

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 305  
5539051

BETWEEN

PADMINI SINGH  
Applicant

AND

COMPASS GROUP NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Michael Beazley for Applicant  
Ethelred Chey for Respondent

Investigation Meeting: 16 July 2015

Submissions Received: 16 July 2015

Determination: 30 September 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Ms Singh was not disadvantaged in her employment.**
- B. Ms Singh was justifiably dismissed.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Padmini Singh claims she was unjustifiably disadvantaged in her employment and then constructively dismissed after she would not agree to the terms of a variation to her employment agreement with Compass Group New Zealand Limited (Compass Group).

[2] Compass Group denies the claims.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Singh and Compass Group but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Background**

[4] Ms Singh was employed by Compass Group from 4 August 2009 until 9 January 2015 as a Food Service Manager at North Shore Hospital. Ms Singh reported to Mr Raymond Hall, Operations Manager. Food safety is considered critical and the Food Service Managers have overall responsibility for the food that is served to the people and patients at Waitemata District Health Board (WDHB).

[5] Ms Singh's responsibilities included:

- Ensuring the operations at the North Shore Hospital kitchen complied with Food Safety Plan and health and safety requirements.
- Carrying out and completion of the monthly Food Safety Inspection audits – the Food Service Manager is required to walk around, physically inspect the kitchen operations and observe whether food safety standards were being met.
- Ensuring there were follow up actions to correct or rectify any non-compliance and breaches of the Food Safety Plan.

[6] On 7 October 2014 Mr Julian Baldey, Chief Operating Officer, visited the North Shore Hospital Kitchen. Mr Baldey carried out a visual site inspection during which he observed that cleaning checklists were not updated and checked, and the kitchen was not up to an acceptable clean standard.

[7] Following the site inspection, Mr Hall met with Ms Singh where they discussed the inspection and its outcomes. Ms Singh acknowledged the inspection

did not go well. It was agreed additional labour would be necessary to get the kitchen in order before the external audit by Telarc on 4 November 2014.

[8] Mr Hall and Ms Singh also discussed whether Ms Singh was coping in her job given that she was also taking care of her mother. Mr Hall raised the possibility of Ms Singh transferring to Waitakere Hospital where the operations would be less demanding and less complex. Mr Hall says he made this suggestion as a way to support Ms Singh as she did not seem to be coping. Ms Singh rejected the option of transferring as she did not wish to move to Waitakere and saw the role at Waitakere as a demotion.

[9] Following the internal audit, Mr Hall implemented a Planning for Improvement (PFI) process to ensure appropriate corrective action was taken to address the cleanliness and presentation issues and to prepare for the upcoming Telarc audit.

[10] A deep cleaning of the kitchen was undertaken to bring the site up to the required cleanliness standard.

[11] Mr Hall then arranged for an internal compliance review to be undertaken on 13 October 2014. The purpose of the review was to ensure the Food Safety Plan and other health and safety requirements were being met and to ensure Compass Group was ready for the external Telarc audit. The review identified a number of serious breaches of the Food Safety Plan and health and safety requirements.

[12] Mr Hall promptly met with Ms Singh and others to discuss the breaches and omissions identified in the review and the steps needed to be taken to immediately address them.

[13] On 4 November 2014 Telarc undertook its external audit. Prior to the audit Mr Hall met with the auditor and disclosed to him the issues that had been identified in the review and provided a copy of the PFI to demonstrate that the issues were being addressed and that progress was being made.

### *Disciplinary process*

[14] Prior to the Telarc audit and after the review, on 15 October 2014 Ms Singh was invited to an investigation meeting to discuss breaches of the Food Safety Plan which included:

- a) Non-compliance with the Critical Control Points (part of the Food Safety Plan);
- b) Inconsistent adherence to the meat cool down process – this includes missing entries to complete the process correctly;
- c) Incorrect core temperature recording (non-compliance to the new end cook temperature of 75 degrees as required from 1 September 2014);
- d) Failure to introduce new Temperature monitoring form updates as required from 1 October 2014 despite being directed prior to this date;
- e) Failure to review weekly compliance of the Temperature monitoring as previously instructed;
- f) Non-compliance with the monthly Food Safety inspection audit including:
  - i. On 31 May 2014 Ms Singh photocopied the Monthly Food Safety Audit completed on 30 April 2014 and amended it to represent the May 2014 monthly audit.
  - ii. It had been observed that despite the requirement for both Elective Surgical Centre (ESC) and the main kitchen to have a monthly food safety audit completed, that only one audit was completed each month.
  - iii. Inaccuracies in the recording of the Critical Control Point (CCP) and relevant questions in some instances of the audit process were also observed.
- g) Other concerns and shortcomings:

- i. The cleanliness of the North Shore Kitchen, its equipment and the presentation of staff had deteriorated to a level that the Waitemata DHB had raised serious concerns.
- ii. It had been observed that the modules of the Compass Monthly Team Train and associated Training Matrix were incomplete including Hand Hygiene.

[15] Ms Singh was advised that she may be subject to disciplinary action if no reasonable explanation was provided. Ms Singh was encouraged to bring a support person or representative to the meeting which was to be held on 22 October 2014.

[16] Ms Singh attended the disciplinary investigation meeting on 22 October 2014. At the meeting Ms Singh acknowledged responsibility for the concerns that were raised. Mr Hall told the Authority that Ms Singh did not dispute the existence or the validity of the concerns and did not try to minimise her own responsibility or suggest that someone else was responsible for the food safety breaches and omissions that were raised. Ms Singh advised Mr Hall that she was facing considerable pressure in her personal and family life, which had affected her work and performance.

[17] On 23 October 2014 a further internal audit was undertaken and further non-conformance issues were added to the PFI raised earlier.

[18] On 31 October 2014 Compass Group set out in writing its summary of findings and the outcome of its investigation. The letter sets out in more detail the issues identified through the investigation. Mr Hall set out his view that Ms Singh as the Food Service Manager:

- a) placed Compass Group at risk of non-compliance to the Site specific Food Safety Plan by not monitoring the day to day management of CCP's and not implementing the Food Safety updates as required;
- b) impacted negatively on the contractual relationship between Compass Group and the Waitemata DHB through the poor presentation of the site

and the potential impact this could have on the services provided to its patients;

- c) did not organise and complete the required monthly Compass Group team training despite being aware of the need to do so, and did not inform Mr Hall or any other managers of her omission; and
- d) demonstrated a lack of leadership.

[19] Mr Hall acknowledged in his letter that Ms Singh had been dealing with personal issues since the start of 2014 and found that while these personal issues would have contributed to her performance it was not the complete answer.

[20] Mr Hall found the allegations to be substantiated based on Ms Singh's responses and admissions during the investigation meeting. He advised Ms Singh that he considered her actions and omissions to have deeply impaired the required level of trust and confidence for a Food Service Manager and that her actions amounted to serious misconduct.

[21] Overall Mr Hall found that the applicant's actions and omissions as the Food Service Manager had placed Compass Group at risk of non-compliance with the site-specific Food Safety Plan by failing to properly monitor the day to day management of CCP, and not implementing the updates to the Food Safety Plan as required. Mr Hall considered Ms Singh's actions had the effect of placing patient safety at greater risk.

[22] Believing Ms Singh was not able to manage the food service operations fully and autonomously for North Shore Hospital which comes with considerable responsibility and complexity, Mr Hall again offered Ms Singh the opportunity to transfer to Waitakere Hospital. This time the offer included a reduction in Ms Singh's salary commensurate with the lower level of responsibility of the role. On the basis that Ms Singh would accept the alternative role Mr Hall advised Ms Singh that he believed it was appropriate to issue Ms Singh with a final warning and the implementation of a Performance Improvement Plan which would include monthly performance reviews.

[23] Ms Singh was provided with the opportunity to respond to the proposals which she did in writing on 10 November 2014. Ms Singh pointed out that the Telarc HACCP Food Safety System Assessment Report of 4 November 2014 found that the overall standard of cleanliness of the main kitchen and café was good. All equipment was well maintained, the chillers, the freezer and dry goods areas were very clean and tidy. Ms Singh pointed out that the report also stated that the staff appeared to be well organised and demonstrated good food handling practices. Good hygiene was confirmed by the hygiene swab results. Ms Singh declined the offer to transfer but accepted the Performance Improvement Plan.

[24] In response Mr Hall reminded Ms Singh that additional labour had been used to bring the site up to the cleanliness standard at additional cost and that this was only necessary because the compliance with Food Safety had not been managed correctly.

[25] On 20 November 2014 Mr Hall confirmed his findings in writing and advised Ms Singh that her actions and omissions amounted to serious misconduct and it was appropriate to remove her from her role at North Shore Hospital. Mr Hall advised Ms Singh that she would be redeployed to Waitakere Hospital, be issued with a final written warning as a step less than dismissal, and Ms Singh would be subject to a Performance Improvement Plan.

[26] Ms Singh raised concerns with Ms Marion Etches, HR Director, about the decision to redeploy her and the corresponding drop in remuneration. Ms Singh pointed out that the same offer of redeployment had been made to her by Mr Hall in an informal meeting in October 2014 on her current contract conditions. Ms Singh sought advice about what her options were.

[27] Ms Etches advised Ms Singh that she should discuss the issues with Mr Hall and that if she disagreed with Mr Hall's decision she could raise a personal grievance. Ms Etches reiterated a previous offer for Ms Singh to engage the support of EAP services.

[28] On 21 November 2014 Ms Singh responded to Mr Hall's letter setting out her concerns with his decision. Ms Singh was confused about why she could not remain at North Shore Hospital where she had support staff at management level i.e. Chef

Manager, Specialist Dietician and a recently recruited Ward Supervisor. Ms Singh pointed out to Mr Hall that the Food Service Manager at Waitakere Hospital dealt with similar complexities and responsibilities as at North Shore Hospital with direct support at management level. Ms Singh requested Mr Hall to reconsider the decision for redeployment to Waitakere Hospital.

[29] Despite discussions between the parties no agreement could be reached about the redeployment of Ms Singh. Compass Group had lost trust and confidence in Ms Singh to carry out her role to the required standard. Compass Group gave Ms Singh four weeks' notice of the removal from her role as Food Service Manager for North Shore Hospital and reiterated its offer to redeploy Ms Singh to the position of Food Service Manager for Waitakere Hospital. Ms Singh was advised that if she did not accept the redeployment offer before 5.00pm on 24 December 2014 her employment would terminate.

[30] Ms Singh advised Mr Hall that she did not agree to the redeployment and intended to lodge a personal grievance. In response Mr Hall advised Ms Singh that her employment would terminate on 10 January 2015. Mr Hall offered Ms Singh the opportunity to suggest other redeployment opportunities which he would then consider. Mr Hall also advised that he was prepared to engage in mediation on an urgent basis if that was Ms Singh's preference.

[31] The parties agreed to attend mediation and Mr Hall extended the period in which the offer of redeployment to Waitakere Hospital could be accepted until mediation had taken place. Mediation was not successful. Ms Singh did not agree to the redeployment and consequently her employment ended on 10 January 2015.

### **Issues**

[32] The issues for determination are:

- a) whether one or more conditions of Ms Singh's employment were affected to her disadvantage;
- b) whether Ms Singh was unjustifiably constructively dismissed;

- c) if the answer to either or both of the first two questions is yes, what, if any, remedies should be awarded.

### **Disadvantage**

[33] Ms Singh says she was disadvantaged when she was offered redeployment to Waitakere Hospital as the food service was one third the size of the food service she was managing at North Shore Hospital.

[34] The statutory test of justification is contained in section 103A of the Act. That section provides that the question of whether an action was justifiable must be determined on an objective basis, having regard to whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[35] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[36] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.<sup>1</sup>

[37] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

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<sup>1</sup> Employment Relations Act 2000, section 103A(5).

[38] As a full Court observed in *Angus v Ports of Auckland Ltd*<sup>2</sup>

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[39] Ms Singh relies on the discussion she had with Mr Hall on 7 October 2014, where he advised her that she could be transferred to Waitakere Hospital on her current terms and conditions including her current salary, to demonstrate that the decision to redeploy her was pre-determined.

[40] I find there was nothing untoward about the discussion Mr Hall had with Ms Singh regarding the possibility of her moving to Waitakere. A review of the kitchen area identified a number of issues which were not being addressed by Ms Singh. The issues uncovered in the October review had not yet come to light and was not something Mr Hall had in his mind when he had this discussion with Ms Singh.

[41] Ms Singh was trying to cope with her job and other personal matters which were contributing to her feeling tired. I find it is more likely than not that Mr Hall was attempting to lift the burden on Ms Singh by offering her an alternative with less stress and complexities.

[42] One or more conditions of Ms Singh's employment were not affected to her disadvantage by an unjustified action of Compass Group.

### **Unjustified dismissal**

[43] Ms Singh claims she was unjustifiably constructively dismissed. I find that in the absence of a resignation and in light of the evidence from Compass Group, Ms Singh was not constructively dismissed, but was actually dismissed, from her employment.

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<sup>2</sup> [2011] NZEmpC 160, (2011) 9 NZLR 40 at [26].

[44] Whether Ms Singh's dismissal was justified is to be determined in accordance with the statutory test of justification set out earlier in this determination.<sup>3</sup> This requires a consideration of whether the dismissal was what a fair and reasonable employer could have done in all the circumstances and whether how that was done was what a fair and reasonable employer could have done.

[45] Mr Hall gave uncontested evidence as to the importance of Food Safety in the Hospital environment. As the Food Service Manager Ms Singh was required to ensure Compass Group met its food safety compliance obligations which is part of the regulatory environment in which Compass Group operates.

[46] The Food Safety Programme is designed to ensure compliance with the Australian New Zealand Food Standards Code ("ANZFS") and the Food Act 1981. The North Shore Hospital runs a Food Safety Programme which is registered under Part 1A of the Food Act 1981. It is a documented programme designed to identify and control the food safety risk factors. To meet the legal requirements the Food Safety Programme is based on the principles of Hazard Analysis Critical Control Point ("HACCP"). This requires appropriate record keeping and a process to systematically identify, monitor, control and supervise the hazards involved in the preparation of food.

[47] Ms Singh had a high level of responsibility for the safety of the food that was served to the patients including ensuring the operations complied with the HACCP Food Safety Programme.

[48] In the event of an adverse food safety incident heavy reliance is placed on the processes used which requires strict adherence to the Food Safety Program. By way of example Mr Hall gave the following evidence of a food safety incident from 2012. Ms Singh was aware of the incident as she was working in the food safety area at the time.

[49] In 2012 there was a large outbreak of Norovirus at North Shore Hospital. The Ministry for Primary Industries (MPI) was notified of 59 cases of gastroenteritis. Each patient apparently received the same food.

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<sup>3</sup> Paragraphs [34] – [38].

[50] MPI conducted an investigation and site inspection of the food service operations at the North Shore Hospital kitchen which included a food safety risk assessment of the kitchen and food service. Indications were that a chicken and barley soup served at lunch on 19 July 2012 was the potential food source.

[51] MPI conducted a complete review of sections of the Food Safety Programme and staff training associated with hand hygiene. The focus was on Compass Group's food safety systems and records.

[52] The temperature monitoring forms recording the temperature of the chicken and barley soup at the time of cooking and at the tray-line demonstrated that the soup was unlikely to have contained the Norovirus while it was in the kitchen.

[53] Ultimately, the source of the Norovirus was unable to be determined however, MPI issued a formal warning to Compass Group that it was at risk of legal action. Mr Hall says this warning was apparently related to hand hygiene practices, training and the Food Safety Programme documentation.

[54] Mr Hall told the Authority that the importance of following safety procedures and recording cannot be understated. Compass Group must be able to demonstrate it has followed its documented controls and procedures in the event of a major food incident, especially in the Hospital environment where patient safety is a priority.

[55] The concerns about Ms Singh's performance included missing and incomplete entries required for the meat cooling process for the period May to September 2014. Ms Singh had overall responsibility to monitor and ensure Critical Control Points were being met through proper temperature monitoring and recording. In its investigations Compass Group found Ms Singh did not follow up missing records, nor were any corrective actions put in place. Mr Hall's uncontested evidence is that in 2011 he provided Ms Singh with coaching and assisted her in establishing a weekly routine for reviewing Critical Control Point logs.

[56] Ms Singh told the Authority that the issues arising between May and September 2014 should not have been treated as serious misconduct, but should have become part of the PFI. Mr Hall's evidence was that the PFI put in place was prospective from October and did not address the issues identified between May and September 2014.

[57] Other performance issues such as failures to increase the end-cook temperature to 75 degrees Celsius, to update the temperature monitoring forms, to undertake food safety inspection audits were viewed as serious failings on Ms Singh's part. Those issues combined with the discovery that Ms Singh had photocopied a used inspection audit form from April 2014 and amended it to represent an audit for May 2014 led Compass Group to the view that Ms Singh's acts and omissions had placed Compass Group at risk of non-compliance with its Food Safety Programme and put patient food safety at risk.

[58] The conclusions reached by Compass Group were not disputed by Ms Singh. Instead Ms Singh disputes the outcome of the process which was the offer to redeploy her to an alternative role at a lesser salary, issue her with a final written warning and implement a performance improvement process, or to terminate her employment.

[59] Ms Singh had the direct responsibility to ensure all aspects of the Food Safety Programme were undertaken in accordance with the documented procedures and policies. Ms Singh had been engaged in the role for more than 5 years and knew the food safety requirements and what was needed to meet those requirements.

[60] Ms Singh was provided with all the information available to Compass Group and her explanations sought. Ms Singh had the opportunity, which she took, to be represented throughout the disciplinary process. Initially Compass Group proposed to redeploy Ms Singh, issue her with a final written warning and place her on a performance improvement plan. Ms Singh rejected the offer of redeployment on the basis that it was a demotion and she wished to retain her current salary.

[61] Ms Singh was advised that Compass Group would prefer to retain her services, but if the option of redeployment was not possible, then termination was the only other option. Ms Singh was invited to suggest alternative redeployment options which could be considered by Compass Group.

### ***Disparity***

[62] Ms Singh says that when the external audit was conducted by Telarc on 4 November 2014 the auditor identified the same or similar non-conformity issues in the staff café but the café manager and his/her supervisor were treated differently to her. Also Ms Singh relies on the treatment of the Chef Manager who also was

treated differently to her in that they were not subject to the same process and/or outcome as her.

[63] The test for disparity was set out in [\*Chief Executive of the Department of Inland Revenue v Buchanan\*](#)<sup>4</sup>. The three questions to be answered are:

- a) Is there disparity of treatment?
- b) If so, is there an adequate explanation for the disparity?
- c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[64] In answer to Ms Singh's complaints about disparity Mr Hall told the Authority that the issues identified in the Telarc audit relating to the staff café were of a different nature to the concerns raised in the review on 7 October 2014. The issues identified in the staff café were that the light cover of the hot bain-marie in the café had dust build up and the fridge door was found open several times during the site inspection and the fridge temperature checked at 9.7 Celsius. These were considered minor issues and were addressed.

[65] The Chef Manager works with and reports to the Food Service Manager. The Chef Manager's role is to provide coordination and coaching to Cooks in the food production process, menu planning, ordering supplies and cooking in the kitchen.

[66] The Chef Manager is responsible for ensuring compliance with Food Safety Plans including the temperature checks and that CCP's are being performed, met and recorded on the temperature monitoring forms. The incumbent Chef Manager was subjected to a disciplinary process and disciplinary action.

[67] The fact remains, however, that Ms Singh was accountable for ensuring the Chef Manager met his/her obligations. Compass Group says she failed to do this and therefore the disciplinary action taken against Ms Singh was appropriate.

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<sup>4</sup> [2005] ERNZ 767 (CA).

[68] I am satisfied that there was some difference in the treatment of the other employees relating to the findings of the Telarc audit but that the explanations from Compass Group adequately explain the differences and there was no disparity of treatment that could cause the decision to dismiss to be unjustified.

### ***Demotion***

[69] The disciplinary process resulted in Ms Singh being offered two separate proposals for her feedback:

- a) Dismissal; or
- b) Redeploy to Waitakere Hospital at a salary commensurate with the role, be issued with a final written warning, and be subject to a performance management process.

[70] Ms Singh says that the option to move to Waitakere Hospital was a demotion and she should not have been required to accept that.

[71] Employers may have a duty to consider alternatives to dismissal and failure to do so may result in the dismissal being unjustified.<sup>5</sup> This may include demotion as a potential sanction short of the extreme of dismissal.<sup>6</sup>

[72] I have accepted the evidence of Mr Hall that the intention was to try and keep Ms Singh actively engaged in employment.

[73] I find that what was done and how it was done by Compass Group in all the circumstances of this case at the time was what a fair and reasonable employer could have done.

### ***Pre-determination***

[74] Ms Singh says the decision to dismiss was predetermined and that Mr Hall's ultimate goal was to redeploy Ms Singh and this was a goal he had in his mind prior to, and during the disciplinary process.

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<sup>5</sup> *Harris v The Warehouse* [2014] NZEmpC 188 at [155].

<sup>6</sup> *Secretary of Justice v Dodd* [2010] NZEmpC 84.

[75] I am satisfied the question on 7 October 2014 from Mr Hall about whether Ms Singh would like to consider a transfer to Waitakere Hospital was in response to Ms Singh's acknowledgement that the site inspection had not gone well, that she was tired and was having to take care of her mother in addition to her work. When Ms Singh declined the offer the matter was not raised again, until after the disciplinary process had been completed and Compass Group was considering alternatives to dismissal.

[76] I am satisfied the evidence demonstrates Ms Singh was able to and did respond to all concerns throughout the disciplinary process and that Mr Hall demonstrated an open mind and considered all Ms Singh's responses fully.

[77] Ms Singh has failed to establish to my satisfaction that the disciplinary process and the outcome of dismissal was predetermined.

[78] I find Ms Singh's dismissal was an outcome an employer acting fairly and reasonably could reach.

### **Costs**

[79] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Compass Group shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Singh shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[80] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Vicki Campbell

Member of the Employment Relations Authority