Determination Number: AA 30A/07
File Number: 5029886

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Gaye Carrothers
AND	Jasons Travel Media Limited
REPRESENTATIVES	Michael Julius Robinson for Applicant Stephen Langton for Respondent
MEMBER OF AUTHORITY	Robin Arthur
SUBMISSIONS CONSIDERED	8 March 2007
DATE OF DETERMINATION	21 March 2007

DETERMINATION OF THE AUTHORITY

[1] The parties seek a permanent non-publication order of some of the content of the Authority's determination of the substantive issues in this matter (AA30/07) issued on 12 February 2007.

[2] The determination is already the subject of an interim non-publication order, sought and granted shortly after it was issued. As the permanent orders now sought would, if granted, require changes to the determination as issued, the Authority member who investigated and determined this matter (and later granted the interim non-publication order) has referred consideration of the application for a permanent non-publication order. That task has fallen to me.

[3] The application was initially from the respondent only, by way of a letter from counsel of 19 February 2007. After a telephone conference with counsel for both parties the interim order was issued. An opportunity was provided for the applicant to consider her position on the permanent order sought. On 8 March 2007 the parties filed a joint application for a permanent non-publication order under clause 10(1) of Schedule 2 of the Employment Relations Act 2000 ("the Act"). This sought to have the determination reissued with the following changes:

> (i) all employees referred to in the determination (except for the applicant and the respondent's general manager) to have their names suppressed, disguised or anonymised; and
> (ii) the names of one corporate client and two of the respondent's products or services referred to in the determination be suppressed, disguised or anonymised.

[4] Counsel were content to have their joint application heard by way of oral submissions in a telephone conference. They also assisted by answering questions put by the Authority.

[5] The position at the time of preparing the determination on this application is that the parties and their legal representatives have seen determination AA30/07. Apart from Authority members and support staff, the only other people who may have seen it are some information officers of the Department of Labour library who provide the service of public distribution of determinations shortly after they are issued by the Authority. Determinations are routinely distributed to those legal publishers, libraries, law firms and media organisations that have standing orders for copies of all decisions. In this case a 'hold' was put on

determination AA30/07 before it was distributed and it remains under the terms of the interim non-publication order.

Approach to application

[6] Determining this application does not require a review of all the evidence available to the original investigation. Rather I have read determination AA30/07 and consider it appropriate to base my determination only on what appears on the face of it.

[7] I emphasise at the outset that this application does not concerns non-publication orders which may be made during the Authority's investigation process, either on the application of a party or the initiative of the investigating Authority member. This application concerns a situation where the Authority's investigation is already complete, its determination made and issued. What is contemplated by the application is what amounts to "recall" of the determination as it was issued on 12 February 2007 and for it to be re-issued after the desired changes have been made.

[8] Counsel for both parties, who were both present throughout the investigation meeting, confirmed to me that no application was made during any stage of the investigation process for non-publication orders regarding any aspect of the evidence. Neither was any indication made to the Authority member that either party considered the content of evidence referring to names of employees and comments made by or about them, products and clients was sensitive. As Mr Langton put it frankly, counsel did not turn their mind to it until they saw the determination "in the flesh".

[9] Only witnesses and counsel were in attendance at the investigation meeting of this matter – held over two days on 15 and 16 November 2006. No members of the public, including media representatives, attended.

The Authority's powers and duties

[10] The Authority's role is to investigate and resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities (s157). It must act in equity and good conscience and consistently with the Act and relevant employment agreements.

[11] Its investigative powers include interviewing witnesses who are giving evidence which is sworn, under oath or affirmation (s160).

[12] Its determinations are required under s174 of the Act to state or set out certain findings and conclusions, but not required to record all evidence and submissions or to indicate why specific findings were made as to the credibility of any evidence or person. Findings on the facts and issues of law and conclusions reached must be stated and any orders specified. However when s174(b) states that the Authority need not set out a record of all or any evidence heard or received, I do not take this to mean that the Authority should not or could not do so, if that were considered appropriate in any specific case being dealt with, particularly if this were part of the process of setting out the required findings of fact and expressed conclusions on the issues before the Authority. Once the minimum requirements are met, the extent to which the determination records evidence and submissions is a matter for the discretion of the Authority member.

[13] The Authority has the power to close its investigation meetings to the public or certain people (s160(1)(e)) and to prohibit publication of parts of evidence, pleading filed and the names of witnesses and parties (Schedule 2 clause 10). Use of these powers in the circumstances of any particular case are subject to well-established principles applied in the Authority, and the Courts above it, to protect the open administration of justice and related public policy considerations.

Determination AA30/07

[14] Determination AA30/07 found the respondent's dismissal of the applicant for serious misconduct was unjustified. Remedies awarded were reduced by one half because of blameworthy conduct of the applicant which contributed to the circumstances giving rise to her personal grievance.

[15] Its 13 pages include consideration of an investigation by Mary Ansell, the respondent's general manager, of allegations of serious misconduct by the applicant, the respondent's national sales manager. The investigation was sparked by criticism of the applicant by another manager. Ms Ansell subsequently interviewed a number of staff who made comments about the applicant and her work as a manager. Some of these comments were the basis of an allegation put to the applicant that she had a poor relationship with her colleagues and team. In responding to those allegations, by way of a 33 page letter, the applicant made critical comments about some colleagues and staff.

[16] Determination AA30/07 summarises, over several pages, both the allegations and the applicant's detailed responses to them.

[17] Respondent counsel has prepared a schedule of 25 specific references to staff, products and a client in Determination AA30/07 which the respondent considers should be removed or "anonymised"– the latter option meaning that any identifying particulars of name and position should be removed and the employees be referred by a number or letter (such as Employee Z).

[18] The parties say the reference to one client is "commercially sensitive". They also say reference to critical comments made by the applicant and some staff about two of the respondent's products are also commercially sensitive.

[19] Apart from the applicant and Ms Ansell, ten other managers or staff are referred to by name, some more than once. The determination records Ms Ansell as having described one named employee as "abrasive" and the applicant saying this employee had been "abrupt and arrogant" in a meeting and alleging that he had an affair with Ms Ansell. The applicant also described another named manager as being "abrupt and arrogant" in the same meeting. Another named employee is described as "high maintenance", one as having "dramas" with her family, one as a gossip and not to be trusted, another as not having returned some company property before leaving the job, another as having used a nickname (presumably derogatory) about another employee. The determination records that Ms Ansell had gathered a number of critical comments from staff about the applicant after asking certain staff members whether they had heard the applicant undermining colleagues. From some comments made Ms Ansell formed the view that the applicant had told her staff about criticisms of other senior staff that Ms Ansell had mentioned to the applicant in confidence.

[20] After setting out this evidence in some detail, the Authority came to the conclusion that the applicant had, as she admitted, engaged in gossip sessions with subordinates in a way that was "unprofessional" and "not appropriate for a senior manager" but that this did not amount to serious misconduct. The applicant was described as demonstrating "serious blurring of the boundaries and poor judgment".

[21] The determination does not make any findings that any of the critical comments have any basis in fact or are in any way reliable descriptions of any person or their attributes. Rather it records a brittle and critical state of affairs between Ms Ansell, the applicant and some staff and colleagues.

Issues

[22] The issues to resolve in respect of this application include:

(i) whether the Authority can recall a determination once issued for the purpose of changing its content; and
(ii) whether the Authority can issue a non-publication order in respect of the content of a determination, after that determination has been issued; and
(iii) if both or either of those actions are open to the Authority, whether such measures are warranted in the circumstances of this case.

"Recall" of a determination

[23] There is no specific statutory provision for the recall and reissue of a determination of the Authority. Arguably once the determination is issued, the Authority is *functus officio*. However there are circumstances when the Authority's powers in respect of a matter extend beyond the date of issue of a determination. One is where there is a need for compliance orders in respect of orders made but not followed. Another is where there is an application for the reopening of an investigation, as provided for at Schedule 2 clause 4 of the Act. That clause allows the Authority to reopen an investigation on terms it thinks reasonable, and in the meantime to stay the effect of any order previously made.

[24] The power at clause 10 of Schedule 2 to prohibit publication is similarly not limited to a particular time or requirement that it be in respect of a matter which the Authority is currently investigating – a point discussed further below.

[25] Section 221 of the Act also requires the Authority to dispose of any matter before it according to the substantial merits and equities. An application of the type being presently considered is a "matter" within the scope of that section. The Authority is authorised under s221(b) to amend any error or defect in the proceeding. Arguably the omission to seek non-publication orders during the investigation, rather than after it was determined, may be such as error or defect. And s221(d) allows the Authority to give directions necessary or expedient in the circumstances. In the present case this may apply to the earlier omission and alleged possible damage from the extended recording of certain evidence in the determination.

[26] However such discretions are to be exercised according to principle. The practice of the civil courts gives guidance on the appropriate principles. The High Court Rules provide for recall of a judgment before it is sealed – sealing being a formal process of setting out and verifying the orders given in a written or oral judgment, which can then be used for enforcing the remedies given. The Authority does not "seal" or "perfect" its determinations in this way but does, on the request of a party, issue certificates of determination which are, in turn, required for enforcement of orders through the District Court (s141). The other means of enforcement is by way of compliance order (s137).

[27] *McGechan on Procedure* at HR 542.04 cites the leading case on recall, *Horowhenua County v Nash (No 2)* [1968] NZLR 632, at 633 for its a statement by Wild CJ of the common law principles applied to the exercise of discretion to recall:

> *Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected [sealed] may be recalled — first where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.*

[28] The first two categories do not apply to the circumstances of the present application. Neither is the "slip rule" applicable for errors which are clerical, arithmetical and such like. However I accept that, under the third category, that it is open to the Authority – particularly in light of the requirement to act in equity and good conscience – to consider recall of a determination if for some "very special reason" justice requires it. I note this is a high hurdle,

not achieved for ordinary reasons but something that is special to the circumstances of a particular case and the determination for which recall is sought.

Can a non-publication order be made after a determination is issued?

[29] The power at clause 10 of Schedule 2 to prohibit publication is not expressed to be in respect of a matter which the Authority is currently investigating. The difference in wording is clear if contrasted with the wording of s221 that allows for necessary directions on any matter "before" the Authority. However, while the time does not appear to be limited by clause 10, there are express categories of information which can be subject of non-publication orders – that is all or part of the evidence given, pleadings filed and name of any party or witness or any other person.

[30] In the normal or common course of events, parties apply for non-publication orders before or during the investigation meeting. The need for such an order – from the parties' point of view at least – will have become apparent from content of the statements of problem and reply initially lodged, or what is said in confidential discussions in mediation, or the documents and written witness statements required to be lodged early in the investigation process, or during the investigation meeting as the evidence is heard and documents examined through the process of witnesses answering questions put by the Authority member and, usually, the parties' representatives.

[31] Where one or more parties raise concerns about evidence or information considered sensitive, this may be dealt with informally or formally. By informally I mean situations where a party expresses a concern but is given some reassurance either by the Authority or the other party. For example, an Authority member may express the view that a particular fact or comment is not relevant to the issues in the matter and will not need to be referred to in a determination. Or the other party may confirm that it understands documents disclosed for the purposes of the investigation cannot be used for other purposes.

[32] At a formal level – either at the request of a party or of its own volition – the Authority may make non-publication orders regarding certain evidence, pleadings and names. The grounds for such orders are widely understood. The provisions authorising non-publication orders are identical in the Authority and the Employment Court (Schedule 2 clause 10 and Schedule 3 clause 12). That wording differs slightly from the non-publication provisions for the former Employment Tribunal and Employment Court under the previous legislation (Employment Contracts Act 1991 s97 and s109) but the case law on those provisions remains of assistance.

[33] Relevant to the present matter are the following observations of a full bench of the Employment Court in *GWD Russells (Gore) Ltd v Muir* [1993] 2 ERNZ 332, 340-1:

> *The Tribunal has a wide discretion as to the conduct of the hearing, but adequate reasons do need to exist before the publication of evidence led before the Tribunal is prohibited: see* Anderson v Employment Tribunal *[1992] 1 ERNZ 500. This power is not a power to suppress anything and the term "suppression order", however convenient, is misleading. It is a power to prohibit publication of the matters specified in the sections. […]*
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> *Different considerations apply to the actual decisions of the Tribunal or the Court. There is no express power in the 1991 Act to prohibit publication of part or all of the decision itself. We have reservations as to whether any general implied power to do so exists, although there may be a limited power to postpone publication of a decision in the interests of justice. We are, however, concerned about the continuation of a practice whereby the decision itself is required to be bowdlerised as a result of what is described as a "Suppression Order" after it has been signed, sealed, and delivered to the parties. Sections 97 and 109 cannot be called in aid of this practice. If the Tribunal or Court considers it is dealing with sensitive evidence the decision can be drafted in a way which sets out the reasoning, without detailing*

> *the evidence which it considers ought not to be published. It is undesirable to set out in a judgment material that may be socially or commercially damaging to either or both of the parties if the decision or judgment can be made to make sense without it. Both the Tribunal and the Court have often found it readily possible to do so without the prohibition of substantial portions of the decision or judgment. Whilst much must be left to individual style, settling personal grievances is a delicate exercise and the more personal the grievance the more circumspect should be its treatment. As an appropriate way of dealing with the matter see, for example, the approach of the Court in* Fowler v Waiau College Board of Trustees *unreported, Finnigan J, 13 July 1993, CEC35/93 and the form of the suppression order set out at p 55:*
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> > *Before departing from the case I order, pursuant to s 284 Labour Relations Act 1987, that the brief of evidence of the psychologist referred to may remain on the Court file, but sealed up, and it is not to be published; copies of that brief may remain with counsel and the advocates for the parties, but are not to be published to any person. Likewise all notes of the psychologist's verbal evidence made during the hearing may remain, but care must be taken that no part of them is published. That order does not, and cannot, extend to this judgment or any part of it.*

[34] The Court in *Muir* was commenting on a situation where the Tribunal's written decision gave details of a party's losses and profits but ordered this evidence not be published. A full form of the decision had been issued to the parties but the version available publicly from the Court and Tribunal library had two paragraphs removed.

[35] The Court suggested decisions dealing with sensitive evidence could be drafted to set out the reasoning but omitting the evidence that "may be socially or commercially damaging".

[36] In his submissions on this application, this is what Mr Langton called adopting "a utility-based approach" so that unless the information referred to "beefs up" a determination, it can safely be excluded.

[37] However I also take from *Muir* that the content of a determination is very much a matter of the discretion and individual style of the member of the Authority who is writing the particular determination. It is for that member to assess the evidence received and to decide what it necessary to meet the requirements of s174 of the Act to state findings and express conclusions. In this respect a determination is written to satisfy the needs of a number of potential "audiences" – firstly, and most importantly, there are the parties (and their counsel) who should be able to see that the relevant information was heard and considered so that even if not successful they can consider whether to accept the Authority's determination or seek further judicial intervention by way of a challenge. Secondly, if the determination is subject to review or challenge in the Court, the facts and reasoning must be sufficiently detailed so the consideration given to the issues by Authority is clear to the Court (although this will be less relevant in the case of a full *de novo* challenge than a partial challenge). Thirdly, lawyers and advocates acting in the employment jurisdiction, and employers and workers' representatives generally, may be interested in how particular facts and legal issues are resolved, for the purpose of legal precedent or to guide their own practice in similar matters. Fourthly, the wider public have an interest (in the sense of a right) in the open administration of justice and may be interested (in the sense of a curiosity) in the content of Authority determinations because of the parties involved or the issues decided. Openness is part of sustaining confidence that justice in employment matters is delivered freely and fairly.

[38] In the light of this, the Court has also expressed strong views touching on the extent of information that non-publication orders can cover, and the limits of a utility or "useful purpose" approach to publication. In *Z v A* [1993] 2 ERNZ 469 at 494, Goddard CJ stated:

> *In* Russells v Muir*, the full Court has doubted the existence of any power to prohibit publication of a part of the Tribunal's decision, and the Tribunal should bear in mind that if it purports to do so it runs the risk that it may be acting without jurisdiction.*

> *If it has the power to prohibit publication of part of a decision, then why not of the whole decision or even of all its decisions? No such despotic power was intended to be conferred on the Tribunal by s 97 of the Act and there is no other source to which it can look for confirmation of the legitimacy of its claim to exercise it. …*
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> *… The short point is that a decision is not evidence even if, in part, it draws on or is derived from evidence. Therefore, it cannot be the subject of an order under s 97. But names are still names, wherever they appear, and the prohibition of their publication is expressly authorised in appropriate cases.*
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> *Also, the Tribunal should not prohibit publication of any part of the evidence on the ground which I have seen expressed in some Tribunal decisions that publication would serve no useful purpose. Whether publication would serve a useful purpose is not a matter for the Tribunal or any Court to judge – it is a matter for the would-be publisher. That is what is meant by the freedom of expression guaranteed to all under the New Zealand Bill of Rights Act 1990, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": s 5. It is implicit in the requirement that the Tribunal must do its work in public that it may impose only reasonable limits as prescribed by law (not by the Tribunal) upon public discussion of its public work. The only ground on which the Tribunal can make an order prohibiting publication is if, in the interests of justice, it is fair for it to do so having regard, not only to the interests of the parties and of witnesses and others directly affected, but also to the public interest in the case. Every member of the public has an interest in knowing how the Tribunal conducts its adjudications. … The public has an intense interest in how the Tribunal discharges its function to deal in a just and speedy way with everyday workplace differences and disputes.*

[39] Taking account of the concerns expressed in the *Muir* and *Z v A* cases, it appears doubtful that the Authority can issue a non-publication order once its finalised determination has been issued to the parties. Rather if any action to the same effect is possible, the mechanism of "recall" is the means open to the Authority to address the substantial merits, if any, of an application made in the present particular circumstances.

The merits of this particular application

[40] In this particular case the issue is whether the references to the names of employees, two products and a client are, or are likely to be, so socially or commercially embarrassing that this amounts to special circumstances that justice requires recall of the determination as issued.

[41] Nothing advanced by counsel persuaded me that there was any real or significant commercial embarrassment likely to arise from the reference to two products and a client. A client company is referred to incidentally in the context of whether an employee carried a task at a time said or another. There is nothing on the face of the determination or in the parties' submissions that support any real commercial risk or sensitivity arising from that.

[42] Similarly I do not accept that references to two of the respondent's products are sufficient to warrant recall of the determination. The references are to disagreement between some staff and the applicant over selling advertising space in two of the respondent's print or web-based publications. The worst that can be taken from it is that there were some arguments about how easy or not it was to sell advertising in the publications. There are no findings in the determination which support one view or another. That advertising sales staff in any commercial operation will have disagreements about their products and how best to sell them is so unremarkable that much more would be required to ground an application for non-publication in the first place, far less a belated one requiring recall of an issued determination.

[43] The more serious issue is the contention that the employees named face significant social embarrassment if the determination is not recalled and their names suppressed or anonymised.

[44] Mr Langton submitted that the comments recorded as being made by or about the named employees easily crossed the threshold of being "embarrassing enough". Some of the employees made comments to Ms Ansell, in the context of a private and internal investigation being made by her, that they did not know would become evidence in an Employment Relations Authority investigation or be recorded in such a way that other staff of the respondent could later become aware of. One concern is that this may affect subsequent working relations between staff who did provide comments to Ms Ansell and those who were not involved in that process.

[45] The respondent's application had initially suggested that the contents of the determination breached the privacy of those named employees. However Mr Langton accepted that the Privacy Act 1993 principles did not apply because the non-compliance, if any, was necessary for the conduct of the proceedings.

[46] However Mr Langton submitted that it would be embarrassing and potentially unjust for some employees to have their names ascribed to certain qualities – both for now and through their working lives. The example he used was of the employee who had been described as a "gossip" and not to be trusted. While sounding relatively innocuous, association with such as an attribute could be devastating.

[47] Mr Robinson advised that the applicant supported the respondent's application to protect third parties from embarrassment.

[48] I am not satisfied that a concern for the potential embarrassment of the employees referred to is sufficient to amount to a special reason so that justice would require recall of the determination. I doubt that the details or comments of particular concern would meet the standard for a non-publication order if it had been made during or before the Authority's investigation. It circumstances certainly do not raise real risks of the kind that were identified in *Y v D* [2004] 1 ERNZ 1, 7 (EC, Colgan J) where non-publication orders were considered necessary because of a real risk to a person's mental health and life arising from the likely level of media interest in salacious elements of a case involving employment exploitation and same-sexual harassment.

[49] No such level of interest is likely in the present case. As I advised counsel there had been an inquiry from one newspaper to the Authority's offices about this case simply because it had not been released along with other determinations but there is nothing to suggest there is likely to be significant media interest. In my assessment, media attention on the case, if any, is likely to focus on the applicant's admission that she had smoked marijuana at a travel industry dinner.

[50] Similarly it is Ms Ansell and the applicant who are likely to be embarrassed about the comments recorded as being made about staff rather than the staff referred to. There is no reason to disagree with respondent counsel's submission that "[m]any of the comments made about the employees were the applicant's opinion – and were without foundation".

[51] I cannot agree with the respondent's submission – on the utility-based approach – that determination AA 30/07 could be recalled and employees' names removed because it would be no less of a determination.

[52] In setting out in a determination the evidence which relates to or explains a particular finding of fact, it is convenient (and often clearer) to name an employee who has not given evidence but whose words or deeds have featured in some way in the chain of events.

[53] I accept that a case of the present type is private civil litigation rather than a public or criminal prosecution. However the statutory framework for resolution of employment

relationship problems provides ample opportunity for parties to first resolve matters confidentially between themselves – either by direct negotiation or in mediation. Even during the Authority investigation process there is provision for consent orders where settlement agreements are routinely made confidential at the request of the parties. In situations where parties will not settle their differences and choose to go ahead with investigation and determination by an independent decision-maker, they also put beyond their control the extent of information revealed about the parties, the witnesses and their business.

[54] The extent to which that is necessary or useful in a particular determination is something which must remain in the discretion of the Authority member dealing with the particular case.

[55] A determination is not a draft issued for the consideration and blue pencilling of the parties. Echoing the concern of the Court in *Z v A* (above), if part were to be rewritten at the behest of the parties after the determination is issued, then why not the whole decision or even all of the Authority's decisions? That would result in great inconvenience and uncertainty.

[56] Leaving open the prospect that there may be a rare case where for special reasons justice requires otherwise, in the phrase used by Chief Justice Wild in the *Horowhenua County* case, a determination once issued "must stand for better or worse subject, of course, to appeal".

[57] The Employment Relations Act contains robust provisions for challenge of the Authority's determinations – in part or in whole – by a specialist court, including questions on non-publication of part or all of the evidence, pleadings and names of parties, witnesses and others.

Determination

[58] For the reasons given above I decline to grant the orders sought for permanent non-publication of names of employees, products and a corporate client referred to in determination AA30/07. A recall of that determination to make the changes sought is not required by any special reason to do justice in the circumstances of the present case.

[59] In respect of the interim non-publication order at presently in place over determination AA30/07, I extend that interim order for a further 29 days from the date of this determination. This allows for the prospect that the parties may challenge this determination regarding permanent non-publication issues. The legislation provides a 28-day period for challenge. If the interim non-publication order were lifted, the benefit of any challenge, if successful, could otherwise be rendered nugatory. Although I am concerned for public policy reasons about the effect on the open and public nature of the Authority's processes and determinations, extension of the interim orders to allow for the prospect of challenge is consistent with the approach of the Employment Court in *X v Auckland District Health Board* (unreported, EC Auckland, AC 10/07, 23 February 2007). It is also consistent with the practice commended by the Court in *Y v D* [2003] 1 ERNZ 623 and although the *post facto* circumstances of the present case differ from that case, I adopt that approach from an excess of caution and the knowledge that determination AA30/07 will otherwise see the light of day in the relatively short period of 29 days.

Robin Arthur
Member of Employment Relations Authority