

**Note: This determination contains an order prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 482  
3191219

BETWEEN TUJ  
Applicant

AND PRO PINE SILVICULTURE  
LIMITED  
Respondent

Member of Authority: Rowan Anderson

Representatives: Hailey Johnson, advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting: 4 July 2023 at Palmerston North

Submissions received: 18 July 2023 from the Applicant

Determination: 28 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] TUJ was employed by Pro Pine Silviculture Limited (Pro Pine) between May and June of 2022. TUJ first attended work on 12 May 2022 for what was described as ‘work experience’ and says they were then invited back the following day to commence employment.

[2] TUJ says that they were initially told that they would receive piece rates, but that at the time they commenced work there was an agreement that they would instead be paid \$25.00 per hour. They say that on their third day of work they were told their pay was being reduced to \$21.00 per hour before they eventually started earning piece rates.

[3] TUJ claims they were unjustifiably disadvantaged in their employment with Pro Pine having regard to the unilateral reduction in their hourly wage.

[4] TUJ claims that they were unjustifiably dismissed from their employment on 15 June 2022 when Akuhata Pirere, Director and sole Shareholder of Pro Pine, messaged them in a group chat telling them, amongst other things, that he did not think the job was for them.

[5] TUJ seeks an award of compensation for lost wages and compensation for humiliation, loss of dignity, and injury to feelings.

[6] TUJ also claims that they are owed wages and leave entitlements and that Pro Pine has breached its statutory obligations in relation to the payment of wages, the provision of wage and time records and the provision of an individual employment agreement (IEA), and by failing to make payment for annual holidays. They seek penalties be imposed upon Pro Pine.

[7] Pro Pine has not responded to TUJ's claims.

### **Non-publication orders**

[8] Having regard to TUJ's age, vulnerability, and the potential for damage to their future employment prospects, I indicated to the parties on 25 August 2023 that I was considering making orders prohibiting the publication of TUJ's name and any identifying details. TUJ consented to the proposed orders being made and no objection to the making of those orders was received.

[9] I consider that making such orders are appropriate in the circumstances and I am satisfied that there is no public interest in the naming or identification of TUJ.

[10] I order a prohibition on the publication of the name of the applicant and any identifying details of the applicant. This order is made pursuant to clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act).

[11] A random generator has been used to refer to the applicant in these proceedings. TUJ is a randomly generated name and does not resemble the name of the applicant.

## Issues

- [12] The issues identified for investigation and determination are:
- (a) Is TUJ entitled to any arrears of wages and annual holidays?
  - (b) Was TUJ unjustifiably dismissed from their employment?
  - (c) Was TUJ unjustifiably disadvantaged in their employment?
  - (d) If Pro Pine's actions were not justified, what remedies should be awarded, considering:
    - (i) lost wages; and/or
    - (ii) compensation under section 123(1)(c)(i) of the Act?
  - (e) Has Pro Pine breached s 4 of the Wages Protection Act 1983 by failing to make payment of wages without deduction when due? If so, should a penalty be imposed upon Pro Pine?
  - (f) Has Pro Pine breached s 130 of the Act by failing to provide wages and time records requested by TUJ? If so, should a penalty be imposed upon Pro Pine?
  - (g) Has Pro Pine breached s 65 of the Act by failing provide TUJ with a written individual employment agreement (IEA)? If so, should a penalty be imposed upon Pro Pine?
  - (h) Has Pro Pine breached s 27(2) of the Holidays Act 2003 by failing pay TUJ annual holiday pay? If so, should a penalty be imposed upon Pro Pine?
  - (i) Should either party contribute to the costs of representation (if any) of the other party?

## The Authority's Investigation

[13] I am satisfied that Pro Pine received a copy of the statement of problem and notice of the investigation meeting, but that it chose not to engage or attend. On 2 March 2023 the Authority received an email from Akuhata Pirere, Director Pro Pine, as follows:

We no longer are in business...  
Fuck off and leave us alone...  
We have no money to give as we are claiming bankruptcy...  
Tell [TUJ] because of idiots like him we no longer want to be in business...

[14] Mr Akuhata was subsequently informed of the date and time of the case management conference and that it would proceed despite any choice by him not to participate.

[15] Pro Pine was also given notice of a case management conference held on 2 November 2022. Despite that, Pro Pine did not attend, rejected attempts by the Authority to have it engage further, and did not lodge a statement in reply.

[16] An investigation meeting was held in Palmerston North on 4 July 2023. There was no appearance on behalf of Pro Pine Pro notwithstanding that it had been served with notice of the investigation meeting.

[17] At the investigation meeting TUJ answered questions from me under affirmation. Leave was sought, and granted, for TUJ's mother to appear at the investigation by telephone. TUJ's mother answered questions from me under affirmation.

[18] At the conclusion of the investigation meeting, I advised that I required certain additional information for the purposes of my investigation.

[19] On 5 July 2023 I issued written directions to the parties as to the documents and information requested and including a timetable for the provision of written submissions. Written submissions, an affidavit, and the further documents requested were lodged by TUJ. Pro Pine were provided an opportunity to respond and lodge any reply submissions, but did not do so.

[20] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Commencement of employment relationship**

[21] TUJ gave evidence that they had previously met Mr Pirere in the carpark of the New World supermarket in Marton in approximately February or early March of 2022. TUJ says that Mr Pirere gave him his card, advised that he owned a forestry company, and that he was looking for workers.

[22] On 25 March 2022 TUJ responded to an advertisement on the Marton Job Search Facebook page. TUJ contacted the number provided and then entered into an exchange with Megan Innes, the other director of Pro Pine. That exchange continued through to 11 May 2022 when Ms Innes asked TUJ if they wanted to go to the job site

the following day, later confirming that the attendance on that day would be ‘work experience’.

[23] TUJ says that following the ‘work experience’ day he was asked back and but was never given an IEA and there was no discussion about any contract or similar. Whilst initially told they would be earning piece rates, TUJ says they were told the rate of pay would be \$25.00 per hour, until they got the hang of the job.

[24] TUJ’s evidence was that they would meet to be driven to work at approximately 7.00am, there would then be a period during which TUJ and others would travel to the work site, and they would finish work on most days at 5.00pm. TUJ says the job was Monday to Friday, with some weekend work. TUJ says that they worked nine hours per day. On some days when they were due to work, they were advised that there would be no work on account of the weather.

[25] Whilst the terms and conditions of TUJ’s engagement are not entirely clear, primarily because no IEA was ever produced. I am satisfied that TUJ was engaged to work under a contract of service.

### **Is TUJ entitled to any arrears of wages and annual holidays?**

#### *Unpaid wages*

[26] Such as TUJ claims that they were entitled to \$60.00 per box for blanking (planting to replace/fill gaps from an initial planting operation), I am unable to accept that position. Whilst TUJ’s evidence is that that was the amount noted by Mr Pirere on a Facebook advertisement for the job, I find that prior to the commencement of employment that an agreement was reached between TUJ and Pro Pine that the rate of pay would be \$25.00 per hour.

[27] I find that there was no agreement as to a reduction in TUJ’s rate of pay to \$21.00 per hour. Whilst there appears to have been some later discussion about piece rates, and TUJ was paid on that basis on one occasion, I am not satisfied that any such discussion was sufficient to supplant the agreement that was reached as to the hourly rate of \$25.00 per hour.

[28] Having regard to the above, and all of the information provided to me regarding the basis on which the employment relationship was entered into, I find that TUJ was entitled to payment of \$25.00 per hour, nine hours per day, and a five-day week.

[29] Mr TUJ gave evidence and provided documents<sup>1</sup> evidencing their claims relating to their hours of work and payments received. In summary, the evidence reflects the following:

- (a) On 14 June 2022 TUJ received a \$50.00 advance on their pay.
- (b) TUJ was paid \$322.40 by electronic funds transaction on or about 20 June 2022.
- (c) The pay advice of 20 June 2022 reflected that an advance of \$200 was paid and was deducted from TUJ's pay.
- (d) The pay advice of 20 June 2022 reflected that 20 per cent tax was withheld, although this is not reflected in the Inland revenue summary provided to the Authority.
- (e) TUJ claims that they worked a total of 20 days (those days being specified in their evidence and excluding the first 'trial' day for which he received a cash payment).

[30] I find that TUJ was entitled to payment of a total gross sum of \$4,500 representing 20 days of nine hours at \$25.00 per hour. From that amount, I deduct the two advances<sup>2</sup> totalling \$250, and the payment of \$322.40 received on 20 June 2022. I order that Pro Pine Silviculture Limited make payment to TUJ, within 28 days of the date of this determination, in the amount of \$3,927.60 (gross) relating to wages due.

#### *Annual holidays*

[31] TUJ was not paid any sum relating to annual holidays as required by s 27(1)(b) of the Holidays Act 2003. I am satisfied that TUJ is entitled to payment for annual holidays calculated based on their gross earnings<sup>3</sup> of \$4,500. I order that Pro Pine Silviculture Limited make payment to TUJ, within 28 days of the date of this determination, of \$360 (gross) for annual holidays not paid out at the end of the employment relationship.

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<sup>1</sup> This included a screenshot of payment advice dated 20 June 2022 and income an summary from Inland Revenue from between 1 April 2022 and 31 March 2023.

<sup>2</sup> See above at paragraph [29](a) and (c).

<sup>3</sup> Calculated at 8 per cent of TUJ's gross income; Holidays Act 2003, s 23.

### *Interest*

[32] Additionally, I consider that interest in accordance with the Interest on Money Claims Act 2016<sup>4</sup> is payable from the date the employment relationship ended<sup>5</sup> until the date on which payment in full is made. This is to be calculated using the Civil Debt Interest Calculator.<sup>6</sup>

### **Was TUJ unjustifiably dismissed from their employment?**

[33] TUJ says that they were dismissed from their employment on 15 June 2022 when Mr Pirere sent a message to a group of people, including TUJ, as follows:

Sorry [TUJ] we not picking you up man...  
Pulled you up so many times and your doing the same shit..

Thanks for giving is a go mate  
But we honestly think this jobs not for you man [thumbs up emoji]  
Goodluck bud...

[34] I accept TUJ's evidence and find that they were dismissed from their employment at the initiative of Pro Pine.

[35] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether Pro Pine's actions, and how Pro Pine acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.<sup>7</sup>

[36] Justification requires the consideration of both substantive and procedural fairness. The onus is on Pro Pine to justify its actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

[37] Pro Pine has not engaged in any meaningful way with the Authority's investigation and nor has it offered a justification. The group message arguably indicates some dissatisfaction with TUJ's level of performance. However, it falls woefully short of providing a substantive justification for the dismissal.

[38] I have considered the factors at s 103A(3) of the Act and find as follows:

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<sup>4</sup> Interest on Money Claims Act 2016, s 10.

<sup>5</sup> That being 15 June 2022.

<sup>6</sup> Interest on Money Claims Act 2016, s 12 and 13.

<sup>7</sup> Employment Relations Act 2000, s 103A.

- (a) such as any reasons for the dismissal are apparent, there is no evidence of any sufficient investigation into Pro-Pine's concerns;
- (b) whilst comments were made to TUJ during their employment to the effect that they were not as productive as they should be, there is no evidence of such concerns being raised in any formal or appropriate manner prior to the dismissal; and
- (c) TUJ was not provided and opportunity to respond to the concerns prior to the dismissal.

[39] No procedural justification has been offered and I consider it clear on the evidence of TUJ, which is unchallenged and which I accept, that dismissal was procedurally unjustified.

[40] Pro Pine's actions in dismissing TUJ in a group chat were not merely only unjustified, they were abhorrent. The dismissal, and Pro Pine's actions were not open to a fair and reasonable employer.

[41] I find that TUJ was unjustifiably dismissed from their employment with Pro Pine.

**Was TUJ unjustifiably disadvantaged in their employment?**

[42] TUJ says that they unjustifiably disadvantaged in their employment in relation to a unilateral reduction in their hourly rate of pay. TUJ says that their rate of pay was unilaterally reduced, without consultation, on their third day of employment. TUJ claims that they were unjustifiably disadvantaged as a result.

[43] TUJ gave evidence that, prior to the reduction in pay, they were on an agreed rate of \$25.00 per hour. The result of the unilateral reduction was that TUJ's hourly rate was reduced to \$21.00 per hour, at least until a later point at which a further agreement was reached in relation to piece rates.

[44] I have set out the considerations relating to justification in relation to TUJ's claim of unjustified dismissal. The same considerations are relevant to TUJ's unjustified disadvantage claim.

[45] I find that TUJ was disadvantaged in their employment by Pro Pine's actions in unilaterally reducing TUJ's hourly rate of pay absent consultation and agreement.

[46] Pro Pine has offered no justification. I am satisfied that TUJ was unjustifiably disadvantaged by the unilateral reduction of their hourly rate. There is no evidence of a substantive justification for Pro Pine's actions, nor of any procedural justification having regard to the factors set out at s 103A(3) of the Act.

[47] I find that TUJ was unjustifiably disadvantaged in their employment.

### **Is TUJ entitled to remedies?**

#### *Is TUJ entitled to compensation for lost wages?*

[48] TUJ submits that they were proactive in seeking alternative employment following their dismissal from Pro Pine. TUJ claims a period of at least three-months lost wages, totalling \$14,625 (based on \$25 per hour and a forty-five-hour week). TUJ also claims an additional \$9,750 said to relate to the relevant piece rates (calculated based on \$60 per box and an average of 2.5 boxes per day). I do not accept the calculations provided relating to piece rates, noting my findings in relation to TUJ's hours of work and pay.

[49] TUJ says that they wanted to get back to work right away, but that was made difficult because they did not hold a driver's licence. TUJ also says that they were eager to find alternative work following their dismissal from Pro Pine, but that their not having a driver's licence made that hard. Despite that issue, TUJ gave evidence that they applied for a role in food packaging, and that they searched online job sites including Trade Me and Martin Job Search on FaceBook.

[50] In terms of finding alternative work after the dismissal from Pro Pine, TUJ said in his statement of evidence, "[i]t was around two or three months before I eventually got work with my uncle at [their] joinery business".

[51] I am satisfied that TUJ lost wages as a result of the grievance relating to a total period of eight weeks. I am also satisfied that TUJ took genuine and reasonable steps to mitigate their loss.

[52] I consider it appropriate to make an award of compensation for lost wages for a total period of eight weeks. I have calculated this sum on the basis that TUJ was paid \$25.00 per hour and an average of 45 hours per week.

[53] I order Pro Pine Silviculture Limited pay TUJ, within 28 days of the date of this determination, compensation of \$9,000 (gross) for lost wages.

*Is TUJ entitled to compensation for humiliation, loss of dignity and injury to feelings?*

[54] TUJ submits that an award of \$20,000 as compensation for humiliation, loss of dignity and injury to feelings, would not be unreasonable in the circumstances.

[55] TUJ's evidence is that their dismissal occurred through a group chat which included approximately five other persons. The approach to the dismissal taken by Pro Pine is of significant concern. This is in my view more so the case having regard to TUJ's age at the time and what would very obviously have been an embarrassing and humiliating experience of being dismissed via a group chat including others.

[56] TUJ's mother gave evidence as to the impacts of the dismissal that she observed. She says that TUJ was visibly upset and grew increasingly withdrawn. She also says that TUJ became quite depressed, and that, in effect, she became extremely worried about TUJ's mental health.

[57] TUJ, and TUJ's mother both also gave evidence that Mr Pirere, having received notice of TUJ's personal grievance, came to TUJ's home, and threatened TUJ. TUJ's evidence is that Mr Pirere said words to the effect that he "knew people" and that TUJ should "be careful".

[58] I am satisfied that TUJ was significantly and negatively impacted by Pro Pine's actions, both in relation to the unilateral reduction in their wage rate and the dismissal.

[59] TUJ worked for Pro Pine for a relatively short period of time. Such that it might be permissible to take any account of that fact, any such consideration is significantly outweighed by TUJ's inherent vulnerability given their age and limited work experience and the impact the dismissal has had on them. This included a loss of confidence and embarrassment caused by the manner in which the dismissal was communicated.

[60] The significance of the impact on TUJ, particularly given the factors recorded above including their age and the circumstances relating to the communication of the dismissal, should not be underestimated. I find that the actions of Pro Pine have had a significant impact on TUJ. However, and to their credit, it is apparent that TUJ was able

to move forward positively, including by gaining alternative work within a reasonable period of time.

[61] Having regard to the above factors, and all of the relevant evidence, I consider a total sum of \$22,500 an appropriate award of compensation in this case.

[62] I order that Pro Pine Silviculture Limited make payment to TUJ of \$22,500 as compensation for humiliation, loss of dignity, and injury to feelings.

#### *Contribution*

[63] Section 124 of the Act requires that the Authority consider the extent to which TUJ's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that the Authority reduce the remedies that would otherwise have been awarded accordingly.<sup>8</sup>

[64] I do not consider there is any basis on which TUJ's actions could be said to have contributed to the situation that gave rise to their personal grievances. I decline to make any reduction on account of contribution.

#### **Penalty Claims**

[65] TUJ claims that Pro Pine has breached:

- (a) section 4 of the Act in relation to its duty of good faith;
- (b) section 65 of the Act by failing to have a written individual employment agreement (IEA);
- (c) section 130 of the Act by failing to provide TUJ with wage and time records upon request;
- (d) section 4 of the Wages Protection Act 1983 by failing to make payment to TUJ of wages, without deduction, as they became due; and
- (e) section 27 of the Holidays Act 2003 by failing to make payment of annual holidays.

[66] I find in each case that the breaches are made out and I find as follows:

- (a) I find that there were numerous breaches Pro Pine's duty of good faith. Those breaches included a complete failure to provide TUJ an opportunity

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<sup>8</sup> Employment Relations Act 2000, s 124.

to comment prior to making a decision to reduce TUJ's hourly rate of pay and before dismissing them from employment;

- (b) there is no evidence of a written IEA being produced and I accept TUJ's evidence that Pro Pine did not provide them one. I find that Pro Pine's failure was a breach of s 65 of the Act;
- (c) TUJ's representative requested a copy of the wage and time records on 4 July 2023. Those records were not provided and I find that Pro Pine breached s 130 of the Act;
- (d) I accept TUJ's evidence that Pro Pine did not make payment of wages when they became payable. I find that Pro Pine breached s 4 of the Wages Protection Act 1983; and
- (e) I accept TUJ's evidence that they were not paid, either during their employment or at the conclusion of their employment, any amount in relation to annual holidays. I find that Pro Pine breached s 27 of the Holidays Act 2003.

[67] In final submissions, TUJ raised an alleged breach of the Minimum Wage Act 1983 and broadly obligations said to arise in relation to the payment of PAYE. Those claims were not raised in the statement of problem, nor at any stage of the Authority's investigation prior to final submissions, and such as the Authority may have any jurisdiction to deal with them, I decline to make any order in relation to those matters.

[68] Whilst I consider Pro Pine's breach of its good faith duties to be serious, I find that the relevant conduct relates to the same factual matrix as that concerning TUJ's unjustified disadvantage and dismissal claims. I decline to issue a separate penalty in relation to that breach.

[69] I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*<sup>9</sup> and had regard to the mandatory considerations at s 133A of the Act.

[70] The maximum penalty in this case for a single breach is \$20,000.<sup>10</sup> There are a total of four breaches in relation to which I need to consider further the issue of penalty. I consider the two breaches of the Act to be of a similar nature, that being a failure in

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<sup>9</sup> [2016] NZEmpC 143.

<sup>10</sup> Employment Relations Act 2000, s 135(2)(b); Wages Protection Act 1983, s 13(1)(b); Holidays Act 2003, s 75(1)(b).

relation to the keeping of necessary records. I consider it appropriate to globalise those two breaches. I consider the breaches of the Wages Protection Act 1983 and the Holiday's Act 2003 of separate statutory provisions. As such, I find that there were three breaches, with the total maximum penalties amounting to \$60,000.

[71] The breaches are not trivial, and I find that all the breaches are serious. They all concern obligations that are long standing and well known. The breaches of the Wages Protection Act and Holidays Act I consider particularly serious.

[72] I am satisfied that the breaches of the Wages Protection Act and Holidays Act were deliberate. It is inconceivable that the relevant representatives of Pro Pine were oblivious to the obligation to make payment of wages and annual holidays to TUJ. The sum actually paid to TUJ was relatively insignificant and I consider it implausible that Pro Pine could have considered TUJ had been appropriately paid for the work performed.

[73] I am not satisfied that the breach of the Employment Relations Act rises to the same level. However, I am satisfied that Pro Pine, at best, was reckless in relation to its record keeping. That failure created some difficulty for TUJ in quantifying their claims. Whilst I consider the breach less severe than the other established breaches, it is still a serious nature.

[74] Pro Pine has not put forward any evidence in relation to the alleged breaches, including as to any mitigating factors. In terms of aggravating factors, I consider the age and vulnerability of TUJ to be significant. There is no evidence of previous relevant conduct by Pro Pine. Having regard to the severity of the breaches I consider an appropriate starting point as follows:

- (a) 40 per cent for the breach of s 130 of the Employment Relations Act. The provisional starting point being \$8,000;
- (b) 70 per cent for the breach of the Wages Protection Act. The provisional starting point being \$14,000; and
- (c) 60 per cent for the breach of the Holiday's Act. The provisional starting point being \$12,000.

[75] Whilst an email received from Mr Pirere on 2 March 2022 indicated that Pro Pine may no longer be in business, no evidence confirming that position is before the

Authority. I am not satisfied that there is any evidence on the part of Pro Pine as to an inability to make payment in relation to any penalties that might be ordered. As such, the provisional sums remain subject to consideration of proportionality.

[76] In considering the issue of proportionality, I consider that a reduction to the provisional penalties is appropriate. I consider a global penalty in the total sum of \$7,000 appropriate.

[77] Compensation has been awarded to TUJ in relation to their unjustified dismissal and unjustified disadvantage claims. I consider the circumstances relating to the breaches differ sufficiently from the basis for the unjustified dismissal claim. There is some degree of overlap as to the unjustified disadvantage claim. I do not consider that apportioning part of the penalty ordered to TUJ would result in TUJ being twice compensation.

[78] I order that Pro Pine Silviculture Limited pay, within 28 days, a penalty of \$7,000. \$4,000 of that sum is to be paid to the Authority via the Crown account, and \$3,000 to TUJ.

### **Summary of orders**

[79] Pro Pine Silviculture Limited is ordered, within 28 days of the date of this determination, to make payment of:

- (a) \$3,927.60 (gross) as arrears of wages due;
- (b) \$360 (gross) for annual holidays in accordance with s 27 of the Holidays Act 2003;
- (c) \$9,000 (gross) to TUJ as compensation for lost wages under s 123(1)(b) of the Act;
- (d) \$22,500 to TUJ as compensation for hurt and humiliation under s 123(1)(c)(i) of the Act;
- (e) \$7,000 in penalties, \$4,000 of which is to be paid into the Crown account via the Authority, and \$3,000 to be paid to TUJ.

[80] Such that there may be any issues as to taxation, that a matter for the parties and the relevant agency to resolve if necessary.

## **Costs**

[81] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[82] If they are not able to do so and an Authority determination on costs is needed TUJ may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Pro Pine would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[83] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.

Rowan Anderson  
Member of the Employment Relations Authority