

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 288  
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5439542

BETWEEN	LUCIELLE PATANGATA First Applicant
A N D	BRENDON FRASER Second Applicant
A N D	KIMIORA LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Mikail Steens, Counsel for Applicant Natalie Bradley, Counsel for Respondent
Investigation Meeting:	27 & 28 April 2016 at Rotorua
Submissions Received:	9 June & 1 July 2016 & from Applicant 15 June & 1 July 2016 from Respondent
Date of Determination:	24 August 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Applicants, Ms Lucielle Patangata and Mr Brendon Fraser, claim that they were unjustifiably dismissed by the Respondent, Kimiora Limited (Kimiora), on 28 August 2013.

[2] Ms Patangata and Mr Fraser also are claiming unpaid wages and unpaid holiday pay in respect of their employment with Kimiora and, in addition, that Kimiora made unlawful deductions from their wages.

[3] Kimiora denies that it terminated the employment of Ms Patangata or Mr Fraser. It also denies that there are any wage arrears or holiday pay owing to them owing to them, or that it made unlawful deductions from their wages.

[4] Kimiora claims that holiday pay was paid on an 'as-you-go' agreement as set out in Ms Patangata's and Mr Fraser's employment agreements.

**Note**

[5] At the Authority's investigation on 27 and 28 April 2016 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' counsel. Counsel have submitted closing submissions on the facts and law.

[6] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result.

[7] This matter concerns issues of credibility. I have carefully evaluated the evidence given and presented and have considered how reasonable, plausible and probable that evidence is. I have also taken into account what corroboration there is and in particular what documentation exists to support one version or another.

[8] Further information was accessed from Kimiora's accountant, Ms Lyn Gillett, after the Investigation Meeting, which has delayed the issuing of this determination.

**The issues**

[9] The issues before the Authority are whether or not:

- Ms Patangata and Mr Fraser were casual or permanent employees with Kimiora
- Ms Patangata and Mr Fraser were unjustifiably dismissed by Kimiora;
- Ms Patangata and Mr Fraser are owed unpaid wages and/or unpaid holiday pay by Kimiora;
- Kimiora made unlawful deductions from Ms Patangata and Mr Fraser's pay

**Background facts**

[10] Kimiora is a company producing kiwifruit based in the Eastern Bay of Plenty. It is owned and operated by Mr Kim Poananga, orchard owner and manager. It offers seasonal casual work to employees.

[11] In May 2009, Ms Patangata and her husband, Mr Fraser, were unemployed and looking for employment. Ms Patangata spoke to Mr Poananga and was offered employment for herself and Mr Fraser as contract workers for the kiwifruit orchards managed by Mr Poananga. Their employment commenced in May 2009.

[12] The duties undertaken by Ms Patangata included pruning and tying the branches of kiwifruit trees at one of the orchards managed by Mr Poananga. Mr Fraser carried out similar work and also carried out some maintenance duties.

[13] Ms Patangata and Mr Fraser had their own tools which are required for cutting and tying, including secateurs, loppers and pouches as a result of their previous experience in the kiwifruit industry.

[14] They were engaged as casual employees, initially being paid a set rate for work carried out in respect of each bay of kiwifruit, the rates varying by the size of a bay and the number of trees in it; however, Ms Patangata could not recall the rates which had been agreed with Mr Poananga.

[15] Ms Patangata said that during the time she and Mr Fraser worked for Kimiora they had worked throughout each year; however there would be approximately a month and a half each year when they did not have work. She said they worked most days from 7 a.m. until 6 p.m.

[16] Mr Fraser said that although the picking work ceased at the end of the season, pruning work continued throughout the year, with himself and Ms Patangata being the 'skeleton crew'. In addition he carried out some maintenance work. He said that he was able to finish work early during the day if he wished to do so, and would usually finish each day when he had completed the work to be done.

[17] Mr Poananga confirmed that Ms Patangata and Mr Fraser were retained longer than the other casual employees who worked in the orchards, but that there was a period of between 4 to 6 weeks each year when they did not work.

[18] By 2011, Ms Patangata said they had become more proficient at their work and could complete the work required in less time than that set by the rates. In 2012, Mr Poananga had introduced a peak rate payment scheme and by August 2013 they had been paid \$6 per bay regardless of how many trees the bay contained.

[19] Mr Poananga confirmed that he had agreed to pay Ms Patangata and Mr Fraser per bay and they would be paid \$0.45 per square metre which was the industry rate and as the bay amount varied depending on its size, they were required to fill in timesheets to ensure they

were paid the minimum wage. He said that if the pruning work did not reach the minimum wage, their wages were topped up to ensure they were paid the minimum wage for the hours they worked. This was the responsibility of the Kimiora accountant, Ms Gillett.

[20] Mr Poananga agreed that Ms Patangata and Mr Fraser did become more proficient at pruning and said that as a result they earned more money in total as they were pruning more bays. The bay rate remained at \$0.45 per square metre. He said that Ms Patangata and Mr Fraser received wages during the summer harvesting which was generally from late October until the end of March, however it did vary.

[21] In addition he confirmed that Ms Patangata was given responsibility for supervising other orchard workers.

[22] Ms Patangata said that her weekly hourly rate increased to \$16.00 per hour and Mr Fraser's to \$15.00 per hour during the summer harvesting months from mid-May 2011 onwards

*June 2011: Property Rental arrangement*

[23] In or about mid-April 2011, Mr Poananga was offered the opportunity to manage kiwifruit orchards in Te Kaha and as a result, he offered Ms Patangata and Mr Fraser the opportunity to live in his home and manage the upkeep and operation of the orchards. The offer was made verbally by Mr Poananga to Ms Patangata and Mr Fraser.

[24] Mr Poananga said that he had made the offer to Ms Patangata and Mr Fraser as he was aware that they were living with Ms Patangata's aunt and he thought it would be more beneficial for them to live in his home. There was an additional benefit to him in that the house would be safe from vandals due to their occupying it.

[25] During the period he was away, Ms Patangata was to continue her supervision of the orchard workers and was given responsibility for bringing in additional contract staff when necessary.

[26] Mr Poananga said a rent of \$200.00 per week was agreed with Ms Patangata and Mr Fraser and that this was to be payable throughout the year.

[27] Ms Patangata disagreed and said that the rent payment of \$200.00 per week was expected to be paid during the period that she and Mr Fraser were working over the summer months, however during the winter period there was no expectation that the rent would be paid as they would not be working.

[28] Mr Fraser said that work was available to them over the winter period and they did not cease working at any stage throughout the year.

[29] The rent was deducted by Kimiora from Ms Patangata's and/or Mr Fraser's wage payments, however the details of the rental tenancy had only been discussed verbally and there is no indication or suggestion that it formed part of an employment agreement. There was therefore no written confirmation of the rental arrangements or any written agreement that the rental amount could be deducted from Ms Patangata's and/or Mr Fraser's wage payments.

[30] Mr Poananga said that Ms Patangata and Mr Fraser lived in his home for two years from approximately 26 June 2011 to 8 June 2013 during which period the total rent payable was \$20,400.00. However, the total rent paid by Ms Patangata and Mr Fraser was only \$10,850.00 according to a deduction report kept by Ms Gillett.

#### *Vehicle Purchase Arrangement*

[31] A van allegedly costing approximately \$3,500.00 was purchased by Mr Poananga for the personal use of Ms Patangata and Mr Fraser. Ms Patangata said that it was agreed with Mr Poananga that the van would also be used for work, specifically for her to collect contract workers when necessary and take them to the workplace and also for Mr Fraser to collect maintenance supplies from suppliers. It was verbally agreed with Mr Poananga that a set amount of \$50.00 per week would be deducted from their weekly earnings to repay the cost of the vehicle.

[32] Once the period regarding the van repayment had come to an end, the deductions from Ms Patangata and Mr Fraser's wages ceased and the van had been registered in Ms Patangata's name.

[33] During the period of employment, work had been performed on the van and it had been agreed to share the cost of repairs to the van with Mr Poananga paying half the cost as Ms Patangata and Mr Fraser had used the van for Kimiora business purposes. Ms Patangata claimed that deductions from their payslips for the vehicle repairs continued after they had paid their portion of the bill. She said she had left the record of the repayment amounts in the office at Mr Poananga's home when they vacated the property.

[34] Ms Patangata said that Mr Poananga had also agreed to provide them with petrol money when the van was used by Ms Patangata to transport workers throughout the Kimiora orchards.

[35] Mr Poananga confirmed that he had reimbursed petrol costs where these had been incurred, and also paid for petrol for the tractor and diesel for other equipment.

*Employment Agreements*

[36] Mr Poananga said that Ms Patangata and Mr Fraser were provided with written individual employment agreements in 2012 and written amended individual employment agreements, and that these were removed, in addition to all other documentation in respect of their financial arrangements, from his home office by Ms Patangata and Mr Fraser when they moved from his home in June 2013. He also stated that all pruning employees were given written employment agreements.

[37] Ms Patangata and Mr Fraser both denied having received a written employment agreement, or that they removed such documentation from Mr Poananga's home and no copies or originals of such employment agreements or copies of employment agreements were produced in evidence.

[38] This is just one of a number of issues where the parties are at issue with each other. Had Ms Patangata and Mr Fraser removed all the documentation as claimed by Mr Poananga, including the written employment agreements, rental and vehicle purchase documentation in addition to time sheets and pay slips, this would have involved the intentional removal of many boxes of files at a time when relations between the parties were still harmonious – which lacks credibility. Conversely it does not appear plausible that Mr Poananga retained no copies of any records of employee information, and that when instructed by me he was able to provide time sheets and pay slips from a different location, namely Ms Gillett, but not the signed written employment agreements..

[39] I find that on the balance of probabilities Kimiora did not provide Ms Patangata and Mr Fraser with a written employment agreement pursuant to s.65.1(a) of the Act.

[40] Ms Patangata said her responsibilities were many and varied and included securing additional orchard workers through WINZ, bees for pollination, arranging for the orchards to be sprayed and fertilised and for the orchard irrigation systems to be cleaned, repaired and maintained. She was expected to supervise the contract workers employed at the orchards during working hours.

[41] She said it was difficult to contact Mr Poananga while he was away at Te Kaha and she and Mr Fraser requested meetings with him on a number of occasions to negotiate income, earnings and authorised deductions, orchard maintenance and management. They were offered some advice by Mr Grant Allan who was the manager of a similar business and

they also attempted to contact Mr Poananga through Ms Gillett, who contacted Mr Poananga once a week to arrange the payment of wages and contract work.

[42] Ms Patangata said that she and Mr Fraser were sent payslips at the end of each month but claimed that they did not understand the basis upon which the payments and deductions were being made. They suspected that Mr Poananga was lowering the set piece-work rates. However, they had left all of their payslips in Mr Poananga's office at his home when they had vacated the house in 2013.

*June 2013*

[43] On or about 8 June 2013, Ms Patangata said that she and Mr Fraser received a call from Mr Poananga advising that as the orchards he was managing in Te Kaha had become infected with PSA and his contract there had been terminated as a result, they were to vacate his home. They were able to obtain alternative accommodation and Mr Poananga agreed to pay the letting fee by way of a wage advance. They had continued working at the orchards owned by Kimiora.

[44] Mr Poananga said he had given Ms Patangata and Mr Fraser notice of the tenancy pursuant to their verbal tenancy agreement by providing a six week notice period. He confirmed that he had lent them the letting fee for their alternative accommodation on the basis that they would make repayments as a loan deduction from their wages. This agreement was not recorded in writing.

[45] Following his return from Te Kaha, Mr Poananga had become concerned about the amount of monies that were outstanding from Ms Patangata and Mr Fraser and he had given a copy of a schedule of deductions to Ms Patangata on her request. He was also aware that she and Mr Fraser were concerned about their level of remuneration and the deductions that were being made from their wages. He said the matters had been raised with him on an almost daily basis following his return from Te Kaha.

[46] Mr Poananga said that Ms Patangata had reacted angrily when presented with the schedule of deductions, and on 27 August 2013 he had met with her when she was working in a nearby orchard. Mr Poananga said that during this meeting with Ms Patangata, she had become angry, and asked for her brother to be paid at her supervisory remuneration rate and also stated that her brother's earnings were to be entered on her payslip and the money paid into her bank account.

[47] He said the meeting had not gone well and had become quite heated and had culminated in Ms Patangata making threatening comments to him including "*watch your*

*back*” and *“I’ll damage your vines”* which if carried out could result in there being no production for the following three years. He said he had taken these threats seriously.

[48] In regard to the schedule and the information requested by Ms Patangata, Mr Poananga had offered to give as much information as possible. He had arranged to set up a meeting the following day to take place at his home.

[49] Later that day, Mr Poananga discovered that vines in the part of the orchard where Ms Patangata had been working had been damaged. As a result of that and the threats she had made, he decided to organise a trespass notice.

[50] Ms Patangata said she had employed her brother in July 2013 without Mr Poananga’s knowledge, but had not asked for his earnings to be included on her payslips. She denied having threatened Mr Poananga that she would damage his vines, and although she confirmed that she had cut the vines, she had not done so with the intention of damaging them.

*Meeting 28 August 2013*

[51] Ms Patangata said that on 28 August 2013, she and Mr Fraser arrived at Mr Poananga’s home for the meeting suggested by Mr Poananga, and he had served her with a trespass notice when they arrived, stating that she had engaged in disorderly behaviour.

[52] As the trespass notice prohibited Ms Patangata from working in the majority of orchards belonging to Kimiora, she concluded that her employment had been terminated forthwith. She said Mr Poananga had asked her to return her work telephone and the van which she had refused to do.

[53] As Ms Patangata walked away from the meeting, she had visited the orchard where contractors whom she had engaged were working, informed them that she had been dismissed, and they all left the orchard.

[54] Mr Fraser said that when they arrived at Mr Poananga’s home, there had been some men standing outside with Mr Poananga. There had also been a girl whom Mr Poananga informed him would be the new supervisor.

[55] Once Mr Poananga had served Ms Patangata with the trespass notice, she had asked for her holiday pay and the previous week’s wages. As the meeting was somewhat hostile, they had returned to their home following which Ms Patangata had taken the van and driven into Whakatane in search of legal advice.

[56] Later that day while Ms Patangata was still in Whakatane, some employees had been sent by Mr Poananga to the home occupied by her and Mr Fraser with instructions to repossess the van.

[57] They had allegedly surrounded the house and Mr Fraser said there were five vehicles in total, two trucks and three cars, in all 12 men and 2 women including some patched Mongrel Mob gang members. He said that these men had started verbally abusing him and wanted to repossess the van. Ms Patangata's younger brother who was in the house at the time had been frightened, and had called the police.

[58] A local police officer arrived and spoke with the men who told him that they had come to issue Mr Fraser with a trespass notice and to collect Mr Poananga's van. Mr Fraser had received the trespass notice; Ms Patangata had arrived shortly after this occurred and was also handed a trespass notice.

[59] Mr Fraser that the police officer had checked the Land Transport register to see who owned the van and discovered that Mr Poananga had changed the ownership of the van into his own name earlier that day.

[60] Ms Patangata said that as she had felt intimidated by what had occurred, she and her younger brother had left the property with her mother. Mr Fraser and his brother decided to go to Mr Poananga's home to discuss what had occurred.

[61] When they had arrived at Mr Poananga's home, Mr Fraser said Mr Poananga had refused to talk to him, and in frustration he had stamped on some of the garden furniture belonging to Mr Poananga.

[62] Mr Poananga said that when Mr Fraser and his brother, whom he alleged was a patched Mongrel Mob gang member, arrived at his home with Ms Patangata and two other people, also gang members. He said they arrived with sledgehammers which they used to break garden furniture and intimidate him, and he had telephoned the police. When he had been seen on the telephone, Mr Fraser and those with him had left his home.

[63] Mr Poananga agreed that he had sent three of his employees to collect the van which he said he had agreed to repurchase as a means of reducing the debt owed to Kimiora by Ms Patangata and Mr Fraser. None of these employees belonged to the alleged gang.

[64] Ms Patangata and Mr Fraser believed that as a result of the trespass notices being issued that their employment had been terminated.

[65] Mr Poananga denied he had terminated Ms Patangata's and Mr Fraser's employment, however he believed that their behaviour was such as to indicate that they had repudiated the employment relationship with him.

[66] He said that the trespass notices prevented Ms Patangata and Mr Fraser working on the orchards closest to his home, however they were not prevented working on other Kimiora orchards. He claimed that their employment had come to an end by virtue of them not returning to work.

### **Determination**

#### **Were Ms Patangata and Mr Fraser were casual or permanent employees?**

##### *1. Nature of employment: casual or permanent*

##### *Intention of the parties*

[67] In deciding whether a person is employed under a contract of service the Authority must consider all relevant matters which include the intention of the parties.<sup>1</sup>

[68] The parties do not dispute that Ms Patangata and Mr Fraser were initially employed on a casual employment basis. However Ms Patangata and Mr Fraser claim that over a period of time their employment had become permanent in nature.

[69] There are no written employment agreements and consequently I have examined the pattern of working and the expectations of the parties.

[70] As His Honour Judge Couch said in *Jinkinson v Oceania Gold (NZ)*<sup>2</sup> in respect of the matter of determining the real nature of an employment relationship:

*All relevant matters must be taken into account in making that decision and the parties' description of their relationship is not to be treated as determinative.*

##### *Analysis of the distinction between casual and on-going employment*

[71] The Employment Court judgment of *Jinkinson v Oceania Gold (NZ)*<sup>3</sup> contains a helpful examination and analysis of the distinction between casual employment and ongoing employment.

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<sup>1</sup> S6 Employment Relations Act 2000

<sup>2</sup> CC/09, 13 August 2009 at para [37]

<sup>3</sup> *Jinkinson v Oceania Gold (NZ)* CC/09. 13 August 2009

[72] In this judgment, His Honour Judge Couch analysed in detail the lines of authority derived from other jurisdictions, these being English, Australian and Canadian, in addition to that of New Zealand. These common law principles are complemented by the statutory framework in New Zealand, in particular that of the Employment Relations Act 2000.

[73] The judgment highlights that a major determinant of the distinction between casual and ongoing employment is the extent to which there exist between the parties “*mutual employment related obligations between periods of work*”<sup>4</sup> The essence of casual work lies in a series of engagements which are complete in themselves, whilst ongoing employment contemplates a continuing pattern of regular and continuous work.

[74] Judge Couch quoted with approval a decision of the Canada Labour Relations Board in which the Board said<sup>5</sup>

*In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable only part-time work is automatically created: the employee is not a casual worker but a part-time one.*

[75] A list of factors designed to assist in the analysis of an employment relationship originated from the Australian authorities to which Judge Couch referred and these are outlined in the judgment. These include:

- a. The numbers of hours worked each week
- b. Whether work is allocated in advance by a roster
- c. Whether there is a regular pattern of work
- d. Whether there is a mutual expectation of continuity of employment
- e. Whether the employer requires notice before an employee is absent or on leave

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<sup>4</sup> Ibid at para [40]

<sup>5</sup> *Bank of Montreal v United Steelworkers of America* 87 CLLC 16,044

f. Whether the employee works to consistent starting and finishing times.

[76] I have therefore proceeded to analyse the employment relationship between the Applicants Ms Patangata and Mr Fraser and the Respondent Kimiora against those factors.

*i. The number of hours worked each week*

[77] The hours worked by Ms Patangata and Mr Fraser varied during the term of their employment, however from April 2011 onwards when Mr Poananga moved away to manage the orchards in Te Kaha and Ms Patangata and Mr Fraser moved into his home in June 2011, I find that they assumed responsibility for the Kimiora orchards' operation. This involved engagement and supervision of the contracting staff, orchard maintenance – mulching, spraying and supervising the contract staff, and PSA infection precautions.

[78] I find that whilst the daily hours may have varied, the duties involved Ms Patangata and Mr Fraser working throughout each week on a consistent basis.

*ii. Whether work was allocated in advance by a roster*

[79] The work was not allocated in advance by a roster, although I find that Ms Patangata was responsible for organising rosters for the contracting staff. However I find that Ms Patangata and Mr Fraser were cogniscent of the work they were expected to undertake, respectively supervisory and maintenance duties in addition to vine maintenance, and these duties had an ongoing nature.

*iii. Whether there was a regular pattern of work*

[80] As stated above, I find there was a regular pattern of work for Ms Patangata and Mr Fraser from April 2011 onwards after they had assumed operational responsibility for the Kimiora orchards.

*iv. Whether there was a mutual expectation of continuity of employment*

[81] A significant factor in determining the nature of the relationship as casual or permanent is whether or not there are obligations subsisting between the parties to the employment relationship even during periods when work is not actually being performed. If there are such obligations, then that will tend to indicate a continuing employment relationship rather than a casual employment relationship which, by law, effectively contemplates a series of discrete engagements each complete in itself.

[82] Ms Patangata and Mr Fraser lived in Mr Poananga's home for a two year period from June 2011 during which time they effectively managed the Kimiora orchard operation during

Mr Poananga's absence in Te Kaha: Ms Patangata engaged and supervised contracting staff, and Mr Fraser performed ongoing maintenance duties.

[83] I find that Mr Poananga effectively delegated the orchard operation to Ms Patangata and Mr Fraser, and was updated from time to time by Ms Patangata about the orchard operation. I accept that the PSA management created for him a greater reliance on their involvement.

[84] Following Mr Poananga's return to Kimiora, he assisted Ms Patangata and Mr Fraser with finding alternative accommodation and I find that this was on the basis that both parties had a mutual expectation that Ms Patangata and Mr Fraser would continue in their employment with Kimiora.

[85] I find both parties had a mutual expectation of continuity of employment.

*v. Whether the employer requires notice before an employee is absent or on leave*

[86] Ms Patangata and Mr Fraser said that before they took leave they would advise Mr Poananga, and Ms Patangata gave evidence of requesting leave and financial support from Mr Poananga so she could attend a funeral.

[87] I find this behaviour to be more indicative of a permanent employment relationship than a casual one.

*vi. Whether the employee works to consistent start or finish times*

[88] Ms Patangata and Mr Fraser did not work regular hours each day, however they worked consistently throughout each week to complete the work required.

[89] Examining the indications of a real employment relationship, I find that there are sufficient indicators that the employment of Ms Patangata and Mr Fraser was more consistent with a continuous or permanent employment arrangement rather than with a casual arrangement.

[90] Mr Poananga confirmed that Ms Patangata and Mr Fraser lived in his home with effect from 26 June 2011 and I note that deductions for rent began appearing on Ms Patangata's pay slips on the period ending 26 June 2011.

[91] I find that in light of these indicia, with effect from 26 June 2011 the nature of Ms Patangata's and Mr Fraser's employment was permanent and not casual.

### Were Ms Patangata and Mr Fraser unjustifiably dismissed by Kimiora?

[92] As a result of a heated discussion between Ms Patangata and Mr Poananga on 27 August 2013 and the alleged threat by Ms Patangata to cut vines located on the Kimiora property which Mr Poananga had taken seriously, a meeting was arranged to take place at Mr Poananga home at 9.30 a.m. on 28 August 2013.

[93] Following their arrival at the meeting Ms Patangata and Mr Fraser were both served with a Trespass Notice pursuant to the Trespass Act 1980. The notice stated the reason as “*Threatening Behaviour.*”

[94] Although Mr Poananga claimed that the trespass notices only prevented them working in the orchards closest to his home, and there were other orchards owned by Kimiora in which they could have worked, I find that effectively the trespass notices prevented them carrying out any of the duties they were employed to perform in all the Kimiora orchards.

[95] Both parties to an employment relationship have a duty of good faith towards each other. The duty of good faith is set out in s 4(1) of the Employment Relations Act 2000 (the Act) and states at s.4(1A):

*(1A) The duty of good faith in subsection (1)-*

...  
*(a) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*

[96] There is no evidence that either party were active and constructive in trying to clarify the situation regarding ongoing employment after the issuing of the trespass notices; however I find that the subsequent events, specifically the later incident at Mr Poananga’s home during which his property was damaged by Mr Fraser, effectively precluded any further conciliatory communication between the parties.

[97] I find that the issuing of the trespass notices effectively constituted a ‘sending away’ as defined by Williamson J in *Wellington Clerical IUOW v Greenwich*<sup>6</sup> as: “... *the termination of employment at the initiative of the employer*”.

[98] I observe that the dismissal of an employee effected by way of a trespass notice in substitution of the minimum standards of procedural fairness as set out in S.103 of the Act is *prima facie* unjustifiable.

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<sup>6</sup> (1983) ERNZ Sel Cas 95

[99] I find that Ms Patangata and Mr Fraser were unjustifiably dismissed by Kimiora on 28 August 2013.

**Are Ms Patangata and Mr Fraser owed unpaid wages and/or unpaid holiday pay by Kimiora?**

*Unpaid wages*

[100] Ms Patangata and Mr Fraser claim that they were paid less than the minimum wage for the hours they worked during the period they were employed by Kimiora. They also claim that because time sheets and payslips are incomplete they cannot calculate the amount claimed but would accept an arbitrary ruling by the Authority to award a payment of \$4,000.00 each.

[101] It is not for the Authority to make arbitrary rulings, but determinations based on findings of fact and law. It is for me to establish an accurate as possible picture of when Ms Patangata and Mr Fraser worked and whether there was any underpayment.

[102] Ms Patangata said that she had completed the timesheets and sent these to Ms Gillett. Copies of the time sheets and pay slips have been supplied, albeit belatedly, covering the period of employment, and there is no reason to doubt this information so I accept the subsequently provided documents as representing the best evidence of the dates and times when Ms Patangata and Mr Fraser worked, and when they did not work.

[103] Section 130 of the Act sets out the requirements expected of an employer regarding the maintaining of time and wage records:.

*(1) Every employer must at all times keep a record (called the wages and time record) showing, in the case of each employee employed by that employer, -*

.....

*(g) when necessary for the purpose of calculating the employee's pay, the number of hours worked on each day, and the days of the employee's employment during each pay period;*

*(h) the wages paid to the employee each pay period and the method of calculation:*

...

[104] The time sheets, which Ms Patangata completed and sent to Ms Gillett, provide the number of hours worked each day or sufficient information to enable Ms Gillett to calculate the hours worked from the piece-work information already in her possession. The pay slips provide calculation of the wages paid, but not in all cases the hours worked relative to achieving the piece-work.

[105] The rate for piece-work, in this case for carrying out various functions in the orchards, is agreed between the employer and the employee, it is not for the Authority to determine whether or not such rates are fair or possible to achieve. In the absence of written agreement as to the rates, which should have been set out in employment agreements provided to Ms Patangata and Mr Fraser, I accept the rates as provided by Mr Poananga, and used by Ms Gillett, to calculate the wages due.

[106] Piece-work is generally understood to mean payment according to the number of individual pieces of work completed, and is commonly used in the kiwi fruit producing sectors. The Minimum Wage Act 1983 s. 4 prescribes the minimum rates of wages payable to a class of workers. These rates are reviewed on or about March in each year. However in practice, it may be difficult to calculate how many units have been completed each hour and therefore whether the worker has become entitled to payment of at least the minimum wages rate for work done in that hour.

[107] Mr Poananga confirmed that although Ms Patangata and Mr Fraser were paid on a piece-work basis their pay was topped up to ensure that they were paid the minimum wage for the actual hours worked at the end of each week.

[108] In the absence of detailed calculations being produced by Ms Patangata and Mr Fraser relating to the period of their employment covering 6 years, I accept the evidence of the time sheets and payslips provided by Ms Gillett and find that there has been no underpayment of wages pursuant to the Minimum Wage Act 1983.

[109] Ms Patangata and Mr Fraser each claim that they were not paid for the final week of their employment. The pay slips produced and other documentation provided confirm that the last payment made to them by Kimiora was for the week ending 18 August 2013. Their employment was terminated on Wednesday 28 August 2013, therefore on the basis of a five day week I find that they are entitled to wages for 7 working days.

[110] It is not clear what work was performed and no time sheets have been submitted, however Mr Poananga does not contest the fact that they did work. Accordingly, having determined they were permanent employees, I find that they are entitled to wages for 56 hours, Ms Patangata at \$15.00 per hour and Mr Fraser at \$14.35 per hour. The withholding of

the final pay due to Ms Patangata and Mr Fraser final pay was not a deduction within the meaning of the Wages Protection Act 1983. It was a default in payment.

[111] If time sheets and pay slips are subsequently provided within 28 days from the date of this determination in respect of the period 18 to 28 August 2013, leave is granted for either party to revert back to the Authority on this issue.

*Unpaid holiday pay*

[112] Ms Patangata and Mr Fraser each claim reimbursement in respect of unpaid holiday pay during the period 1 July 2009 to 31 May 2012. The only basis for this claim is Ms Patangata statement at paragraph 26 of her written evidence: “*I had not been paid 5 years of holiday pay.*” Mr Fraser makes no specific claim, other than a general statement in the Statement of Problem seeking payment of holiday pay due to him.

[113] The Holidays Act 2003 s. 28(1)(a)(ii) provides that an employer may regularly pay holiday pay with the employee’s pay where the employee: “*works for the employer on a basis that is so intermittent or irregular that it is impractical for the employer to provide the employee with 4 weeks annual holidays ...*”.

[114] Mr Poananga said that both Ms Patangata and Mr Fraser received an amount of 8% of their gross earnings as holiday pay included in their ‘gross pay’ during their period of casual work. Although holiday pay was not quantified in numerical terms on the payslips, they did contain a statement identifying holiday pay as a component and that it was included in the gross pay of Ms Patangata and Mr Fraser.

[115] I observe that Mr Poananga’s evidence was that the wages due to Ms Patangata and Mr Fraser were ‘*topped up*’ to meet the applicable minimum hourly wage, however there is no mention of the 8% holiday pay that should have been added to the ‘gross pay’ following that calculation.

[116] In order to progress this part of their claim for unpaid holiday pay during the period 1 July 2009 to 31 May 2012, I order that within 28 days of the date of this determination, Ms Patangata and Mr Fraser submit calculations showing in each weekly pay period, the gross amount of pay, (before deductions); the amount of holiday pay; the actual hours worked, and the minimum wage for that period. The time sheets, pay slips and statements provide sufficient information for this calculation, with the cooperation of Mr Poananga to provide any further information.

*Withheld holiday Pay*

[117] Ms Patangata and Mr Fraser each make a claim in respect of holiday pay which was allegedly withheld following the termination of their employment. Mr Poananga confirms in the schedule 'A' which he submitted that he withheld holiday pay due to Ms Patangata of \$1,421.33 and to Mr Fraser of \$605.06. There is however no record of what period this relates to, and I note that the pay slips relating to 2013 onwards state that the gross pay includes holiday pay, which does not conform to Mr Poananga having withheld the same holiday pay. In addition, because a pay slip was not produced for the final week of their employment, there is no record of holiday pay that was due at termination.

[118] In order to progress this section of the claim made by Ms Patangata and Mr Fraser I order that unless within 28 days of the date of this determination, Mr Poananga provides full details and calculations as to how he arrived at the figures he quoted in Schedule 'A', Kimiora is to pay Ms Patangata \$1,421.33 and Mr Fraser \$605.06 in respect of holiday pay it claims to have withheld. The withholding of Ms Patangata and Mr Fraser's holiday pay at termination was not a deduction within the meaning of the Wages Protection Act 1983. It was a default in payment.

**Did Kimiora make unlawful deductions from Ms Patangata and Mr Fraser's pay?**

[119] Pursuant to the Wages Protection Act 1983 (WPA) s.4, when wages become payable, an employer must pay the entire amount due to the employee without deductions. However, an employer may make deductions provided this is for a lawful purpose on the written request or with the written consent of the employee. In addition an employer may do so in other limited circumstances e.g. under statute. The Wages Protection Act 1983 states:

***4. No deductions from wages except in accordance with Act.***

*Subject to sections 5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

***5 Deductions with worker's consent.***

*(1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—*

*(a) With the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or*

*(b) On the written request of the worker.*

[120] Pursuant to s.11 Wages Protection Act 1983, an employee may recover deductions which have been made without the written consent of the Employee. Ms Patangata and Mr Fraser claim recovery of monies deducted from their wages in respect of a van, rent and deductions.

*Rent*

[121] It is agreed that Ms Patangata and Mr Fraser occupied Mr Poananga's home as the sole occupants during the period 26 June 2011 to 8 June 2013. It was also agreed orally that the weekly rent for the property was set at \$200.00 per week.

[122] Mr Poananga claims that there was that there was a written tenancy agreement, however this was disputed by Ms Patangata and Mr Fraser, and during the Investigation Meeting Mr Poananga confirmed that nothing was agreed in writing. No written agreement relating to payment of rent was produced relating to the occupation of Mr Poananga's property has been provided to the Authority.

[123] Mr Poananga stated that the rent was payable for the duration of the occupancy of his property by Ms Patangata and Mr Fraser, however Ms Patangata claimed that the rent was only be payable during the season when they were working.

[124] As I have determined that Ms Patangata and Mr Fraser were permanent employees during the time they worked for Kimiora, I find that the rent would have been payable for the whole period of occupation, that is a total of \$20,400.00 (102 weeks x \$200.00).

[125] Mr Poananga's evidence was that the occupation by Ms Patangata and Mr Fraser of his personal home was on a normal tenancy basis and therefore was not a condition of their employment with Kimiora. I find that evidence is supported by the fact that Ms Patangata and Mr Fraser continued in their employment after Mr Poananga terminated the tenancy.

[126] Tenancy arrangements do not fall within the Authority's jurisdiction and therefore any claim by Mr Poananga for unpaid rent will need to be dealt with by an appropriate body such as the Tenancy Tribunal or the District Court.

[127] I accept the statement by Counsel for Kimiora that the total rent deducted by Kimiora was \$16,788.94<sup>7</sup>, and in the absence of any written agreement to the contrary I find that the deductions made by Kimiora from Ms Patangata and/or Mr Fraser's wages in respect of rent were unlawful pursuant to s.4 of the Wages Protection Act 1983.

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<sup>7</sup> According to their respective deduction reports filed with the Authority

[128] In both Ms Patangata and Mr Fraser's Statement of Problem (SOP) they each state that during the course of their employment various deductions were made by Kimiora from their wages without their consent. However there is no specific claim made here or elsewhere in their Counsel's submission for repayment of the unlawful rent deductions. Therefore I make no order for repayment of the unlawful deductions made in respect of the rent.

*The Van*

[129] There is no disagreement that a van was purchased by Mr Poananga for the personal and some business use of Ms Patangata and Mr Fraser. Mr Poananga's evidence was that he purchased the van on the basis that he was in effect entering into a loan arrangement with Ms Patangata and Mr Fraser of the amount required to purchase the van and that they would repay that amount at rate of \$50.00 per week.

[130] Ms Patangata accepts that it was agreed orally that she and Mr Fraser would make loan repayments of \$50.00 per week in respect of the van purchase by Mr Poananga. It is accepted by the parties that Ms Patangata and Mr Fraser completed the agreed payments and registration of the van passed to Ms Patangata thereafter.

[131] Mr Poananga agrees that he claimed ownership of the van and had sent other employees to repossess the van on 28 August 2013. However they were unable to do so and he has not had ownership of the van following the events on 28 August 2013.

[132] In the absence of any written agreement to the contrary the deductions made by Kimiora from Ms Patangata and/or Mr Fraser's wages relating to the purchase of the van were unlawful pursuant to s.4 of the Wages Protection Act 1983. I accept the statement by Counsel for Kimiora that the total amount deducted by Kimiora was \$2,500.00, and find that these deductions were unlawful pursuant to s.4 of the wages Protection Act 1983 and Kimiora is ordered to repay this amount of deductions to Ms Patangata.

[133] I observe that the van was subsequently registered in Ms Patangata's name, and it appears was not in Mr Poananga's ownership at any time on or after 28 August 2013.

[134] I also observe that it appears that although the van was sometimes used for the benefit of the orchard, it did not form part of the employment remuneration and benefits, and as such the loan, purchase and ownership lies outside the jurisdiction of the Authority.

[135] The cost of \$1,300.00 relating to garage repairs to the van was agreed to be paid on a 50/50 basis by Kimiora and Ms Patangata to reimburse use of it on some orchard business, and accordingly \$650.00 was deducted from Ms Patangata's wages.

[136] In the absence of any written agreement to the contrary, including an employment agreement, I find that the deduction made by Kimiora from Ms Patangata wages in respect of \$650.00 relating to repairs to the van was unlawful pursuant to s.4 of the Wages Protection Act 1983 and Kimiora is ordered to repay this amount of deductions to Ms Patangata.

#### *Loan Repayments*

[137] Mr Poananga confirmed that Kimiora made unlawful deductions pursuant to s.4 of the Wages Protection Act 1983, claiming that such deductions were justified and recorded on Ms Patangata and/or Mr Fraser's pay slips. The employee did not consent in writing to the deductions and therefore they were unlawful pursuant to s.4 of the WPA.

[138] It is not the Authority's task to evaluate each and every payslip, and therefore I accept the schedule provided as annexure B to an affidavit sworn by Ms Patangata on 21 April 2014 and put forward as a claim for reimbursement of unlawful deductions pursuant to s.11 of the WPA.

[139] I find that in the absence of any written agreement to the contrary the deductions relating to loans totalling \$5,561.00 were unlawful pursuant to s.4 of the wages Protection Act 1983. The deductions include \$3,150.00 for the van purchase and garage costs which have been addressed in the preceding paragraphs. Kimiora is ordered to repay the remainder part of the loan repayments to Ms Patangata and/or Mr Fraser respectively

#### **Remedies**

[140] Ms Patangata and Mr Fraser have been unjustifiably dismissed and they are entitled to remedies.

#### *Outstanding Wages and Holiday Pay*

[141] I order Kimiora to pay Ms Patangata the sum of \$840.00 gross in respect of unpaid wages for the period 18 to 28 August 2013 (calculated as 8 hrs x 7 days x (\$15.00 per hour).

[142] I order Kimiora to pay Mr Fraser the sum of \$803.60 gross in respect of unpaid wages for the period 18 to 28 August 2013 (calculated as 8 hrs x 7 days x (\$14.35 per hour).

[143] I order that, with the proviso noted in paragraph [118] above, Kimiora is ordered to pay Ms Patangata the sum of \$1,421.33 gross in respect of withheld holiday pay.

[144] I order that, with the proviso noted in paragraph [118] above, Kimiora is ordered to pay Mr Fraser the sum of \$605.06 gross in respect of withheld holiday pay.

*Unlawful deductions*

[145] I order that Kimiora pay Ms Patangata the sum of \$2,500.00 in respect of unlawful deductions in respect of the van pursuant to s.4 of the Wages Protection Act 21983.

[146] I order that Kimiora pay Ms Patangata the sum of \$650.00 in respect of unlawful deductions in respect of the garage bill for the van pursuant to s.4 of the Wages Protection Act 21983.

[147] I order that Kimiora pay Ms Patangata the sum of \$2,411.00 in respect of the unlawful deductions relating to loans to Ms Patangata pursuant to s. 4 of the Wages Protection Act 1983.

*Lost wages*

[148] The principles for an award of money as a result of personal grievance under s.123(b) and s.128(2) of the Act are well established, and the Authority must, pursuant to s.128(2), whether or not it provides for any of the other remedies, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[149] The amount awarded is dependent upon the proof of income lost as a result of the personal grievance s.128(1)(b) and the employee must take all reasonable steps to mitigate losses arising from the dismissal.

[150] In *Allen v. Transpacific Industries Group Ltd (trading as Medismart Limited)*<sup>4</sup> Chief Judge Colgan explained the obligations of a dismissed employee in relation to a loss of earnings claim, stating:<sup>8</sup>

*... Dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.*

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<sup>8</sup> (2009) 6 NZELR 530 (EmpC) at [78]

[151] No such evidence has been produced by Ms Patangata and the Authority should not be left to speculate or guess.<sup>9</sup>

[152] Ms Patangata said she had obtained alternative casual employment after her employment with Kimiora had ended. She was unable to provide a date when that employment commenced, nor how long a period she was unemployed, if at all.

[153] In the absence of any evidence that there was a period of unemployment following 28 August 2013, I decline to award lost wages.

[154] Mr Fraser when questioned by the Authority at the Investigation Meeting said that he and Ms Patangata had obtained other employment pruning work at another orchard after the employment at Kimiora had finished.

[155] Mr Fraser was also unable to provide a date when that employment commenced, and in the absence of any evidence that there was a period of unemployment following 28 August 2013, I decline to award lost wages.

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

*Ms Patangata*

[156] Ms Patangata is entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Ms Patangata suffered distress as a result of the dismissal.

[157] I order Kimiora to pay Ms Patangata the sum of \$4,000.00, pursuant to s 123(1) (c) (i) of the Act.

*Mr Fraser*

[158] Mr Fraser is entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Mr Fraser suffered distress as a result of the dismissal.

[159] I order Kimiora to pay Mr Fraser the sum of \$4,000.00, pursuant to s 123(1) (c) (i) of the Act.

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<sup>9</sup> *Radius Residential Care Ltd v. McLeay* [2010] NZEmpC 149

*Contribution*

[160] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

*Ms Patangata*

[161] Ms Patangata's employment had terminated as a result of Kimiora issuing a trespass notice. That followed as a result of the heated discussion between her and Mr Poananga on 27 August 2013 and her alleged threat to cut the Kimiora vines which Mr Poananga had taken seriously.

[162] I consider that it was this threat by Ms Patangata that resulted in the issuing of the trespass notice and the effective termination of her employment with Kimiora. Ms Patangata had subsequently cut vines, although she claimed that this was not done with the intention of causing damage.

[163] I find Ms Patangata's conduct was blameworthy and the remedies must reflect what I have found to be contributory fault on the part of Ms Patangata and I therefore reduce the amount awarded by way of compensation by 90%.

*Mr Fraser*

[164] Mr Fraser's employment had also been terminated as a result of the issuing of a trespass notice. At the time of issuing the trespass notice, Mr Fraser had not been involved in any altercation with Mr Poananga. At the time an altercation occurred, it did so after the trespass notice had been issued and the employment had effectively come to an end.

[165] The subsequent events at Mr Poananga's home may have resulted from inappropriate behaviour on the part of Mr Fraser, but they occurred following termination rather than the trespass notice issue resulting from it and they have been addressed in another jurisdiction.

[166] I find no contributory behaviour on the part of Mr Fraser and there is accordingly no reduction in the compensation awarded to him.

**Penalties**

[167] Ms Patangata and Mr Fraser are seeking penalties for a breach of the Employment Relations Act 2000. I have found that Kimiora did not provide Ms Patangata and Mr Fraser with an employment agreement pursuant to s.65 of the Act, and therefore under s.65.4 of the Act it is liable to a penalty imposed by the Authority.

[168] Section 135 of the Act states:

***S135 Recovery of penalties***

*(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of –*

*(a) the date when the cause of action first became known to the person bringing the action, or*

*(b) the date when the cause of action should reasonably have become known to the person bringing the action.*

[169] The evidence provided by Ms Patangata and Mr Fraser was that they were aware that they had not been provided with a written employment agreement from the date of commencement of their employment in 2009 and the subsequent amendment in 2012. Ms Patangata also confirmed that she had asked Mr Poananga for an employment agreement but none had been forthcoming. Neither Ms Patangata nor Mr Fraser raised a personal grievance in respect of this matter until 28 July 2014.

[170] Ms Patangata and Mr Fraser must have brought their action for the recovery of a penalty either within 12 months of becoming aware of the cause of action, or within 12 months of reasonably becoming aware of the cause of action pursuant to s. 135(5) of the Act.

[171] . It is therefore appropriate that I consider this issue as unless Ms Patangata and Mr Fraser brought their claim within the statutory time frame, he is time-barred and not entitled to remedies.

[172] I find that Ms Patangata and Mr Fraser did not commence an action for the recovery of a penalty under this Act within 12 months of the date when the cause of action first became known to them, and accordingly I make no order for the payment of a penalty against Kimiora's breach in respect of breach of s.65 of the Act.

[173] Ms Patangata and Mr Fraser are also seeking penalties for a breach of the Minimum Wage Act 1983. In this case any claim must be for wages paid within the period of 12 months from 28 July 2013 to 28 July 2014 the date of their statements of problem.

[174] If Ms Patangata and Mr Fraser, who were dismissed on 28 August 2013, wish to progress this claim for a penalty I order that within 28 days of the date of this determination, Ms Patangata and Mr Fraser submit calculations showing in each weekly pay period, their

gross amount of pay, (before deductions); their actual hours worked, and the minimum wage for that period.

*Mr Poananga's Claims*

[175] Mr Poananga has made a number of claims for payment of goods or services he provided to Ms Patangata and Mr Fraser during the period of their employment. Although Mr Poananga's claims are not submitted in the required format of a counterclaim in a statement of problem, I shall deal with each one as presented, noting that there is no written evidence to support such claims.

*Garage account*

[176] An amount of \$1,300 was agreed to be split on a 50/50 basis; I have found that the \$650.00 deducted from Ms Patangata's wages by Kimiora to have been unlawful despite the fact that Ms Patangata agreed to the deduction because such agreement was not in writing. In respect of petrol costs the amount claimed \$80.00. The capital purchase of the van and any maintenance or running costs did not form part of an employment agreement, and I find such an arrangement to have been a private matter between Ms Patangata and Mr Poananga. There is no evidence that Kimiora as the employer was involved in this matter, and Mr Poananga's claim for reimbursement should be dealt with in the appropriate jurisdiction.

*Advance for funeral attendance:*

[177] Mr Poananga's claim is for reimbursement of an advance of \$400.00 made to Ms Patangata in respect of her attendance at a funeral. I accept that such an advance was made, and note that Ms Patangata makes no specific reference to this. There is no written evidence relating to the advance and no agreement in writing as to its repayment which I conclude was made via a number of unlawful deductions marked as loan repayments.

[178] What is not clear is whether or not this was an advance against Ms Patangata's wages or simply a loan, Ms Patangata states that she did not request any advances against her wages, which in view of conflicting evidence given by both parties may or may not be true. I find that the \$400.00 in relation to the funeral attendance item was in the nature of a loan made by Mr Poananga, and as such is a personal matter the recovery of which should be dealt with in the appropriate jurisdiction.

*Claims for equipment purchased:*

[179] Mr Poananga's claim is for the reimbursement of \$452.41 in respect of tools purchased by Mr Fraser, using Kimioroa's credit account at Farmlands. Mr Poananga further claims that Mr Fraser removed the tools following the termination of his employment. Mr Fraser claims that such tools were necessary to carry out required tasks in the orchards and are the property of Kimioroa. Both Ms Patangata and Mr Fraser state that tools were left in Mr Poananga's property following their termination of employment. I accept their version of events. If Mr Poananga believes Mr Fraser has the tools in his possession he should deal with the recovery in the appropriate jurisdiction.

**Costs**

[180] I consider that this is an appropriate case for letting costs lie where they fall.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**