response to the breach?

[50] Ms Andrew's evidence was clear, she was aggrieved at having been removed from the MSD sites without knowing why and without having an opportunity to influence the decision to remove her. Ms Andrew felt Armourguard had not done enough to try to understand what had happened, to respond to MSD rather than simply effect the MSD instruction and to consult with her over what was happening. Ms Andrew was also clear that she could not cope with reduced hours of work and the failure by Armourguard to engage with her over possible shifts compounded this. These concerns, which encapsulate the breaches of good faith, caused Ms Andrew to resign.

Conclusion on dismissal

[51] In all of the circumstances I am satisfied that Ms Andrew's resignation amounts to a constructive dismissal.

Was dismissal justified?

[52] Having decided that Ms Andrew was constructively dismissed I must now consider if that dismissal was justified. The onus is on Armourguard to prove that the dismissal was justified.

[53] The test of justification is set out in s 103A of the Act. It is similar to the duty of good faith, but not the same. However, in *Jinkinson v Oceania Gold (NZ) (No. 2)*[7] the Employment Court stated at [42]:

> [t]he relationship between ss 4(1A)(c) and 103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply with section 4(1A)(c) will not be justifiable.

[54] I have already outlined why I have concluded that Armourguard did not meet the duty of good faith and it follows therefore that it that failed to meet the requirements for justification, based on *Jinkinson*. In short, there was a failure to meet the duty of good faith and a failure to meet any of the requirements of s 103A of the Act.

[55] Ms Andrew's dismissal was both procedurally and substantively unjustified.

Unjustified action

Action complained of

[56] Ms Andrew's grievance for unjustified action causing disadvantage is based on an alleged unilateral reduction in hours of work and change of shift pattern. This arises because Armourguard removed her from all MSD sites, where she was working 42.5 hours per week and had been working those hours for several years, and offered her reduced shifts of four hours each with those shifts being at times not suitable to her. Armourguard did this without

[7] [2010] NZEmpC 102

properly consulting with Ms Andrew and without seeking her agreement to the proposed changes.

[57] I am satisfied that this did occur.

Did this cause a disadvantage?

[58] The unilateral change to Ms Andrew's hours did cause disadvantage to Ms Andrew's employment.

Were Armourguard's actions justifiable?

[59] Because Armourguard did not consult with Ms Andrew over the changes to her hours of work but simply sent her rosters with the proposed shifts, it did not meet the duty of good faith (as I have already indicated) nor did it meet the test for justification.

[60] Armourguard's actions were not justified.

Remedies

[61] As Ms Andrew was constructively dismissed and Armourguard acted in an unjustified way causing disadvantage to Ms Andrew's employment, I may award any of the remedies provided for under s 123 of the Act; Ms Andrew seeks compensation and reimbursement.

Compensation

[62] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This is about compensating Ms Andrew for the humiliation, loss of dignity and injury to feelings she suffered because of the actions giving rise to the grievance.

[63] What I must consider is the effects of Armourguard's unjustified actions and the dismissal on Ms Andrew. In this regard, the unjustified dismissal arises out of the way in which Armourguard handled Ms Andrew's removal from MSD sites and the subsequent change to her hours. The change to her hours also informs the unjustified disadvantage grievance, so I will deal with compensation for both grievances together.

[64] Ms Andrew gave evidence of the impact of Armourguard's actions. Ms Andrew was emotional when giving the evidence particularly around her frustration at not knowing why she was removed from MSD sites and not having the ability to answer any issues. Ms Andrew's evidence clearly showed that even now the way Armourguard failed to deal with her removal from MSD sites still has an impact on her.

[65] The evidence shows that as a result of the way she was treated Ms Andrew:

(a) Felt humiliated, upset and devastated by what occurred, feeling ashamed and broken by what occurred;

(b) Was angry and confused by the process and lack of support and discussion, feeling let down by Armourguard after so many years of service;

(c) Had feelings of failure and being depressed – for which Ms Andrew was prescribed medication;

(d) Suffered from low self-esteem, loss of confidence and feeling worthless;

(e) "Went to pieces", continually revisiting the issues and asking herself why;

(f) Avoided working with others, accepting a new job in which she worked from her garage so as to avoid interacting with others.

[66] Ms Andrew's friend described the effects on Ms Andrew as damaging her as a person, causing her to struggle with eating, sleeping and interacting with others. She stated that Ms Andrew has gone from a bright bubbly individual to one who refers to herself as pointless, unwanted, worthless, stupid and damaged.

[67] In deciding the level of compensation, Ms Andrew is entitled to for the loss of dignity, humiliation and injury to feelings described above, I have considered the recent decisions of the Employment Court which provide guidance on assessing compensation[8].

[68] I assess the level of compensation to be $20,000.00.

Reimbursement

[8] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[69] Ms Andrew seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) of the Act.

[70] As I am satisfied that Ms Andrew has a personal grievance and she has lost remuneration as a result, then pursuant to s 128 of the Act I must award Ms Andrew at least the lesser of her actual loss or three months ordinary time remuneration.

[71] Ms Andrew consistently worked 42.5 hours per week and at the time of her dismissal she was paid $675.33 for a week's work. Based on this three months ordinary time remuneration is $8,779.29.

[72] Since her dismissal Ms Andrew has been working but on lesser hours and therefore at a reduced rate to her weekly wage at Armourguard. Based on the financial information provided in evidence I calculate Ms Andrew's actual loss up until 31 March 2018 as $17,761.86.

[73] So the starting point for an award for reimbursement of lost remuneration is three months ordinary time remuneration, being $8,779.29.

[74] However Ms Andrew seeks to be reimbursed her actual loss up to 31 March 2018. In essence I am being asked to exercise my discretion, as set out in s 128 of the Act, to award Ms Andrew this greater sum. In this case I am prepared to do this. I have considered if it is appropriate and am satisfied that it is and I have considered whether Ms Andrew might not have remained employed for the period of loss she is claiming (if the unjustified dismissal had not occurred). Given that Ms Andrew had worked for Armourguard for several years and was a valued employee I conclude that, but for the unjustified dismissal, she would have continued to work for Armourguard.

[75] So I will award Ms Andrew her actual loss claimed of $17,761.86 (gross).

Kiwisaver contributions

[76] Ms Andrew seeks employer Kiwisaver contributions on the lost remuneration. I am satisfied that I can award this pursuant to s 123(b) of the Act. Ms Andrew is entitled to 3% of $17,761.86, which is $532.86.

Contribution

[77] As I have awarded remedies to Ms Andrew, I must now consider whether she contributed to the situation that gave rise to her dismissal.[9]

[78] This assessment requires me to determine if Ms Andrew behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievances.[10]

[79] Whilst I accept that MSD had some issue with Ms Andrew's work at its Papanui site, I have insufficient evidence to know what that actually was and whether Ms Andrew was actually at fault. In short, there is no evidence of what Ms Andrew may have done wrong at MSD so there is no basis to conclude that there is contributory conduct.

[80] Next, in terms of the changes to Ms Andrew's hours of work, Ms Andrew did not contribute to this nor was she at fault for what occurred.

[81] So, in conclusion there was no contributory behaviour from Ms Andrew which warrants a reduction in remedies.

Conclusion

[82] Armourguard unjustifiably dismissed Ms Andrew and acted in an unjustified manner causing disadvantage to Ms Andrew's employment. In satisfaction of these grievances Armourguard must pay Ms Andrew:

(a) $20,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;

(b) $17,761.86 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000; and

(c) $532.86 for reimbursement of other money lost, being employer KiwiSaver contributions, pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[9] Section 124 of the Act.
[10] *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

Costs

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

[84] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority