

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Shane Douglas Binnie (Applicant)

AND Meteorological Service of New Zealand Limited
(Respondent)

REPRESENTATIVES Geoff O'Sullivan, for the Applicant
Michael Quigg and Deirdre Marshall, for the
Respondent

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Wellington, 18 December 2006

TELEPHONE CONFERENCES 5 February & 2 April 2007

**FURTHER INFORMATION
AND SUBMISSIONS** 19 March 2007 (confirmation of Shane Binnie's
Postgraduate Diploma in Meteorology 2005) and
Submissions by 20 April 2007 and 11 May 2007

DATE OF DETERMINATION 28 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. The applicant, Mr Binnie, has claimed that he was unjustifiably dismissed from his employment as a trainee meteorologist with the Meteorological Service of New Zealand Limited ("the Met Service").
2. At the Authority's investigation meeting, Mr Binnie withdrew his claim for reinstatement. He is now seeking lost wages, compensation and costs.
3. The respondent denied the claims. The respondent says that Mr Binnie's individual employment agreement with the Met Service was terminated upon him failing to meet a precondition for his employment.

The background

4. The parties signed off an individual employment agreement. The relevant terms of that agreement which will be referred to throughout this decision are as follows:

"Conditions of employment

- 1) *The agreed period of training shall be two years commencing on Tuesday, 25 January 2005 at Met Service corporate office in Kelburn and shall*

include part or all of the graduate diploma in meteorology at Victoria University of Wellington.

- 2) Further to clause 1, it is also provided that within the period of formal training (approximately the first 13 months) the Employee will successfully complete all course work and within the period of on-the-job training (a period of approximately 11 months, commencing about 28 February 2006) the Employee will satisfactorily perform shift duties at the Kelburn Forecast Office. It is acknowledged that the performance of the Employee will be reviewed from time to time by Met Service, and the Employee will be advised of the outcome of such reviews.
- 3) The terms and conditions set out below are in full compensation for the requirements of the position.
- 4) This Agreement may be varied at any time by agreement in writing between Met Service and Employee.

Remuneration and expenses

- 10) The remuneration of the employee will be as set out in Schedule B attached ...

Fixed term of the agreement

- 20) This Agreement is a Fixed Term Agreement and will expire under the provisions of clause 1.
- 21) Notwithstanding clause 20, this Agreement of Employment may be terminated in accordance with the following provisions:

During first 13 months of employment:

- a) The Employee shall give Met Service two weeks' notice in writing of an intention to terminate this Agreement. A shorter period of notice may be considered by Met Service.
- b) The Employee may be dismissed:
 - i. At any time and without notice in the event of a serious misconduct or other conduct justifying summary dismissal.
 - ii. With two weeks' written notice if there has been repeated minor misconduct or repeated unsatisfactory performance. Met Service may alternatively give immediate notice and a sum equivalent to two weeks' salary.

During subsequent 11 months of employment:

- a) The Employee shall give Met Service one month's notice in writing of an intention to terminate this Agreement. A shorter period of notice may be considered by Met Service.
- b) The Employee may be dismissed:
 - i. At any time and without notice in the event of a serious misconduct or other conduct justifying summary dismissal.
 - ii. With one month's written notice if there has been repeated minor misconduct or repeated unsatisfactory performance. Met Service may alternatively give immediate notice and a sum equivalent to one month's salary.

Schedule B: Remuneration

Date	Duties	Salary	Comments
25 January 2005 – 28 February 2006*	Meteorologist course, followed by completion of Grad Dip Met project	\$23,000	
28 February 2006* - 30 June 2006	Forecasting operations	\$28,000	Transfer to forecasting operations is conditional upon successful performance in all aspects of the meteorologist course, including successful completion of the Grad Dip Sci project.

- **The Employee's salary will change from \$23,000 to \$28,000 upon transfer of the Employee to Forecasting Operations. This transfer will take place no later than 28 February 2006.*

Schedule C: Job Description

Job title *Trainee Meteorologist*

Responsible to: *Manager, Learning and Development*

Location: *Learning and Development Centre, Kelburn, Wellington, New Zealand.*

National Forecast Centre, Kelburn, Wellington, New Zealand.

Job Purpose: *Preparation for a career in Met Service as a meteorologist.*

Job Dimension: *Salaried student position for approximately first 12 months: salaried forecaster for approximately second 12 months. Retention of position conditional on:*

1. *Successful performance as a student (including successful completion of all examinations and simulations, in first year of employment, and*
2. *Successful performance as a forecaster in second year of employment.*

Key Results:

1. *Successful completion of meteorologist course (including part or all of the Graduate Diploma in Science (Meteorology) as relevant.*
2. *Proof of one's ability as an operational weather forecaster.*
3. *Full understanding of Met Service's vision and the individual's role in fulfilling it."*

5. The Met Service assessed Mr Binnie's qualifications as part of its meteorological training programme upon him applying for employment. The Met Service decided that Mr Binnie would be required to undertake the Graduate Diploma in Meteorology for his employment.
6. The Met Service has a formal arrangement with Victoria University of Wellington ("VUW") that its trainees are included in the diploma and certificate courses offered by that University. This arrangement is formalised in a Memorandum of Understanding

between the Met Service and VUW. The diploma and certificate are offered by VUW and the papers are supervised by VUW academic staff. The lecturers include the academic staff from VUW and the subject matter experts from the Met Service. The lectures for the diploma are "embedded" in the Met Service's formal meteorologist training programme and usually held at the Met Service's headquarters at Kelburn. During his training, Mr Binnie was located at the university. The aim is that if a trainee completes all of the first year's work and testing satisfactorily, including the research proposal required to pass the diploma, the trainee is transferred to the second part of the meteorological training programme, i.e. forecasting at the National Forecasting Centre in Kelburn.

7. Mr Binnie had three performance reviews during the course of his employment including a review dated 21 December 2005. The performance review recorded the following:

"OVERALL COMMENTS ON PERFORMANCE

Shane's first degree did not seem to provide him with all the maths and physics background that an entry to Met Service usually has; consequently, some aspects of the meteorologist course were particularly challenging for him and he only just reached the required standard. I did, therefore worry about him quite a bit. As far as forecasting is concerned, the most important challenge for Shane is to do it analytically: this means he will have to curb his tendency to take a seat of the pants approach.

BUSINESS AND PERSONAL OBJECTIVES FOR THE NEXT SIX MONTHS (until next performance review):

Successfully complete project for Graduate Diploma in Meteorology. Successfully 'go solo' as a forecaster."

8. The performance review was signed off by Mr Binnie and Mr Peter Kreft, his reviewing manager.
9. During his employment, Mr Binnie became interested in the marketing area of the Met Service's activities. He spent some time while he was finishing his research proposal in that area of the Met Service's activities through his own arrangement with a contact in that area.
10. On 1 February 2006 Mr Binnie expressed an interest by email for the position of Media Market Manager and he wished to be considered as an appropriate candidate. He was informed that his application had been received and he would be contacted in regard to the dates for interviews.
11. On 24 February 2006, Mr Binnie was written to by Peter Kreft, the manager Professional Development and Consulting. The letter read as follows:

"Dear Shane,

Schedule B of your employment agreement states that 'transfer to forecasting operations is conditional upon successful performance in all

aspects of the Meteorologist Course, including successful completion of the Grad Dip Sci project'. (Emphasis added).

I have discussed your research project's progress with your supervisor. Based on these discussions, and although your project is not yet complete, I do not yet have confidence that it is likely to be graded as a 'pass' or better by Victoria University of Wellington. It is important for you to attend to all the concerns raised by your supervisor and keep him fully informed of your progress and plans. Further, I require that you hand in your project no later than Monday 13 March 2006. I trust you will spend the time between now and Monday 13 March 2006 ensuring your project is successful, and I wish you well with it.

If, by the completion of the project both I and the Chief Meteorologist are reassured that your project is likely to be graded as a pass, you will transfer to forecasting operations at that point.

However, should this reassurance be lacking, for the period between handing in your project and receiving formal advice of its grade you will be paid but will not be required to report to work. [Emphasis added]

Should Victoria University of Wellington award your research project a 'pass' grade or better, you will transfer to or continue in forecasting operations.

However, should Victoria University of Wellington award your research project a 'fail' grade, you will not have met the academic requirements for a post-graduate diploma in meteorology. [Emphasis added]

You will thus have not:

- *Successfully completed all course work outlined in clause 2 of your employment agreement.*
- *Met Key Result 1 of your job description (see Schedule C of your employment agreement).*

*If this is the case, **you will at that point be given notice by Met Service of the immediate termination of your employment agreement and a sum equivalent to four weeks' salary.*** [Emphasis added]

12. Mr Binnie has complained about this letter and says his termination of employment was pre-determined in that letter. He relied upon the Met Service's comment: "*you will at that point be given notice by Met Service of the immediate termination of your employment agreement and a sum equivalent to four weeks' salary*" (see letter above).
13. Also, Mr Binnie says that the Met Service got it wrong when it made the comment in the letter: "*However, should Victoria University of Wellington award your research project a 'fail' grade, you will not have met the academic requirements for the post-graduate diploma in meteorology*" because he did pass the post-graduate Diploma in Meteorology and received advice of his pass on 17 July 2006 when the University wrote to him confirming that he had completed the requirements for the post-graduate Diploma in Meteorology. The University's letter was a confirmation of the completion of the qualification until he received his graduate certificate.
14. Mr Binnie says that upon receiving the letter of 24 February 2006, and being advised of the Met Service's concerns, he visited Peter Kreft. He says that he was reassured. He also says that he spoke to Dr McGregor and did not receive any adverse feedback from

him at that point. He completed and handed in his research project on 13 March 2006 as required.

15. Mr Binnie's pay was increased by the Met Service on 28 February not to disadvantage him.
16. On 30 March 2006, Mr Binnie received another letter from the Met Service signed by Peter Kreft. This letter read as follows:

"FAILURE TO SATISFY CONDITIONS OF EMPLOYMENT

I have been formally advised by your supervisor at Victoria University that you will be awarded a 'fail' grade for the research project you undertake as part of your graduate diploma in meteorology studies. This confirms the concern Met Service has previously expressed to you about the quality of and commitment to your meteorological studies.

I refer to my letter to you of 24 February 2006, where I reminded you of the conditions of your ongoing employment with Met Service as set out in your employment agreement. These include the general requirement that you successfully complete all course work and the following specific requirement:

'Transfer to forecasting operations is conditional upon successful completion in all aspects of the meteorologist course, including successful completion of the grad dip sci project'.

In that letter I advised that if you were awarded a 'pass' grade or better for your research project your transfer to forecasting operations would be confirmed. As you have not obtained this grade you have not met the conditions required in order to transfer to forecasting operations. This places Met Service in a very difficult position in terms of your continued employment.

I require you to attend a meeting for the purpose of discussing what options we have regarding your continued employment with Met Service. Please be advised that your failure to fulfil the required conditions of your employment agreement appears to place you in a situation where your continued employment with Met Service is untenable. Please consider this situation and any suggestions or alternatives you can provide to Met Service. You can discuss these matters with me at our meeting, which I have scheduled for 10am Wednesday 5 April in the Paroro Room at Met Service.

This is a serious matter and your continued employment is potentially at risk as one possible outcome of the meeting is that Met Service has no option but to terminate your employment. Accordingly you are entitled to consult with a legal representative. Furthermore, you may wish to bring a representative or support person along to our meeting. Please contact me to confirm that you will be present at this meeting and advise me if anyone else will be attending the meeting with you.

Yours sincerely,

Peter Kreft

Manager, Professional Development and Consulting.

17. Mr Binnie advised Mr Kreft that he would attend the meeting with his parents, Donna and Warwick Binnie. The Met Service did not advise Mr Binnie that it would have John Lumsden, the Chief Executive, and, Deirdre Marshall the Met Service's lawyer, present at the meeting.

18. Prior to the meeting, another letter was sent to Mr Binnie from Peter Kreft. This letter, dated 31 March 2006, complained about Mr Binnie's absence in making himself unavailable for work between 28 March and 2 April 2006. That letter also commented on his performance and I quote:

"As you are aware, you are awaiting confirmation of whether or not you have fulfilled the conditions required to enable you to progress to the forecasting phase of your employment. In my letter to you of 24 February 2006, I stated that 'for the period between handing in your project and receiving formal advice of its grade you will be paid but will not be required to report to work'. This letter goes on to explain the process to be followed upon receipt of advice from Victoria University regarding your project's grade. You are awaiting advice – and are being paid to do so – and could be called upon to commence work in forecasting operations at any time."

19. During this time VUW wrote to Peter Kreft a letter dated 23 March 2006 in the following terms:

"Diploma Projects 2006

Dear Peter,

As you are aware I will be taking annual leave from 24 March 2006 – 13 April 2006. Because of the heavy teaching commitments and the extra time given to students to complete their project work it has not been possible for me to complete the marking of the 2006 diploma projects.

I have however read through each of the project reports and with one exception I am confident that each of the students will be awarded a pass grade.

*The exception is Shane Binnie; his report appeared, on initial examination, to fall short of the standards normally expected for a Diploma project. In light of my concerns I have completed my examination of his report and have concluded that Shane will not be awarded a pass grade for his project. **I will be recommending a grade of D.** (Emphasis Added)*

I have discussed this with the Professor Ewan Smith, programme director in geophysics, and he has confirmed that although Shane has failed his project he will, on the basis of his aggregate mark, obtain an overall pass for the post-graduate diploma in meteorology.

I am sorry to have to report Shane's failure to meet the required standards for his project work but feel it is appropriate to let you know this ahead of my departure overseas on 24 March 2006.

Yours sincerely,

Dr James McGregor"

20. Mr Binnie was not given this letter until the meeting on 5 April 2006.
21. The meeting took place on 5 April 2006. Mr Binnie was handed the letter, from Dr McGregor, by Peter Kreft. Mr Binnie learned that Dr McGregor would not be recommending a pass for his research project work. Mr Binnie and his parents then put forward some options. Their options were:
- (a) The condition that Shane receives a pass grade for his research project be waived by the Met Service as Shane passed the other academic requirements.

- (b) Shane be given a further period of grace and allowed to resubmit his research project.
 - (c) Shane explores employment options outside of forecasting.
22. Following a discussion on the options the parties took a break so that the Met Service could consider the options. When the meeting resumed, Peter Kreft apparently explained that options (a) and (b) were not open to the Met Service, that it had taken all reasonable steps to ensure that Mr Binnie could pass his research paper and had provided support to him throughout his studies. He had also been given notice of the need to improve or face the prospect of his employment being terminated. The Met Service relied upon the extension of time that it had given him to sufficiently reach the requisite level.
23. It was also pointed out by Mr Lumsden that Mr Binnie would be free to pursue any other areas of employment within the Met Service but that any consideration of him for any positions elsewhere would have to be dealt with on the merits and on a case-by-case basis.
24. It has not been challenged that Deirdre Marshall asked Mr Binnie if he was aware that his continued employment had been conditional upon him obtaining a pass grade for the research project and apparently he confirmed that he had been aware of this. Also, he has not challenged that he was advised by Ms Marshall that termination of his employment appeared to be the only course open to the Met Service. She referred to the provisions in the employment agreement in regard to notice and that Mr Kreft's letter of 24 February had referred to a four week notice period in the event that the condition of a pass grade was not met. The Met Service confirmed that it would abide by Mr Kreft's letter of 24 February and pay four weeks payment in lieu of notice.
25. Mr Binnie then asked when a final decision would be made and if there would be any decision that day. Mr Lumsden said that the decision had been made and confirmed that the Met Service would terminate his employment on four weeks' notice. Mr Binnie was given the option that if he wished to resign he could do so and he had until Monday to give that option further thought. Mr Lumsden says he made the decision minutes before announcing it.
26. Mr Binnie then sought legal advice. Negotiations commenced between the Met Service's lawyer and Mr Binnie's lawyer on trying to find a resolution to the problem. However this did not eventuate. On 10 April 2006, Mr Binnie's lawyer raised a personal grievance.

27. On 13 April the Met Service made arrangements to remove Mr Binnie from the payroll. He was paid until 3 May 2006.
28. On 4 May 2006 Mr Binnie's lawyer received a letter from VUW that amongst a number of things said that *"In respect of the status of Mr Binnie's project, I advise that he together with all the other students on the Programme will receive their final grades by the end of next week. If Mr Binnie wishes to apply for a reconsideration of that grade, he will need to contact the Head of the School..."*. No action was taken by Mr Binnie for the details. No grade for the research project was received by Mr Binnie until after the Authority's investigation meeting.
29. The parties attended mediation but were unable to settle the matter. It now falls upon the Authority to determine the issues.

The issues

30. The first issue is whether or not the Met Service could reasonably rely on the letter dated 23 March 2006 from VUW and Mr Kreft's information for the advice of Mr Binnie's results.
31. The second issue is whether the employment agreement and the terms of Mr Binnie's employment provided for a pre-condition with regard to his employment being able to continue after 28 February 2006. In this regard, has the Met Service, as a fair and reasonable employer, been able to justify the termination of Mr Binnie's employment? Relevant findings include whether or not Mr Binnie was dismissed, and if so whether or not the employment agreement permitted it.

Decision

32. The first finding I have made is that Mr Binnie was dismissed. Mr Lumsden's decision on 5 April 2006 to terminate Mr Binnie's employment agreement supports this finding. Also, Mr Binnie was removed from the pay roll and arrangements were made on 13 April to pay out his entitlements until 3 May 2006. The purported termination of the employment agreement was tantamount to dismissing Mr Binnie.
33. The next finding related to whether or not the employer has to justify the decision and what its reasons were at the time. It has relied upon terminating Mr Binnie's employment agreement because Mr Binnie did not complete the precondition of passing his research project. Mr Binnie denied this and says he had not received the formal result of his research project and that he had been awarded his Diploma from the University.
34. Mr Lumsden never verified the content of Dr McGregor's letter and says he relied on Mr Kreft's information. Dr McGregor's letter was not a confirmation of the result. Dr

McGregor said *"I have completed my examination of his report and have concluded that Shane will not be awarded a pass grade for his project. I will be recommending a grade of D".* He added that he had *"discussed this with the Professor Ewan Smith, programme director in geophysics, and he has confirmed that although Shane has failed his project he will, on the basis of his aggregate mark, obtain an overall pass for the post-graduate diploma in meteorology."*

35. He added that *"I am sorry to have to report Shane's failure to meet the required standards for his project work but feel it is appropriate to let you know this ahead of my departure overseas on 24 March 2006."*

36. This letter is a clear indication that Mr Lumsden could rely upon Mr Kreft's information of 30 March that *"I have been formally advised by your supervisor at Victoria University that you will be awarded a 'fail' grade for the research project you undertake as part of your graduate diploma in meteorology studies"*, and that the University was going to fail Mr Binnie in his research project, but using the aggregate mark, pass him for the post graduate diploma in meteorology. In other words it was open to the Met Service to reasonably rely on Dr McGregor's letter.

37. However, I conclude that there are a number of procedural issues. These are as follows:

- Mr Binnie was not provided the letter of 23 March 2006 in advance of the 5 April meeting, and he should have been. A fair and reasonable employer would have provided this letter in advance to enable Mr Binnie to prepare for the meeting and get his own information. Mr Binnie was not disadvantaged because he did have advance notice from Mr Kreft that: *"I have been formally advised by your supervisor at Victoria University that you will be awarded a 'fail' grade for the research project you undertake as part of your graduate diploma in meteorology studies."* Mr Kreft relied upon Dr McGregor's letter and it was open to him to conclude from the information that a "fail" grade was going to be given for the research project. However, a fair and reasonable employer would have provided reasonable time to get formal confirmation of the results mentioned in the letter. This is especially so given the applicant's rights of appeal against the grade if it was confirmed. There was no waiting or effort made to check further.
- Mr Binnie was not informed of the employer's finding that his employment agreement was going to be terminated when Mr Lumsden decided *"on the spot"* to terminate the employment agreement. However, Mr Binnie has not challenged the Met Service that Deirdre Marshall asked him if he was aware that his continued employment had been conditional upon him obtaining a pass grade

for the research project and apparently he confirmed that he had been aware of this.

- Mr Binnie says that his termination of employment was predetermined by Mr Lumsden's announcement of his decision at the meeting on 5 April and the language used in Mr Kreft's letter that if he did not pass then "***you will at that point be given notice by Met Service of the immediate termination of your employment agreement and a sum equivalent to four weeks' salary***" (emphasis added). Predetermination is an interpretation that could be taken from the above. However considered alongside Mr Lumsden's evidence that he made the decision a few minutes before he gave it I find that the decision was not predetermined. Furthermore the Met Service was relying upon what it considered its rights were under the employment agreement and the training requirements that Mr Binnie was required to meet.
- Mr Binnie had taken no action to get any result reconsidered. Mr Kreft acknowledged that Mr Binnie could expect to receive advice of his results: "*the process to be followed upon receipt of advice from Victoria University regarding your project's grade. You are awaiting advice*" (31 March letter). In the same letter Mr Kreft said: *As you are aware, you are awaiting confirmation of whether or not you have fulfilled the conditions required to enable you to progress to the forecasting phase of your employment.* (31 March letter). Also, VUW recognised that students would receive their grades (4 May 2006 letter), and in this case the letter implicitly applied to receiving the results of the research project referred to in the University's letter. No further action appears to have been taken on the result of the research project and this was Mr Binnie's responsibility, I hold. However, Mr Binnie could have reasonably expected to receive such results other than the aggregate result (that was produced much later from the University). The reason why the result was not provided earlier has not been satisfactorily explained. A fair and reasonable employer would have provided reasonable time for the receipt of the verified result and Mr Binnie's right to decide whether or not to obtain a reconsideration of the grade.
- The Met Service failed to allow for an option that involved the point subsequently raised by the University that "*In respect of the status of Mr Binnie's project, I advise that he together with all the other students on the Programme will receive their final grades by the end of next week. If Mr Binnie wishes to apply for a reconsideration of that grade, he will need to contact the Head of the School...*" The Met Service owed it to Mr Binnie to let him obtain his final grade and consider if he wished to apply for a reconsideration of that grade if he had failed. There was at the time no formal result of the grade for the research

project. A fair and reasonable employer would have considered this as an option and provided time to get verification of the results. The Met Service says it was faced with a timing problem to transfer Mr Binnie to the Forecasting operation on 28 February. This was not of Mr Binnie's making especially when the Met Service decided cautiously to increase his salary and to avoid any disadvantage to him.

38. There was criticism that the Met Service did not tell Mr Binnie who it was taking to the meeting on 5 April. Mr Binnie was put on notice that he could get legal advice and was entitled to bring a support person (30 March 2006 letter). Mr Binnie was also advised of the seriousness of the meeting (30 March letter). Therefore I hold that he had plenty of notice and he could have decided to take a professional representative because he would reasonably have known of the seriousness of the situation from the earlier correspondence. The Met Service's failure to tell Mr Binnie who it was taking to the meeting and Mr Binnie's decision not to get legal advice was not fatal.

39. The next point is whether Mr Binnie properly understood that he was required to pass the research project to qualify and transfer to the Forecasting operation. The Met Service's letter dated 24 February clearly says *"However, should Victoria University of Wellington award your research project a 'fail' grade, you will not have met the academic requirements for the post-graduate diploma in meteorology"*. From this it would have been reasonable for Mr Binnie to conclude that a failure in the research project would have meant he would not have met the *"academic requirements for the post-graduate diploma in meteorology"*. Also Mr Binnie's employment agreement provided the duties to include the *Meteorologist course, followed by completion of Grad Dip Met project*. The above have to be considered alongside the following comments and evidence:

- *"Further to clause 1, it is also provided that within the period of formal training (approximately the first 13 months) the Employee will successfully complete all course work and within the period of on-the-job training (a period of approximately 11 months, commencing about 28 February 2006) the Employee will satisfactorily perform shift duties at the Kelburn Forecast Office."* (Employment Agreement).
- *"Transfer to forecasting operations is conditional upon successful performance in all aspects of the meteorologist course, including successful completion of the Grad Dip Sci project."* (Schedule B of Employment Agreement)
- *"BUSINESS AND PERSONAL OBJECTIVES FOR THE NEXT SIX MONTHS (until next performance review):"*

"Successfully complete project for Graduate Diploma in Meteorology."
(Performance Review December 2005)

- **"Job Dimension:** *Salaried student position for approximately first 12 months: salaried forecaster for approximately second 12 months. Retention of position conditional on:*
 3. *Successful performance as a student (including successful completion of all examinations and simulations, in first year of employment, and*
 4. *Successful performance as a forecaster in second year of employment".(Schedule C of the Employment Agreement)*
- **"Key Results:** 1. *Successful completion of meteorologist course (including part or all of the Graduate Diploma in Science (Meteorology) as relevant."* (Schedule C of the Employment Agreement)
- Schedule B of your employment agreement states that *'transfer to forecasting operations is conditional upon successful performance in all aspects of the Meteorologist Course, including successful completion of the Grad Dip Sci project'. (24 February letter)*
- At the meeting on 5 April it was put to Mr Binnie that his continued employment had been conditional upon him obtaining a pass grade for the research project and apparently he confirmed that he had been aware of this. He did not challenge this but says he was stressed when he was advised by Ms Marshall that termination of his employment appeared to be the only course open to the Met Service.

40. The above does support the Met Service's standard for the requirement to pass the research project. The employment agreement makes provision for it. The letter dated 24 February reminded Mr Binnie of the requirement. He seemed at the time to accept it because he did not challenge it (minutes of the 5 April meeting). He was given further time, like the other trainees to complete it and hand it in on 13 March.
41. My conclusion is that Mr Kreft potentially misled Mr Binnie when he said in his correspondence that *"However, should Victoria University of Wellington award your research project a 'fail' grade, you will not have met the academic requirements for the post-graduate diploma in meteorology"* and told him *"I have been formally advised by your supervisor at Victoria University that you will be awarded a 'fail' grade for the research project you undertake as part of your graduate diploma in meteorology studies"* without disclosing the letter from Dr McGregor until the meeting of 5 April. Mr Kreft was not wrong when he said in his letter of 30 March 2006 that *I have been formally advised by your supervisor at Victoria University that you will be awarded a 'fail' grade for the research project you undertake as part of your graduate diploma in meteorology studies.* He is supported by Dr McGregor's letter of 23 March 2006 and it

was handed to Mr Binnie on 5 April. Any difficulties that might have existed between Mr Binnie and Mr Kreft have not been borne out by the evidence and Mr Binnie did not raise them until his evidence was produced in the Authority. I conclude that Mr Kreft's alleged action was probably unintentional.

42. I now turn to whether or not the Met Service could terminate the employment agreement. There has been no provision made for it to do so in these circumstances, even although the agreement purported to be for a fixed term. The Met Service has not relied upon clause 21 of the agreement except to determine the appropriate notice. This clause makes no provision to terminate during the training period or upon any failure to achieve results in the timeframes provided, except for serious misconduct, minor misconduct and poor performance. It has not relied upon any of these but instead has interpreted the continuation of Mr Binnie's employment to involve a precondition in regard to the level of training that had to be achieved before 28 February (the transfer date) or terminate the employment agreement. There certainly was a standard of performance required and I do not intend to interfere with that given that it was tied to a training timetable and had standards that needed to be achieved to enable Mr Binnie to transfer to the Forecasting operation. Mr Binnie could have reasonably understood that he had to pass his research project.
43. However, the dismissal upon the termination of the employment agreement and in the absence of an express term to terminate that agreement was procedurally unfair for the two the reasons I have given, namely Mr Binnie was not afforded time to get his formal result and to consider a reconsideration of the grade given to his research project. Therefore Mr Binnie has a personal grievance.
44. I must consider the issue of fault or blameworthy conduct on Mr Binnie's part in the situation giving rise to his personal grievance. Mr Binnie could have taken more action to obtain his results and applied for a reconsideration of his grade. It appears subsequently that there were difficulties in obtaining his results from the University. He could argue correctly that he did not take action because he had not received his result at the time. Therefore I hold he has not contributed to the grievance. I have also had regard to any problems that he says Mr Kreft had with him, his absence from work on 28 March until 2 April (where I have given him the benefit that he was not required at work while waiting for the results), and that the matter was not pursued by the Met Service. Any wish he had to move to another operation at the Met Service was also not pursued further by the Met Service. I conclude that there was no contribution.
45. The employment agreement is not a proper fixed term agreement because it contains no provision on how it will end. Mr Binnie is entitled to lost wages because he has a personal grievance where his agreement was terminated without a proper precondition

to cease if he failed his research paper. Thus there was a presumption of some continuing employment under the agreement in a role where he could have received wages at the appropriate rate. The Respondent has not justified the dismissal for performance where other options existed for further training or other deployment. The award I have decided should be restricted to three months wages including the notice period. I have decided that the salary that should be used is the training salary earned by Mr Binnie because he had no guarantee of any increase upon confirmation of his research project result. He enjoyed the benefit of the increase given to him to avoid any prejudice by his employer from 28 February. The result has now been confirmed as a "D" and that he failed the project. Thus he was not eligible for transfer and a higher salary. Therefore his salary for calculation was \$23,000. He is entitled to nine weeks further wages and I assess this in the sum of \$3,905.66.

46. He is also entitled to compensation for humiliation, loss of dignity and injury to feelings. I hold that this should be a sum of \$9,000 for humiliation, loss of dignity, injury to feelings and financial losses.

Orders

47. Meteorological Service of New Zealand Limited is to pay Shane Douglas Binnie:

- The sum of \$3,905.66 lost wages due to his personal grievance.
- The sum of \$9,000 for humiliation, loss of dignity, injury to feelings and financial losses.

48. Costs are reserved.

P R Stapp
Member of the Employment Relations Authority