

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 96  
3152001

BETWEEN

JI EUN KIM  
Applicant

AND

HORIZON RADIOLOGY  
LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Jasmine Kim, advocate for the Applicant  
Emma Butcher, counsel for the Respondent

Investigation Meeting: 20 and 21 September 2022

Submissions received: 3 October 2022 from the Respondent  
10 October 2022 from the Applicant

Determination: 28 February 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant Ji Eun Kim was employed by the respondent Horizon Radiology Limited, a provider of diagnostic imaging services. Ms Kim worked as a trainee sonographer from February 2018 until July 2021, when she was dismissed without notice for serious misconduct. A personal grievance was raised by her.

[2] Earlier during her employment she had raised a grievance claiming unjustifiable action was taken against her, causing disadvantage in her employment or conditions of employment. That grievance remained unresolved when she was dismissed.

[3] As well as her two personal grievances Ms Kim has brought claims to the Authority for penalties, alleging Horizon Radiology breached the duty of good faith under s 4 of the Employment Relations Act 2000 (the ER Act), and charged her a premium in breach of s 12A of the Wages Protection Act 1983 (the WP Act).

[4] At an investigation meeting Ms Kim gave evidence and was questioned by the Authority and Ms Butcher, counsel for Horizon Radiology. Ms Kim was unrepresented throughout the Authority's investigation but was ably spoken for and assisted by her sister Jasmine Kim.

[5] Witnesses for Horizon Radiology who gave evidence included its managing director Mary Gordon, and its Sonography Clinical Tutor, Training Coordinator and Lead Sonographer, Kerrie Child. The respondent's witnesses were available to be questioned and most were, by the Authority, Jasmine Kim and Ms Butcher. Full written submissions were received from both Ms Kim and Horizon Radiology.

[6] This determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority or submissions received.

[7] The determination is issued outside the three-month time frame of s 174C of the ER Act. An extension of time has been given by the Chief of the Authority.

### **Overview of grievances**

[8] Ms Kim raised disadvantage grievances to begin with and Horizon Radiology started to investigate them. After a staff member made a complaint about Ms Kim, she was required to attend a disciplinary meeting for that to be considered. Following the meeting and matters discussed at it, Horizon Radiology decided to give some priority to trying to resolve issues Ms Kim raised about the relationship with her supervisor Ms Child. As they had an ongoing relationship, those issues seemed to require consideration ahead of other complaints, which were then put on hold.

[9] While the disadvantage grievance claims were parked, further matters of concern about Ms Kim came to the attention of Horizon Radiology and were investigated ahead of others. Those matters arose from a concern that Ms Kim may have breached privacy and patient confidentiality. The employer's investigation into

those further matters, concluded with Ms Kim's summary dismissal which in turn led to an unjustified dismissal grievance being raised by her.

### **Unjustifiable action grievance**

[10] Ms Kim claimed that she was unjustifiably disadvantaged by the actions of Horizon Radiology on three separate occasions: 1) at a meeting she had on 13 May 2021 with Ms Child and representatives of Auckland University; 2) during a phone call she had with Ms Gordon on 9 June 2021; and 3) in response to her raising a grievance on 16 June 2021.

### **University meeting on 13 May 2021**

[11] Trainee sonographers are enrolled for a post-graduate Diploma course at Auckland University. Although training occurs on the job at the premises of Horizon Radiology, the University is largely responsible for grading the trainee's written work and for making decisions about progression through the Diploma programme, including an assessment of whether a trainee is ready to sit exams. Formal reports from the supervisor of the trainee are reviewed by the University as part of this process.

[12] The Authority accepts the evidence that Ms Child reported on Ms Kim to the University fairly and accurately and that the University made the decision, not Ms Child, that Ms Kim was not ready to sit her final exam. Ms Child had not expected this decision.

[13] To any extent Ms Kim may have been disadvantaged in her employment by delay before she could sit her final exams, that was not the result of any action of Ms Child or Horizon Radiology. Ms Kim has no grievance from this action.

### **Ms Gordon's telephone call to Ms Kim on 9 June 2021**

[14] An audio recording came to be made of this telephone call, which the Authority accepts as an accurate recording. A transcript of the recording was also provided to the Authority.

[15] The Authority cannot find anything untoward about the recorded communications. They are such that would routinely take place in an employment relationship in which parties are required to be active, constructive, and communicative.

[16] Ms Gordon was prompted to communicate with Ms Kim when she became aware that Ms Kim appeared to be having some difficulties at work and there had been some complaints about her from patients. The conversation is a constructive one, with Ms Gordon obviously seeking to understand Ms Kim's problems and help her overcome them, particularly by offering practical advice and giving Ms Kim encouragement.

[17] The recording and transcript speak for themselves. The Authority is unable to find that Ms Gordon's words or tone during the phone call of 9 June 2021, was in any way threatening, intimidating, hostile or abrupt, as alleged by Ms Kim. Ms Gordon was apparently unaware the conversation was being recorded by Ms Kim who throughout remains cool and calm in her manner and speech.

[18] The last few words show very well the tone of the entire discussion that took place

Mary Is there anything else you want to say to me?

Ji Eun No, I thank you for your call, and for your concern. I will try and work up and try to be the best that I can.

Mary Well, if there's anything else that you can think of, you can call me or you talk to Kerrie, because we need to get you through here, but we'll put you down for the exam in September then?

Ji Eun Yes, that's my goal.

Mary OK, awesome. OK, well, you take care and you enjoy the rest of your day. OK.

Ji Eun OK thank you Mary.

Mary See you, Bye.

Ji Eun Bye bye.

[19] During the conversation Ms Gordon emphasised the importance to Horizon Radiology of making sure Ms Kim became qualified. She said, 'you know that's really important because you've come so far we really want you to pass, you know that's really important to us'.

[20] Ms Gordon followed up her telephone call with an email the same day. She carefully listed the points earlier discussed and concluded, 'Ji Eun, we want to work with you to support you so you can sit and pass you final exam....'. Ms Gordon continued to offer encouragement and support, while urging Ms Kim to give her best.

[21] From the 9 June telephone discussion, the Authority finds no foundation for a disadvantage grievance, or any other complaint.

### **Ms Kim's 16 June grievance**

[22] A few days later on 16 June 2021, by letter Ms Kim raised a grievance. She alleged she had been subjected to discrimination and unjustified action, disadvantaging her in employment. Ms Gordon described the letter as long and highly emotional. It is also very detailed.

[23] Ms Gordon considered the grievances arose from Ms Kim having misunderstood particular events or occurrences and the intentions of Ms Gordon and Ms Child. The Authority considers that was a reasonable assessment.

[24] Ms Kim was advised she was mistaken about key events and the intentions of Ms Gordon, Ms Child and other staff. Her request for a formal written apology to be given by Ms Child, was rejected. Her request to have a different supervisor was also rejected.

[25] After considering the grievance raised by Ms Kim in her lengthy letter, the Authority finds nothing about the way Horizon Radiology dealt with it, that was not the response of a fair and reasonable employer in the circumstances.

[26] It must be said that the information and evidence before the Authority showed a gradual increase in uncharacteristic behaviour and responses by Ms Kim to events or developments. It is not clear what caused this, but it was detected by Ms Child who was alleged by Ms Kim to have 'conspired' to prevent Ms Kim from qualifying as a sonographer.

[27] Ms Child became perplexed by the changes she began to notice in Ms Kim from about March 2021. The Authority accepts that Ms Child as her supervisor was properly observant of Ms Kim's individuality and moods, and that she saw a change in her

behaviour which had usually been calm and respectful towards others. Ms Kim became distrustful of Ms Child to the point of secretly recording conversations Ms Kim had with her.

[28] The Authority considers that Ms Child provided due care and attention to help Ms Kim lift her performance in readiness for final exams. She was unable to fully understand why Ms Kim appeared to change in ways that hindered her progress to successfully completing her training.

[29] The Authority accepts that Ms Child is a highly experienced and qualified sonographer and tutor, who has served Horizon Radiology for several years and is a valuable and valued employee of the practice. The Authority considers the idea to be far-fetched that she would sabotage the resources Horizon Radiology had put into training Ms Kim for three years.

[30] The Authority observes that Ms Kim has demonstrated a general propensity in the use of language, to mischaracterise or overstate circumstances, in particular those surrounding her interactions with Ms Child and Ms Gordon. Ms Kim has good written and spoken English and from many examples of her written expression can be taken to understand the usual meaning of strong words she used such as ‘conspiracy’, ‘blackmail’, ‘interrogate’ and ‘bombard’. Although English is her second language, the Authority is satisfied that does not explain why events and actions she refers to have been misdescribed, to the point where the Authority must conclude that Ms Kim’s grievances were quite incongruous with the circumstances giving rise to them.

[31] The Authority concludes that Ms Kim does not have an unjustified disadvantage grievance arising from any of the three events or occurrences she pointed to, or from any other circumstances in the period before her dismissal.

### **Unjustifiable dismissal grievance**

[32] As a trainee, Ms Kim worked with the patients of Horizon Radiology performing scans for diagnostic purposes. Much of the work was Obstetric scans.

[33] While Horizon Radiology was endeavouring to resolve with Ms Kim the disadvantage grievance she had raised, it came to Ms Gordon’s attention from things

Ms Kim said that she had made notes about patients and the scans of them carried out by her. It seemed from discussion with Ms Kim that the notes had been put into a journal she kept as a separate record from the authorised digital ‘logbook’, in which sonographers are required to input patients’ personal information, as part of a record of procedures carried out.

[34] Ms Gordon became concerned that Ms Kim’s notetaking may have been a breach of patient privacy and confidentiality.

[35] In this regard Horizon Radiology has obligations under the Privacy Act 2020, the Health Information Privacy Code 2020, and the rules of the New Zealand Radiation Technologists Board.

[36] Horizon Radiology trainee sonographers receive instruction about the existence and scope of these obligations. Upon signing her employment agreement Ms Kim had undertaken that she would familiarise herself with and observe all policies, procedures and House Rules of Horizon Radiology. These included, in the Employee Handbook, an instruction to adhere to the Privacy Act 1993 guidelines, and the Health Information Privacy Code.

[37] The Handbook also required of all employees

- You must not breach the privacy of any client in the course of your employment. This includes keeping client information in any format whatsoever for your own use or providing to third parties.
- Waste paper must be carefully vetted and placed in the shredding bin if it has any client information on it.

[38] Ms Kim accepted in her evidence that she was familiar with the Medical Radiation Technologists Board Code of Ethics, which contains standards of conduct and behaviour expected of sonographers and other professionals. These are said to be ‘values fundamental’ to the practice of medical imaging in which Ms Kim was training while working with patients.

[39] Under the Code, practitioners are required to protect the privacy of patients at all times and to protect, respect and safeguard the privacy of all patients’ personal information. All such information is required to be treated as confidential.

[40] There were other undertakings and instructions that should have made Ms Kim aware of her obligations to maintain patient privacy and confidentiality. The Authority accepts that she was under a strong and clear obligation to read the written requirements. If she failed to, that omission by itself was unlikely to provide an acceptable explanation for breaching the rules.

[41] Ms Kim was asked by her employer to immediately give back any patient information in her possession. In response she said there was nothing to return and she had kept only the digital logbook required of her.

[42] Horizon Radiology then made enquiries of other employees who confirmed they had seen Ms Kim keeping a journal containing personal details and medical information about patients.

[43] She was requested to attend a disciplinary meeting and answer three allegations: 1) that in her journals she had collected personal information about patients in breach of the Privacy Act 2020; 2) that she had also been untruthful when asked about having the journals in her possession; 3) that she had not complied with a reasonable instruction to return the journals containing patient information.

[44] When Ms Kim attended the disciplinary meeting, with her sister Jasmine, she confirmed she had been recording in her own private diaries, patients' personal information. This included name and ethnicity, NHI number, type of scan performed, and Ms Kim's observations of the mannerisms and physical characteristics of her patients. The diaries were shown to the Authority by Ms Kim.

[45] At the disciplinary meeting Ms Kim explained that she kept the journal only as an aid to transferring information into the authorised logbook, after which she deleted the notes by scribbling over them. She explained that these notes were made for every patient she scanned, and that this was a practice she had adopted for the purpose of self-reflection and to keep her on top of her task, as she put it.

[46] She said she was not aware that by her conduct she may have breached Horizon Radiology's privacy policies or the Privacy Act.

[47] Ms Kim accepted that some of the notes had not been completely obscured by scribble and could have been seen by others when she had taken her diaries home or

out in public away from the premises of her employer. Horizon Radiology inspected one of the diaries and found it was still possible to read information even after it had been scribbled over by Ms Kim.

[48] Ms Kim denied she had been untruthful when replying to Horizon Radiology about keeping her own record of private information. She said the notes were considered by her to be a temporary record she used as an aid to writing-up the official logbook. She considered she had not kept any patient information, because information had not been retained after being deleted by her, and because the diaries the information was written in were her private and personal records.

[49] Horizon Radiology viewed the act of recording the information as a breach of its policies and the Privacy Act. The keeping of the information once it had been recorded was also viewed as a breach. Although Ms Kim had attempted systematically to remove the information, Horizon Radiology found that some of it was still able to be read. Ms Kim accepted that the information had not always been removed entirely or quickly. She put this down to human error.

[50] In considering Ms Kim's explanation, Horizon Radiology assessed her future reliability and trustworthiness as relevant in deciding whether any disciplinary action should be taken.

[51] Horizon Radiology found that Ms Kim seemed not to view the matter as serious or show any regret for her actions, and she had aggravated her employer's concerns by suggesting that Horizon Radiology was acting in bad faith and was improperly motivated by a desire to retaliate against her for having raised a disadvantage grievance earlier. She said (through her sister) that she did not feel she should be remorseful or regretful for keeping her diary, although she accepted that she had learnt a lesson to reflect upon. Later she suggested that Horizon Radiology had been 'scavenging and fishing' for reasons to dismiss her. Her in approach of going on the offensive with serious allegations made against her employer, was viewed unfavourably by Horizon Radiology.

[52] The Authority was referred to *Shaw v Bay of Plenty District Health Board*<sup>1</sup>, in which the Employment Court found the dismissal of a health professional to be justified where there had been a failure to treat patients' personal information as strictly confidential. The Authority accepts that the case on its facts and law should guide it when determining Ms Kim's dismissal grievance in particular.

[53] After considering her explanation, Horizon Radiology gave Ms Kim an opportunity to comment on a particular outcome it proposed from its enquiry into her journal keeping. The proposal was that Ms Kim would be summarily dismissed for serious misconduct but allowed to continue her employment until she had sat her final exams and had had the opportunity to become eligible to be a sonographer.

[54] Horizon Radiology also required Ms Kim to immediately return all her diaries so that they could be thoroughly checked for any patient information still visible in them. When they were returned it was found that some of the entries had not been scribbled over and could still be read.

[55] Horizon Radiology considered the comments of Ms Kim about its proposed disciplinary action and decided that it should dismiss Ms Kim summarily. That action was confirmed to her.

### **Justification for dismissal**

[56] Horizon Radiology is required to justify the dismissal of Ms Kim by satisfying the test of s 103A of the ER Act. There are several specific factors to be considered under the statutory provisions.

[57] It is not the role of the Authority to repeat an employer's disciplinary enquiry or justify a dismissal. The Authority has a well-defined role excluding it from standing in the shoes of Horizon Radiology, in this case.

[58] Ms Kim's dismissal has been shown to be justified.

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<sup>1</sup> [2020] NZEmpC 10.

[59] The Authority is satisfied that the nature and gravity of her conduct was such as to amount to serious misconduct, as it caused the destruction or serious diminishment of the employer's trust and confidence.

[60] Horizon Radiology reasonably considered that Ms Kim was, or should have been, aware of its privacy policies. She should have known about those from information she had been given or directed to when commencing employment and in the course of her work. Horizon Radiology reasonably concluded it could not trust her to take her obligations and responsibilities seriously, especially when she continued to view its concerns as improperly motivated by a desire to take disciplinary action so that she could be removed from her job.

[61] Ms Kim's views of her employer's motives and actions were unreasonable and unfounded in the view of the Authority.

[62] Notwithstanding her reasons for doing so, as soon as Ms Kim made entries in her diaries of patient information and for as long as the information remained visible, there was a risk that it would be seen or accessed by others outside of Horizon Radiology. She created a risk that Horizon Radiology would be held accountable for failing to fully protect the information and for causing harm to its patients. This was likely to have an adverse impact on its professional reputation and standing.

[63] Ms Kim also seriously impaired her employers trust and confidence by initially denying, untruthfully, that she had kept a personal record of confidential and private patient information.

[64] Having considered the relevant factors in s 103A(3) of the ER Act, the Authority finds that Horizon Radiology carried out a full and thorough enquiry into Ms Kim's conduct and did so in a way that was fair to her. Horizon Radiology raised its concerns with her, considered her explanations and reached a conclusion that was strongly supported by the information obtained from its enquiry.

[65] In the view of the Authority, Ms Kim acted only with innocent intentions, more from naivety than deliberate disobedience of her employer. She simply had an intellectual curiosity wider than the recognised limits of her field of practice and study.

She had also developed a particular system that suited her for keeping the required records of her work.

[66] The employer showed empathy towards Ms Kim and her situation, and it seemed to the Authority to have been genuinely saddened by the ending of Ms Kim's employment.

[67] It was for Horizon Radiology to consider Ms Kim's explanation and draw any reasonable conclusions open to it, about the nature and seriousness of any misconduct the degree of her culpability. Before it could justify dismissal Horizon Radiology was not required to conclude that Ms Kim had wilfully disobeyed an instruction. It was enough if she had been careless or had neglected to inform herself of the requirements of her position, particularly when she had been charged with the responsibility for familiarising herself with requirements and complying with them.

[68] Although English is a second language of Ms Kim, there is no indication that her comprehension or fluency were so rudimentary that she may not have understood the request made by Horizon Radiology for her to disclose whether she retained any private information and return it to the employer.

[69] In the view of the Authority, Horizon Radiology could reasonably conclude from its disciplinary inquiry that there was a risk Ms Kim might breach privacy again if her employment continued.

[70] The Authority determines that Ms Kim was not unjustifiably dismissed and does not have a personal grievance of that type. Viewed objectively, the actions of Horizon Radiology were what a fair and reasonable employer could have done at the time the dismissal occurred.

### **Unlawfully seeking a premium from Ms Kim for employing her**

[71] It is unlawful for an employer to seek or receive a premium in respect of the employment of any person. Section 12A of the WP Act prohibits that conduct, and s 13 provides that a worker may recover a penalty of up to \$20,000 from the employer.

[72] Ms Kim's claim is that a training bond she agreed to in her employment agreement was a premium sought from her in breach of the WP Act.

[73] As to seeking a payment, at the time of entry into the agreement with Horizon Radiology no payment was sought from Ms Kim. As to receipt of a payment, Horizon Radiology has not received any payment from Ms Kim. The Authority was advised by Ms Gordon that the company has not asked Ms Kim to pay any money and it has no intention of doing so.

[74] The Employment Court in *Holman v CTC Aviation Training (NZ) LTD*<sup>2</sup>, with reference to other cases said there are two requirements for a payment to be a premium

- (a) The payment is a condition for the obtaining of employment. The employment will not be obtained without making the prior payment.
- (b) The payment does not benefit the employee in any way other than obtaining employment.

[75] The Authority finds that the training bond Ms Kim agreed to, was a form of security against the possibility that while still in training, or for a period afterwards, she might leave the employment, after cost had been incurred providing professional training to her, and after full payment had been made by the employer of the course and examination costs of her becoming professionally qualified.

[76] The scale of those costs met by Horizon Radiology was reflected in the amount repayable under the bond, \$125,000 per annum for up to 2 years. There is no suggestion that the amount was inflated.

[77] The rationale for a training bond is that the employer bears a cost to obtain the opportunity of retaining the service of employees once they have become fully trained and qualified. Ms Kim bonded herself to repay the training costs if she resigned or was dismissed for any reason other than redundancy, during training or within 30 months of qualifying.

[78] Whereas a premium is no more than a payment made to acquire employment, the bond protected a training cost for which the employee's liability to repay would reduce to zero after qualifying and serving the employer for at least 30 months. A premium is the price of a job and nothing but the job, whereas the bonded trainee has the potential to significantly expand their qualifications and enhance their employment

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<sup>2</sup> [2017] NZEmpC 60, at [20]

and career prospects, by becoming a qualified sonographer through successfully completing training fully paid for by Horizon Radiology.

[79] Ms Kim referred the Authority to the judgment of the Employment Court in *A Labour Inspector v Tech 5 Recruitment Ltd*<sup>3</sup>. The Court held that a premium is wide enough to include ‘recruitment-related costs or other expenses that would ordinarily be borne by an employer’. A feature of those may be a lack of any benefit to the employee in meeting such costs or expenses other than getting the job.

[80] The costs and expenses in the *Tech 5* case were of a very different nature to those covered by the training bond Ms Kim signed up to. She had the opportunity to obtain a professional qualification, broadening her future choice of occupation and level of remuneration.

[81] Ms Kim pointed out that she did not conclude her course of study and the final exams which would have enabled her to become a qualified sonographer. That is so, but whether a cost or expense is a premium must be looked at when it is sought or when it is received, rather than in the light of future supervening events unknown at the time employment was agreed to.

[82] It is also not correct that Ms Kim obtained no benefit from the training bond. She obtained a valuable opportunity to undergo formal and institutional sonography training which, had she met the course requirements and completed the course, would have enabled her to become a qualified sonographer. The dismissal did not take away that opportunity, as Horizon Radiology left it open to her to continue in employment until she had sat the final exam. The Authority accepts that the circumstances that arose leading to dismissal were a distraction to Ms Kim in trying to qualify.

[83] The Authority agrees with submissions for Horizon Radiology and finds that the nature and purpose of the training bond did not make it a payment of the type forbidden by s 12A of the WP Act. The evidence and the law do not support the penalty claim of Ms Kim.

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<sup>3</sup> [2016] NZEmpC 167, paragraph [54] in particular.

## **Breach of good faith**

[84] If Horizon Radiology had unjustifiably dismissed Ms Kim and unjustifiably disadvantaged her and had also sought and received a premium from her in breach of the WP Act, it is likely that a breach of s 4 occurred somewhere along the way. But, for a penalty to be imposed there must not only be a breach, but a breach that is deliberate, serious, and sustained, or intended to undermine an employment agreement or employment relationship. The Authority is unable to find any breach which meets that standard and satisfies the elements of s 4A of the ER Act.

[85] Unjustified dismissal, where that occurs, although it may involve a breach of good faith, does not of itself amount to a deliberate, serious and sustained breach. It cannot be viewed as 'sustained' when it is a permanent state following the complete destruction of the employment relationship rather than the undermining of it.

[86] Horizon Radiology did not act in bad faith in its handling of the disadvantage grievance raised by Ms Kim during her employment. To meet the changing circumstances of Ms Kim's employment and different problems as they arose, Horizon Radiology was entitled to give priority to some matters over others, depending on a reasonable assessment made of the urgency and importance of those various matters.

[87] The disadvantage grievance, a staff member complaint About Ms Kim and plans to try and rebuild the relationship between Ms Kim and Ms Child, were justifiably given less priority once the employer began to investigate Ms Kim's conduct in making notes in diaries. That led to dismissal, although the disadvantage grievance cannot be viewed as having been wiped or extinguished by that action taken, and the Authority may still investigate and determine the merits of the grievance.

[88] The Authority finds that the disadvantage grievance was addressed by Horizon Radiology to the extent required in the changing circumstances of Ms Kim's employment.

## **Conclusion**

[89] In summary, this employment relationship problem is resolved by the Authority determining that no orders are justly to be made against Horizon Radiology, because

Ms Kim has no sustainable personal grievance of any kind and there has been no breach for which a penalty may be ordered.

### **Costs**

[90] Horizon Radiology is entitled upon application to an order for reasonable legal costs to be met by Ms Kim. The Authority may determine this by applying its daily tariff or rate, with adjustments where appropriate.

[91] Any application for costs is to be made within 14 days of the date of this determination, and any reply within a further 14 days of any application for costs being made.

Alastair Dumbleton  
Member of the Employment Relations Authority