

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Jason Trotter (Applicant/Respondent)  
Stephen Parkinson (Applicant/Respondent)

**AND** Bank of New Zealand (Respondent/Applicant)

**REPRESENTATIVES** John Coyle, Advocate for Applicants/Respondents  
Stephen Langton, Counsel for Respondent/Applicant

**MEMBER OF AUTHORITY** R A Monaghan

**INVESTIGATION MEETING** 23 and 24 May 2006

**SUBMISSIONS RECEIVED** 9 and 23 June, 6 July 2006

**DATE OF DETERMINATION** 25 August 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Jason Trotter and Stephen Parkinson say they were unjustifiably dismissed by their former employer, Bank of New Zealand Limited (“the bank”). The bank employed Mr Trotter as a mobile mortgage manager. Mr Trotter reported to his area manager, Mr Parkinson. Both have filed separate employment relationship problems but, since the problems concern the same set of facts, they have been heard together.

[2] The bank says the dismissals of Messrs Trotter and Parkinson were justified. In addition it has filed its own employment relationship problems concerning both men, seeking penalties and damages for breaches of their respective employment agreements. By agreement with the parties the claims for damages have been addressed as to liability, with quantum to be addressed later if necessary. Otherwise these problems, too, have been heard together, and were incorporated in the overall investigation.

**The no-broker policy**

[3] On 1 June 2003 the bank introduced a new policy under which it would no longer deal with mortgage brokers. All existing relationships with commissioned and non-commissioned brokers were to end. The bank took the change very seriously. It intended to adhere to the change to the extent that it sought to avoid even any suggestion it was continuing to deal with mortgage brokers.

[4] In preparation for the change, area managers were to investigate certain business relationships within their areas and identify whether the relationships were with brokers. If so the relationships would have to cease, even if significant amounts of business might be lost to the bank as a result.

[5] There was no applicable definition of ‘mortgage broker’. According to Gary Ashton - at the time the head of mobile mortgage managers and Mr Parkinson’s immediate superior - the tests the bank used for identifying whether a person was acting as a mortgage broker included:

- . is the person a registered broker?
- . is the person receiving a payment for services?
- . is the person putting business out to tender?

[6] Three companies were identified as having relationships with the bank that were less than clear in that context. Two were in Mr Parkinson’s area and one of those was with Alliance Strategic Property Investment Limited (“Alliance”). Alliance had a number of associated companies, referred to collectively as the Alliance Group. Trent Cary was the director of Alliance and over some two years Mr Trotter had built a business relationship with him. Prior to 2003 Mr Cary had also operated as a broker under an arrangement with the ASB, although he said he had done so only occasionally and had not done so recently.

[7] In mid-2003 Messrs Trotter and Parkinson met with Mr Cary to discuss the Alliance business, and the company’s relationship with the bank, with a view to identifying whether Alliance was acting as a mortgage broker in the light of the tests. Mr Parkinson concluded Alliance could not be regarded as a mortgage broker since it was not registered as such and had not been involved in that practice for some time. In particular, Mr Cary advised that he was not operating under his arrangement with the ASB. This was significant because, if Mr Cary was dealing as a broker with other banks, that alone might be seen to taint the bank’s strategy even if its own relationship with Mr Cary was something other than lender and broker. Mr Parkinson was also satisfied the company was properly described as a property investment company, rather than as a mortgage brokerage. There appeared to be no payments to Mr Cary or Alliance when clients were introduced to the bank, and there was no tendering for the associated business.

[8] Mr Parkinson asked Mr Trotter to detail the company’s business practice and status in a written report, which Mr Trotter did.

[9] According to Mr Trotter’s report, “[Alliance] does not deal with one off borrowers seeking finance to purchase a house. They focus their business on becoming property investment consultants.” Mr Cary’s evidence was that the company’s profit came from its consulting and from the margins it made when it onsold property. As Mr Trotter also reported, among other things Alliance’s business was to:

- (i) assist property investors to obtain finance for the purchase of investment properties; and
- (ii) purchase properties at a discount from developers and on-sell them to investors, with the settlements being effected contemporaneously.

[10] Mr Trotter noted in his report that no fee was paid by the customer or the bank in association with these transactions, and there was no tendering for the mortgage lending. He also noted that FlyBuys/Global Plus facilities were used, but did not otherwise expressly refer to his use of ‘empowerment’ (a term to which I will return) or to contributions by the bank to legal fees.

[11] In or about June 2003 Messrs Trotter and Parkinson met with Mr Ashton to discuss the bank’s relationship with Alliance, and Mr Trotter’s report. On the basis of this material Mr Ashton concluded that none of the three tests was met, so that Mr Trotter’s relationship with Alliance could continue under the bank’s new policy. It was common ground between Messrs Ashton and Parkinson that empowerment, and the payment of legal fees, were not discussed at this meeting. It was also common ground that the discussion focussed on Alliance’s activities in buying and onselling investment properties.

[12] The nature of the bank's business with Alliance and Mr Cary was addressed again in similar terms during a further meeting that month, between Mr Ashton and all of his area managers. Mr Trotter's report was again discussed, and again there was no evidence of any discussion about empowerment or the payment of legal fees. The team approved the continuation of the relationship based principally on the information in Mr Trotter's report.

[13] Turning to 'empowerment', this was a policy under which home loan customers were offered specified incentives to encourage them to give the bank their business. In the period to October 2003 the bank's written 'empowerment guidelines' permitted mobile mortgage managers to exercise discretion - within the guidelines - to reduce a loan establishment fee, make a contribution to the cost of switching loans or for purchase of airpoints, or use empowerment in conjunction with a 'rewards for loyalty package'. Mr Trotter said his mention of Flybys/Global Plus in his report on the relationship with Alliance was a reference to this. The contribution under empowerment could be used to fund various fees and costs, including insurance and legal fees. Within a particular loan size specified in the guidelines, a contribution of up to \$600 was available.

[14] Mr Trotter says he was applying the guidelines in making contributions to legal fees in the sum of \$600 in certain of the bank's home loans involving customers introduced by Alliance. In his statement of evidence Mr Parkinson said Mr Trotter used empowerment at his suggestion. Mr Parkinson's evidence was that, while the bank was not in a position to pay any form of brokerage payment, Mr Trotter was 'empowered' to incentivise customers Mr Cary presented. Mr Parkinson asserted in his written statement of evidence that he had a robust sign-off process for empowerment payments, he never saw any payment made directly to Alliance rather than to a customer, and he had no issues with Mr Trotter's use of empowerment.

[15] With effect from 6 October 2003 new 'Home Loan Empowerment Guidelines' were in place. They contained a new set of incentives, although the option of making a contribution to switching fees remained. The loan size previously attracting a possible contribution of \$600 now attracted a possible contribution of \$500 or \$750, depending on the loan. Another change was that empowerment ceased to be available for Global Plus home loans.

### **A possible breach of the no-broker policy is identified**

[16] Commencing in November 2003, Mr Parkinson was seconded to the United Kingdom to work for an associated bank there. The secondment was to be for two years, and Mr Parkinson would remain an employee of the bank's during that time. He was based in Leeds. Mr Trotter was seconded to the same bank, under a similar arrangement, in or about February 2004. He was based in Bristol.

[17] When Mr Trotter left on his secondment, he handed his Alliance business to another mobile mortgage manager, Edward Chote. Mr Chote continued to arrange finance for customers introduced by Alliance, until (according to his statement of evidence) he became concerned at a comment of Mr Cary's that Alliance normally received a contribution to the legal fees associated with a sale and purchase of property. Mr Chote believed such contribution should be paid directly to the customer. He said he was uncertain of whether the arrangement had been agreed to, or whether Mr Cary was trying to take advantage of Mr Trotter's absence. He obtained from Mr Cary copies of invoices for payments of the kind Mr Cary was referring to, and a blank finance application form used by Alliance. He approached his area manager at the time, Wayne Smith, to discuss his concerns.

[18] Messrs Smith and Chote met on 31 May 2004. The documents they discussed included:

(i) two invoices from Alliance clients to the bank, for the payment of \$600 as a contribution to costs of a property purchase and refinance transaction ‘which has currently been absorbed by [Alliance] re legal, establishment fees and other disbursements’, stating that cheques should be made payable to Mr Cary of Alliance, and asking that the ‘applicable transactional account’ [being a customer account] be credited and debited regarding the fee; and

(ii) a blank finance application form headed ‘Alliance Loan Approval Services’, worded in part-

. ‘Client New Loan Requirements, Bank Tender Overview ASB/ANZ/WESTPAC/NATIONAL/BNZ’

. ‘Finance Fee ... - \$1200’

. ‘The finance fee is exclusive of any contribution made by any financial institution ... I/we authorise BNZ to credit my account \$600.00 and then debit the same amount for payment to [Alliance] ...

I/we authorise [Alliance] to obtain the most suitable facility to meet all aspects of our loan application ...

I/we agree to allow the applicable lending institution to debit our account to pay all fees due to [member of the Alliance Group] ..’

[19] Mr Smith shared Mr Chote’s concern that the invoices showed a payment being made to Alliance. If empowerment was being relied on, the payments should have been made to the customer. Not only that, it appeared from the heading on the finance application form that Alliance was putting business out to tender. Further, the reference to a finance fee, and to a payment of \$600, made it look as if the bank was paying for business referred by Alliance. Based on these documents, Mr Smith formed the view that the arrangement with Alliance probably breached the no-broker policy.

[20] Subsequently Mr Smith looked at some of the loans Mr Trotter had approved and drawn down since October 2003. He said he was looking for evidence of sums being credited to a customer, then debited out. He identified one example of a transaction in or about December 2003 in which \$750 had been credited to a customer’s account, then debited and transferred to a credit card held in the name of Mr Cary and another person.

[21] Mr Smith said he did not look for any more examples because he did not consider it necessary to do so. I could accept that a single example was sufficient to warrant starting an investigation into whether Mr Trotter was breaching the no-broker policy in his association with Alliance, or to question Mr Trotter’s use of empowerment. However in the absence of full details of the associated sale and purchase, any information about other transactions involving Alliance and its clients over the same period, or an explanation from Mr Trotter, it was premature to place too much emphasis on the material at least as it related to the no-broker policy.

[22] Mr Smith also identified from the sales ‘funnel’ (an information management system onto which details of loans under action were loaded) that prior to June 2003 Mr Trotter had been coding business sourced from Mr Cary as ‘Broker Non-Commissioned’, but after that date the business was coded as ‘External Other Personal Network.’ Aside from the implications of the change in bank policy, there seemed to him to be no reason to make that change.

[23] Messrs Smith and Chote arranged to meet with Mr Cary on 3 June 2004, and Mr Smith prepared a written report afterwards. At the meeting Mr Cary explained that he did business with the bank because of its policies on loan to value ratios on investment properties. The policies meant his clients could obtain loans for these properties in circumstances when, because of their very high gearing, they might not qualify elsewhere. In turn he believed he had built a good working relationship with Mr Trotter. Mr Cary also explained Alliance’s purchase and onselling

transactions, and described the package offered to Alliance clients. He denied he was a mortgage broker, although he said he had a broking arrangement with the ASB which he had not been using.

[24] Mr Cary explained the payments of \$600 by saying some sale and purchase transactions did not proceed when legal costs became too high for already financially-stretched clients. When assistance with payment was available, an otherwise at-risk transaction could proceed. While Alliance paid the legal fees associated with its own transactions anyway, clients' ability to meet their legal fees was the issue. In particular the costs for clients of conveyancing, and of establishing the legal structure under which an investment property would be owned, could reach a point where the client could not afford to continue with a deal.

[25] Mr Cary also said in his written statement of evidence that the solicitors involved would act for Alliance and the client, and that Alliance could be held responsible for the client's legal fees. Indeed in his explanation to the bank during its disciplinary investigation Mr Trotter indicated an understanding that Alliance would prepay clients' legal fees. Mr Cary's further evidence was that sometimes Alliance would write a fee off, depending on the margin it had secured in the relevant transaction. Obviously Alliance had a business and financial interest in having the transactions proceed, as well as an interest in avoiding or minimising liability in respect of its client's legal fees, and hence derived a benefit from Mr Trotter's use of empowerment.

[26] Mr Cary told Mr Smith he had discussed the issue of clients' legal fees with Mr Trotter (and said he 'believed Mr Parkinson was aware of it'), at which point Mr Trotter had offered to use empowerment to assist. That is why the authority for a credit and debit of \$600 was added to the finance application form. Mr Parkinson was indeed aware empowerment was being used, but a key issue in his grievance is whether he was aware of the detail of the arrangement.

[27] As for the finance application form, Mr Cary explained to Messrs Smith and Chote he had copied it from forms used by other businesses and he would amend it. Mr Cary tended to bluster in aspects of his evidence about the form, but the key issues arising from it concern whether it is evidence that Alliance was really acting as a broker, and whether Messrs Trotter and Parkinson were trying to hide that fact. Mr Cary's bluster did not shed much light on those issues.

[28] By letter dated 8 June 2004 Mr Smith advised Mr Cary in writing of the bank's concerns in part as follows:

- (a) a pre-agreed amount (usually \$600), paid to the customer and transferred to Alliance, was to assist Mr Cary's business in reducing the legal costs associated with completing the transaction with the customer;
- (b) Alliance remained a 'registered broker' with the ASB; and
- (c) The loan application form referred to tendering.

[29] Regarding (a) above, it is not entirely accurate to describe the payments under empowerment as payments made to assist Mr Cary's business in reducing legal costs associated with completing the transaction. Mr Cary had said the relevant costs were the client's, not Alliance's, although for various reasons Alliance might on occasion meet them.

[30] The letter also set out the bank's requirements if the relationship was to continue. In particular it advised that the practice of transferring a predetermined amount from a customer's account to an Alliance account was not acceptable and would not continue. The other relevant concern was with Alliance's association with the ASB, with the bank seeking the termination of that arrangement if the parties' relationship was to continue.

[31] There was another meeting on 7 July 2004, in order to discuss the procedures to be used when Alliance referred clients to Mr Chote. Empowerment could still be used, but at Mr Chote's discretion and not under pre-set arrangements. Eventually the relationship ended, although the precipitating issue was Mr Cary's failure to confirm he had broken his ties with the ASB.

### **The bank investigates further**

#### 1. Mr Trotter

[32] In an email message dated 16 August 2004 Mr Ashton asked Mr Trotter to explain the relationship with Alliance in view of the bank's policy of not dealing with brokers, advising that the issue could be deemed to be misconduct and have disciplinary consequences. Mr Ashton referred to: Alliance's arrangement with the ASB; the contents of the finance application form; the payments under empowerment and the transfer of the payments to Mr Cary or Alliance; Mr Trotter's allegedly having said 'there is always a way around these things' in a discussion about relationships with brokers; and the descriptions loaded in the funnel. Mr Ashton expressed the view that the bank was in effect paying for referrals from Mr Cary or Alliance.

[33] Mr Trotter sought to delay replying until he had spoken to Mr Parkinson, who was on holiday until 26 August. Mr Ashton responded on 17 August, saying it was Mr Trotter's understanding he sought, and saying Mr Trotter could add anything else he wished to later. Mr Trotter ignored this, discussed the matter with Mr Parkinson anyway, and responded by email message dated 27 August.

[34] A written explanation was attached to the message. Part of the explanation was a brief account of Alliance's business activity, and a general account of the procedure Mr Trotter followed when processing a related loan. The rest: acknowledged the Alliance Group's arrangement with the ASB but said that had been addressed (in that it was not operating); said payments of \$600 went towards a customer's legal costs and acknowledged the transfer of the payments to Mr Cary or Alliance; said the transfers were authorised by the customer; denied the payments were fees for the Alliance Group or Mr Cary; and explained the comments attributed to him. A concluding statement was:

'I felt that I had already been through this with Steven and Gary with regards to the Alliance Group when we had our meeting on this matter at our Henderson office.'

[35] References such as this to Mr Ashton's involvement meant Mr Ashton stepped down from the investigation. Richard Upton, then the employee relations manager, and Blair Vernon, general manager of personal and financial services, took the matter over.

[36] They were briefed by Messrs Smith and Ashton in meetings on 2 September. A key question recorded in the notes of the meeting with Mr Ashton was "Thought it was solicitor \$ - can we find out more to prove/disprove this?" Mr Smith gave an account of his discussions with Messrs Chote and Cary. He also expressed his concern about the use of empowerment, and, according to the meeting note said:

"T had discussions with S & J – said about \$800 in legal costs each time. S & J propose that they'd help by providing e/ment to help reduce the cost.  
Wording was run past Jason, but SP was aware.  
Sounds like 3 of them discussed it. Came up with idea. S & J suggest that TC come up with wording & then have that approved by JT."

[37] My difficulty with that note is its vagueness as to the dates of and participants in the various discussions and actions, and it is not clear whose legal costs are being referred to. Mr Smith's conclusions were not necessarily sound, although they suggested valid questions for Messrs Trotter and Parkinson.

[38] By letter dated 7 September 2004 Mr Upton advised Mr Trotter, among other things, that a disciplinary meeting was to be held by video conference on 9 September in London. This was because:

“The Bank has recently become aware of an instance where it appears that you may have engaged in conduct that may be in breach of the Bank’s Code of Conduct. In particular, this is in relation to a transaction involving the Alliance Group, which it appears you were involved with. It appears that the transactions involving this Group may have contravened strict instructions ... involving the fact that the Bank of New Zealand would no longer have any dealings with mortgage brokers, whether commissioned or otherwise.”

[39] By facsimile dated 9 September 2004 Mr Upton forwarded to Claire Westerman, who was employed in a human resources capacity at the associated bank in the UK, a set of documents to be discussed with Messrs Trotter and Parkinson. The documents included:

- (a) Mr Smith’s report on the 3 June 2004 meeting with Mr Cary (incorporating Mr Trotter’s original report on the relationship with Alliance);
- (b) the example Mr Smith had found of a transfer of a sum of money (\$750) into a customer account and on to Mr Cary’s credit card account;
- (c) the blank finance application form;
- (d) the August 2004 email exchanges and the response to Mr Ashton’s request for an explanation; and
- (e) a set of documents relating to loans for customers T, J, E, and B – all also clients of Alliance.

[40] The last of these comprised a bank ‘View Opportunity’ form and a completed version of the Alliance finance application form for each customer. The ‘View Opportunity’ forms showed the change from ‘Broker Non-Commissioned’ to ‘External Other Personal Network’ classification. The finance application forms were essentially the same as the blank form, except that the reference to a ‘finance fee’ in the small print in the blank form corresponded to a reference to a ‘broker fee’ in the completed forms. The completed forms also deleted express references to fees other than the \$600.

[41] The meeting with Mr Trotter went ahead on 10 September. A support person was present. There was no real dispute about any of the documents presented, rather Mr Trotter said the payments of \$600 and \$750 were made under empowerment and with the consent of the customer. It was put to him that the transaction was irregular and he said that was a ‘fair call’.

[42] The customer’s consent to the credit and debit of the payments was said to be contained in the finance application form. There was also a discussion about a change in the form from a reference to a ‘broker’s fee’ (as shown in the completed forms produced) to the reference to a ‘finance fee’ (as shown in the blank form). Mr Trotter acknowledged pointing out to Mr Cary that the bank was not paying brokerage fees and the form would have to be changed. The evidence suggests he did so in mid-2003, and there was no explanation of why unamended forms were apparently used for J, E and B after that time.

[43] Mr Trotter said, too, that he had been aware of Mr Cary’s earlier relationship with the ASB, but did not investigate it. He should have, and should have included the matter in his report. As for the change from referring to Mr Cary as a ‘broker non-commissioned’ to ‘external other personal network’, he said there was no category that accurately described the source of the Alliance business but that ‘personal network’ was the best. The original label was applied at a time when the accuracy of the label did not matter. Indeed Mr Vernon accepted that the category ‘non-commissioned broker’ was not a perfect category for the kind of business in which Alliance engaged, and in itself the use of the category was not sinister. To him the problem was in the compounding effect of this with the payments of \$600 and \$750.

[44] Finally, according to a meeting note of Mr Upton's, Mr Trotter said he: 'went through it with SP and GA', "Explained relationship in great depth. Showed him everything. Would have discussed about payment".

## 2. Mr Parkinson

[45] Bank representatives in the UK had a preliminary meeting with Mr Parkinson on 27 August, advising him of the nature of the concern about Mr Trotter's relationship with Alliance. Mr Parkinson was told the bank wanted to look into his involvement in those matters. According to a note of the meeting prepared by one of those representatives, Mr Parkinson was told:

"BNZ will be looking to investigate the allegations further and will want to determine the approach you used with the Alliance Group, and if this deviated from Bank policy/procedures, why. They will be wanting to understand your and Jason Trotter's relationship/involvement with Alliance Group in much greater detail to determine if, and to what extent you have breached Bank procedure."

[46] Mr Upton followed with a letter dated 7 September 2004, which was almost identical to the 7 September letter to Mr Trotter. I accept that the preliminary discussions meant the conduct of concern on Mr Trotter's part was reasonably easy to identify. However, as illustrated by the above note, the bank knew very little about Mr Parkinson's involvement. The material it did have amounted to information about Mr Smith's meetings, and the conclusions Mr Smith had drawn. Mr Parkinson was not given this information.

[47] Nevertheless, the 7 September letter advised Mr Parkinson that he may have 'engaged in conduct that may be in breach of the Bank's Code of Conduct'. Mr Parkinson said in evidence he was not aware he had done anything wrong, and was confident the matter could be readily explained.

[48] Both 7 September letters had advised the recipients they could bring a support person or representative if they wished. When Mr Parkinson enquired of Ms Westerman what was meant by 'a representative', Ms Westerman replied on the basis of what I was told was the law in England. That is, legal counsel was not permitted. Mr Parkinson proceeded on that basis. Thus when he was asked at the meeting whether he wanted a representative, he said no. At the time, the bank was unaware of what Ms Westerman had said so took the response at face value.

[49] Mr Parkinson's disciplinary meeting also went ahead on 10 September. It was conducted immediately after the meeting with Mr Trotter.

[50] According to Mr Upton's note of the meeting the questioning addressed whether Mr Parkinson thought Mr Cary was operating a brokerage, as well as the extent of Mr Parkinson's knowledge of Mr Trotter's use of empowerment. The latter was carried out with particular reference to the documents that had been provided.

[51] Mr Parkinson made some general comments on Mr Trotter's relationship with Mr Cary, and on Mr Cary's aggressive approach to business. As for the direct question of whether Mr Parkinson thought Mr Cary was acting as a broker, on two occasions he is noted as saying 'no' and on one occasion he is noted as saying 'it may have been the case that the arrangement looked like a brokerage post-June 2003'. I do not regard that acknowledgement (if made) as an acknowledgement of culpability on Mr Parkinson's part particularly as, in evidence, Mr Vernon characterised the discussion as resulting in an 'agreement to disagree' about whether or not Mr Cary was a broker.

[52] Mr Parkinson denied that the payments in question were commission payments to Mr Cary. He also denied being aware that some of the sums being paid under empowerment were being paid

to Mr Cary's credit card, or that empowerment payments were being transferred out of a customer's account and into an account associated with Alliance. He said he thought empowerment was being used as it should be.

[53] As for the documents being put to him, Mr Parkinson said he had not seen the completed finance application form, and had not seen the documents relating to T, J, E and B until receiving them the previous day. When he was asked whether 'all documents were discussed' he said he had discussed only 'the letterheads' and Mr Trotter's report. There had been no discussion about the contents of the blank finance application form.

[54] The 10 September meeting note also records Mr Parkinson as saying Mr Cary was 'not happy with \$600 fee – he wanted it increased', although it is not clear from the context whether the comment related to the period before or after June 2003. At the investigation meeting Mr Parkinson said he was referring to the period prior to June 2003. Mr Cary was known to him at that time. Mr Parkinson said Mr Cary had sought payment through the mobile mortgage managers (rather than the bank's home loan unit, to whom brokers were referred when dealing with the bank), and was told that was not possible. Mr Cary was told the best the mortgage managers could do was use empowerment. Mr Parkinson said that after June 2003, when the bank's policy on dealing with brokers had been made clear, Mr Cary was less aggressive.

[55] Mr Upton said in evidence that he and Mr Vernon did not accept Mr Parkinson's explanation. They believed Mr Parkinson knew of and permitted Mr Trotter's conduct in relation to the Alliance business, and did not accept Mr Parkinson's denials. Mr Upton said: 'Jason had told us that Stephen Parkinson had been present when the documents were discussed with Trent Cary. This was consistent with what Trent Cary had told Wayne Smith.'

[56] My difficulty with that conclusion is that, according to Mr Upton's meeting note, Mr Trotter's statement was as quoted at [44]. Among other things it is not clear what Mr Trotter's reference to showing Mr Parkinson 'everything' meant, and nor is it clear what Mr Upton's reference to 'the documents' covered. There was nothing in the evidence to indicate the references were clarified with Mr Trotter during the disciplinary process. For example the references cannot have included several of the documents put to both men in September 2004. Many of those were created after the relevant meetings in June 2003 - being the time when 'everything' was apparently discussed.

[57] The bank also seems to be of the view that Mr Cary had indicated to Mr Smith in June 2004 that Mr Parkinson knew of the finance application form – being one of 'the documents'. However I am not persuaded Mr Cary went that far. He told Mr Smith he had discussed with Mr Trotter his clients' difficulty in meeting legal costs, and Mr Trotter's proposal that empowerment be used, but did not say he had done so in Mr Parkinson's presence. He said only that he 'believed' Mr Parkinson was 'aware of it'. He was not asked about the basis for his belief. He also told Mr Smith the form itself was redrafted in consultation with Mr Trotter, but said nothing about Mr Parkinson being involved in the redrafting exercise.

[58] As for the meeting with Messrs Trotter and Parkinson in mid 2003, Mr Cary said in his written statement of evidence that he advised he was replacing his company stationery, including his letterhead stationery, and Mr Parkinson's response was that all references to mortgage broking should be removed. There was nothing to suggest Mr Parkinson was involved in subsequent redrafting of the finance application form, and it was far from clear whether the parties had the form with them at that meeting.

[59] When Mr Parkinson's knowledge of the form was discussed more directly at the investigation meeting, Mr Cary was clear that Mr Trotter had seen it, but not that Mr Parkinson had. As I have

noted, Mr Parkinson himself denied having seen the completed application forms or discussing the blank form except to the extent that he raised a general need to remove references to a 'broker's fee'. Finally, there was nothing in Mr Trotter's evidence amounting to an allegation that Mr Parkinson was otherwise aware of the detail on the form.

[60] It was said during the investigation meeting that Mr Parkinson should have picked up the details of the transfers of payments from customer accounts to Alliance in the monthly reports available to him. However that proposition was not put to Mr Parkinson for comment during the bank's disciplinary investigation, and Mr Parkinson denied it at the investigation meeting. No example of such a report was provided on either occasion. Nor was there any evidence the reports were checked for this information in the course of the bank's investigation. There was only a record of a comment from Mr Smith on 2 September that the monthly returns showed sales opportunities, their source and additional information, what fee, and what empowerment.

[61] The last sentence in the passage quoted at [44] referred to discussing 'payment'. Again it is not clear what Mr Trotter meant by 'payment', and that was not followed up with him. Again, the evidence about the June 2003 meetings was that the use of empowerment was discussed, but nothing in that evidence suggested discussion extended to payments being transferred out of a customer's account and into an account associated with Alliance or Mr Cary. That, together with the lack of persuasive evidence that Mr Parkinson was familiar with the detail of the finance application form - and particularly the provisions for payment contained in it - means I do not accept there was enough information on which to conclude Mr Parkinson was aware of the extent of Mr Trotter's purported use of empowerment.

[62] Having said that, I accept it was reasonable for Messrs Upton and Vernon to further question Mr Trotter about the detail of Mr Parkinson's knowledge of the 'documents' and the 'payments' as Mr Trotter saw it. They did so by mobile telephone immediately after the meeting with Mr Parkinson.

[63] The questioning took the form of a query about whether Mr Parkinson had been aware of 'the financial arrangement'<sup>1</sup> (or had 'discussed finance'<sup>2</sup>) with the Alliance Group, and a query about 'whether Stephen had been aware of the documents (such as the application form)<sup>3</sup> (or had 'discussed documents'<sup>4</sup>). The answers were recorded respectively as 'yes' and that Mr Trotter was 'sure he would have gone through them'. The answers were taken as confirming Messrs Vernon's and Upton's conclusions, but the continuing imprecise nature of the questioning means I do not accept the answers were sufficient confirmation.

## **The decisions to dismiss**

### **1. Mr Trotter**

[64] Mr Vernon said he did not accept Mr Trotter's view that no fee had been paid to Mr Cary. The finance application forms made it look like there had been an agreement between Messrs Trotter and Cary and the customer was just along for the ride. Moreover the arrangement for the payments of \$600 and \$750 was in contravention of empowerment. Payments under empowerment were to be agreed directly with and paid to the customer. Here the payments in question were purportedly authorised in the pre-printed application form provided by Mr Cary, and transferred from the customer's account to one of his or Alliance's. It was also said in the letter of dismissal

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<sup>1</sup> As it was put in Mr Upton's written evidence

<sup>2</sup> As it was put in the meeting note

<sup>3</sup> As it was put in Mr Upton's written evidence

<sup>4</sup> As it was put in the meeting note

that the relevant legal costs were Alliance's not the client's, and empowerment was paid with every loan. Overall, this created a relationship with a broker.

[65] Messrs Upton and Vernon also concluded Mr Trotter was aware Alliance was acting as a broker. Mr Trotter knew Alliance had a brokerage arrangement with the ASB, and had characterised the source of Alliance business as 'broker non-commissioned' in the sales funnel. Another part of the overall picture was Mr Trotter's discussing with Mr Cary the possibility of dealing with the bank's home loan unit, and the bank considered Mr Trotter would not have done this if he believed Mr Cary was not a broker.

[66] As for the change to the finance application form, Messrs Upton and Vernon considered Mr Trotter's involvement was consistent with his knowledge that Mr Cary or Alliance remained a broker.

[67] There was also a conclusion that Mr Trotter had sought to conceal the ongoing arrangement by continuing to purport to use empowerment, changing the finance application form, and changing the source of business classification in the funnel.

[68] These conclusions were put to Mr Trotter during a conversation on 13 September 2004. Mr Trotter's response was merely to say he could refute these conclusions, and to enquire about appeal processes available to him.

[69] Mr Trotter's summary dismissal was confirmed in a letter dated 14 September, accompanied by written reasons dated 15 September. The overall ground was that Mr Trotter had breached the bank's code of conduct by breaching bank policies and procedures, specifically:

- (a) breaching the instruction not to deal with mortgage brokers post June 2003;
- (b) taking steps to conceal dealings with mortgage brokers after that time;
- (c) falsifying bank records by labelling Alliance transactions as 'broker non-commissioned' instead of 'broker commissioned' in the funnel; and
- (d) using the empowerment fund inappropriately.

[70] The letter said this conduct individually and cumulatively irreparably harmed the bank's trust and confidence in Mr Trotter.

## 2. Mr Parkinson

[71] Messrs Vernon and Upton did not accept Mr Parkinson's explanation because: they believed his denial of having seen the finance application form before the disciplinary process was inconsistent with what Messrs Cary and Trotter had said; Mr Trotter had said Mr Parkinson knew about 'the financial arrangements' and the payments of \$600; and Mr Parkinson knew Alliance's transactions were labelled as 'broker non-commissioned' prior to June 2003, but allowed the dealings to continue after June 2003.

[72] There was a further video conference with Mr Parkinson on 13 September, at which he was asked whether he had anything to add. His response was that he did not. Mr Vernon then advised him of the bank's conclusions.

[73] Mr Parkinson's summary dismissal was confirmed in writing in a similar manner to Mr Trotter's. Again the bank relied on a breach of the code of conduct, in particular the failure to follow bank policies and procedures. The stated reasons were that Mr Parkinson:

- (a) knowingly allowed Mr Trotter to breach the bank's instruction not to deal with mortgage brokers post June 2003;
- (b) took steps to conceal those dealings from the bank and allowing Mr Trotter to do so as well; and
- (c) knowingly allowed Mr Trotter to use the empowerment fund inappropriately.

[74] The letter said this conduct, individually and cumulatively, irreparably harmed the bank's trust and confidence in Mr Trotter.

### **The justification for the decisions**

#### **1. Mr Trotter**

[75] With reference to the four stated reasons for Mr Trotter's dismissal, the underlying questions concern whether Mr Trotter was actually dealing with a mortgage broker both before and after June 2003, and whether he did so deliberately.

[76] The effect of the bank's view of the facts is that Mr Trotter had always dealt with Mr Cary on the basis Mr Cary was a broker, using empowerment to pay him a fee in that capacity, and Mr Parkinson knew this. When the nature of the arrangement came under scrutiny, because of the change of policy, Messrs Trotter and Parkinson sought to continue it but took further steps to hide its true nature. I have to say I gained the strong impression during this investigation that the bank thought the true nature of the arrangement was obvious, so much so that it did not take the care it should have in its disciplinary investigation. I gained the strong impression, too, that the bank viewed the information it had in the light of that conclusion, at the expense of reasonable possibilities that did not fit the conclusion.

[77] On Messrs Trotter's and Parkinson's view of the facts, the change in policy caused their thinking to focus on the possibility of doubt as to the true nature of the arrangement, but the doubt was addressed and resolved in June 2003. Mr Trotter could continue to deal with Mr Cary, but certain documents had to be changed because they were not suitable in the light of the new policy and the arrangement as confirmed. Mr Trotter thought he was providing good customer service by using empowerment as he did, and Mr Parkinson was not aware of the detail of the use. Neither thought the use of empowerment affected the existence or not of a brokerage. Overall that view of the facts struck me as less strained than the bank's, although it is unfortunate that Mr Trotter failed in June 2003 to give a full report on the nature of the bank's association with Alliance when he omitted to detail his use of empowerment.

[78] Regarding the three tests for the existence of a mortgage brokerage, as I understand it neither Mr Cary nor Alliance was registered with the New Zealand Mortgage Brokers' Association although the bank treated the brokerage arrangement with ASB as a registered brokerage. The concern about tainting means the difference is probably not significant. Nor was there any evidence, or any real suggestion, that Mr Cary or Alliance was putting business out to tender. The key to defining its association with the bank as that of a mortgage brokerage was the conclusion that Mr Trotter's use of empowerment amounted to a payment for services to Mr Cary or Alliance.

[79] That conclusion requires persuasive evidence in support.

[80] For example while it was open to the bank to conclude that Alliance had an interest of some kind in having the payments made, I do not believe it had enough evidence to conclude the customer was merely 'along for the ride'. I accept the arrangement could look like that, but the bank did not question Mr Cary in detail about his assertion that the payments were applied to his

clients' legal fees, or ask him for any evidence of that. Indeed the evidence about its investigation identified only limited evidence for its conclusion that the relevant legal costs were Alliance's rather than its client's, although Mr Smith put that construction on the arrangement. Not only that, there is at least room for uncertainty about the proposition that the payment of empowerment, applied to a client's legal fees when Alliance might otherwise have been obliged to meet those fees, amounts to the payment of a fee to Alliance.

[81] If such questioning had been undertaken and Mr Cary was unable to show that a payment transferred from a customer's account into his or Alliance's was a reimbursement of the customer's legal fee, there would be support for concluding the payment amounted to a fee to Alliance. I do not accept the submission that there was evidence available to the bank at the time to the effect the payments were treated as a revenue stream for Alliance. Not only that, the proposition was not put to Messrs Trotter and Parkinson during the disciplinary investigation.

[82] Secondly, the bank asserted that all of Mr Trotter's transactions involving Alliance were accompanied by an empowerment payment. No evidence was provided in support of the assertion, and more importantly there was no evidence information of that kind was obtained or put to Messrs Trotter and Parkinson during the disciplinary investigation. Moreover Mr Trotter said at the Authority's investigation meeting that not all of his transactions with Alliance were accompanied by a payment under empowerment - although Mr Cary indicated that most of them were. Ironically, one of the examples put to Messrs Trotter and Parkinson during the disciplinary investigation - namely the documentation for J - contains an indication that no empowerment was used for that transaction. A second example - relating to B - indicates airpoints were provided rather than a payment being made. This calls into question both what actually happened in the course of those transactions, and the extent to which the references to payments of \$600 in the loan application form can be relied upon. The bank should have addressed the matter more thoroughly than it did during its investigation.

[83] The bank also had a concern about the apparently standard nature of the payments, and queried the likelihood that every customer receiving a payment under empowerment would receive \$600 (or \$750). The concern was not well-founded on the evidence available to the bank at the time in that it was based on an assumption about the content of the finance application form together with a handful of examples, rather than its own detailed records of what was paid. Having said that, there was no significant challenge to the assumption - rather it was said that a payment of \$600 was consistent with the minimum level of legal fees a customer might expect to incur. At the same time (at least until October 2003) it was the maximum contribution payable. Thus there was nothing sinister about it. The bank does not seem to have addressed that possibility.

[84] The final concern was that the payments were pre-authorised, when they should have been discussed with customers on a case by case basis at an appropriate time. Mr Trotter said he did speak to customers individually, and that did not appear to have been disputed. The bank's concern would have had more force if it was associated with stronger evidence indicating the existence of a mortgage brokerage. However, it was not.

[85] For these reasons I conclude that the bank did not have enough information on which it could fairly and reasonably conclude that in reality a fee was being paid to Alliance for its services.

[86] Nor do I believe there was enough information on which the bank could fairly and reasonably conclude that Mr Trotter knew Mr Cary was acting as a broker, but continued their arrangement after June 2003 anyway.

[87] As to whether Mr Trotter knew prior to June 2003 that Mr Cary was acting as a broker, the bank's conclusions rely in part on assumptions based on its construction of discussions about whether Mr Cary should be referred to the home loan unit. It is not clear why an aggressive businessman like Mr Cary chose not to deal with the unit as a broker when he could have - foregoing a fee substantially in excess of \$600 per transaction in the process - unless he was content not to deal as a broker with the bank. On the bank's view, empowerment was used as a mask for that very arrangement, but that does not explain why Mr Cary would forego such sizeable fees. At the same time it seems to me to be in character for him to push for other kinds of payments the bank might be able to provide, as he did. I do not believe anything in this proves the parties knew Mr Cary was acting as a broker. All it does, again, is raise the question of the true nature of the payments under empowerment, and possibly a question about Mr Trotter's judgment.

[88] Further to the period after June 2003, a facsimile transmission apparently from Mr Trotter to Mr Cary, dated 3 December 2003, was produced and put to Mr Trotter for the first time during the Authority's investigation meeting. The material paragraph read:

“Also we need to look at switch customers from Global Plus, the reason is the bank has changed the rules. Customers can still have it but I'm unable to offer \$\$\$ as per our arrangement anymore with the Global Plus loans. I can however with non Global Plus loans. E.G. You can have your loan attached to Fly Buys, get the \$\$\$ as we have arranged and the customer will also get fee rebates on any account fees.”

[89] This text might require an explanation. At the investigation meeting, Mr Trotter struggled to provide one.

[90] However the document appeared unexpectedly two and a half years after it was apparently drafted, so for that reason I do not attach great weight to Mr Trotter's struggles. Otherwise the text is obviously an attempt by Mr Trotter to explain to Mr Cary (whether in addition to or instead of the customer) the effect of the recently-introduced change in the empowerment guidelines. I read Mr Trotter's references to '\$\$\$ as arranged' as references to the arrangement under which payments were made and transferred using empowerment. The words 'you' and 'your loan' are problematic, but there is nothing anywhere to suggest that 'your loan' means a loan of Mr Cary's rather than the customer's. Nor do I accept an inference can be drawn that Mr Trotter knew the '\$\$\$' would go to Alliance without the customer receiving any benefit from it. The matter cannot be taken any further than that.

[91] The bank's conclusion that Mr Trotter knew Mr Cary was acting as a broker also relied on the change in the classification of 'source of business' in the funnel from 'broker non-commissioned' to 'personal network', and the attempt to amend the finance application form. As I have indicated, both of these acts have other reasonable explanations.

[92] The second reason for dismissal was that Mr Trotter had taken steps to conceal his dealings with Mr Cary. For the reasons already set out, I do not accept it was reasonably open to the bank to conclude that those steps were taken for the purpose of concealment.

[93] There is the problem of Mr Trotter's failure to detail his use of empowerment in his 2003 report. Had he done so, it seems to me this employment relationship problem could have been avoided. However there was nothing to indicate the failure was part of a deliberate cover up, or was associated with some form of guilty knowledge on Mr Trotter's part.

[94] The third reason for dismissal was that Mr Trotter had falsified bank records by labelling transactions as 'broker non-commissioned' instead of 'broker commissioned'. That reason concerns conduct prior to June 2003.

[95] The examples relied on in support are in the documentation relating to F and E, as produced to Messrs Trotter and Parkinson during the disciplinary investigation. It seems payments under empowerment were made in respect of those transactions, but no evidence of where the payments went was put to Messrs Trotter and Parkinson. That evidence should have come from the bank's records, and it was not sufficient to rely on the contents of the associated finance application forms. The bank was able to provide the Authority with a transfer summary relating to F, showing a payment of \$600 to another account having the particulars 'BNZ Costs', but my concern as illustrated here is with the bank's tendency to pick examples to support its suspicions or conclusions instead of conducting a thorough and impartial investigation.

[96] The bank says the payments made under empowerment prior to June 2003, too, were really broker's fees, so the associated transactions should have been labelled 'broker commissioned.' Left unsaid, but following from that in terms of bank procedures, is the proposition that the home loan unit should have been dealing with Mr Cary and Alliance prior to June 2003 and Mr Trotter knew it.

[97] I cannot accept there is sufficient in the bank's investigation to warrant such a conclusion, or that there was any evidence of deliberate falsification.

[98] Further to the fourth reason for the dismissal, empowerment was available to create an incentive for customers to bring their home loan business to the bank. It amounted to a discretion to use bank funds in the manner specified in the guidelines. If it was used outside those guidelines, then it amounted to an inappropriate use of the discretion and a misuse of empowerment.

[99] On at least some occasions Mr Trotter's use of it facilitated a transaction between the bank and its customer in which Mr Cary and Alliance also had an interest. On at least some occasions the bank even transferred the payment from the customer's account to accounts associated with Mr Cary or Alliance. It was common ground such action was, at best, irregular. That the payment was transferred to a credit card account in Mr Cary's name on at least one occasion deservedly causes concern. Messrs Upton and Vernon would have been entitled at least to conclude that Mr Trotter had exceeded the limits of the discretion.

[100] The bank gave four main reasons for the decision to dismiss, but I have found it was not reasonably open to it to reach the conclusions it did on three of them. There remains a question of whether any misuse of empowerment was itself sufficient to amount to serious misconduct, and of whether the bank was relying on the misuse of empowerment in that way. However the focus in the decision to dismiss was overwhelmingly on the conclusion that Mr Trotter had deliberately breached the bank's policy on dealing with mortgage brokers, and sought to cover that up. The relevance of the use of empowerment lay in its role in the alleged dealings with a mortgage broker. There was nothing to suggest it was being relied on as amounting to serious misconduct - even if it was not appropriate conduct - independently of the concern about dealings with mortgage brokers.

[101] Since I do not accept that, on the basis of its investigation, the bank could fairly and reasonably reach the conclusions it did, I find Mr Trotter's dismissal was unjustified.

[102] Although it is of particular concern that Mr Parkinson (and possibly Mr Trotter) was given wrong information about the nature of the representation available to him, and the almost casual approach to providing Messrs Trotter and Parkinson with documents in support of the allegations against them, my finding means there is no need to pursue those matters. Further, the vagueness in the way serious allegations were put to and pursued with Messrs Trotter and Parkinson, coupled with their lack of access to the representation they really needed in order to address the allegations, means I do not weigh against them their relative lack of response to the bank's requests for comments on its conclusions before it confirmed the decisions to dismiss.

## 2. Mr Parkinson

[103] For the reasons indicated I do not accept that, on the basis of its investigation, the bank could fairly and reasonably reach the conclusions it did in respect of any of the reasons for Mr Parkinson's dismissal.

[104] Accordingly I find Mr Parkinson's dismissal was unjustified.

### **Remedies**

#### 1. Mr Trotter

[105] Mr Trotter was being paid in British pounds at the time of his dismissal. He says he earned GBP7,157.54 per month and lost a total of GBP53,025.42 from the date of dismissal to 1 May 2005, when he obtained new employment. However that amount is significantly more than the GBP 32,000 per annum Mr Trotter was to be paid according to his letter of secondment. I assume the amount Mr Trotter nominated includes allowance for bonuses. Those have not been properly detailed so I am not persuaded I should accept the nominated figure. The parties should address that matter themselves, and leave is reserved to return to the Authority if they are unable to agree on an appropriate monthly figure.

[106] My finding that, at least on occasion, Mr Trotter exceeded his discretion in his use of empowerment means I believe he contributed to the circumstances of his personal grievance. Accordingly, while he is entitled to the reimbursement of remuneration lost as a result of the grievance, the nature of the contribution means I reduce the amount I would otherwise have awarded. The bank is ordered to pay to Mr Trotter the equivalent of four months' remuneration calculated at the exchange rate extant at the date of dismissal.

[107] The evidence regarding injury to Mr Trotter's feelings was limited but took the form of a deep sense of outrage and injustice about what had happened. Bearing in mind the limited nature of the evidence and my assessment of Mr Trotter's contribution, I order the bank to pay to Mr Trotter the sum of NZD10,000 as compensation for the injury to his feelings.

#### 2. Mr Parkinson

[108] Mr Parkinson was also being paid in British pounds at the time of his dismissal. He obtained new employment commencing 28 April 2005. I have not been provided with the detail of remuneration lost which I sought, but note that Mr Parkinson's letter of secondment records he was to receive an annual salary of GBP84,000.

[109] Despite Mr Parkinson's assertion about the robustness of his sign-off process, the process was not robust enough to identify the unusual nature of Mr Trotter's use of empowerment. To that extent he contributed to the circumstances of his personal grievance. Only a limited reduction in the remedy available to him is warranted, however. The bank is ordered to pay to Mr Parkinson the equivalent of five months' remuneration, calculated at the exchange rate extant at the date of dismissal if appropriate.

[110] Mr Parkinson gave evidence of the humiliation, anxiety and loss of self worth he had suffered as a result of his dismissal, and it was clear that he, too, has a deep sense of injustice.

[111] The bank is ordered to compensate him for the injury to his feelings in the sum of NZD20,000.

## **The claims for damages**

### 1. Mr Trotter

[112] Mr Trotter's breaches of the employment agreement were said to concern his:

- (a) receipt of incentive payments, to which he was not entitled, regarding the loans he arranged through the Alliance Group from June 2003;
- (b) payment of bank funds to customers which amounted to the payment of a broker's fee, breaching the empowerment guidelines in that the payments were not among those permitted by the guidelines.

[113] In turn the breaches underlying (a) above were said to concern Mr Trotter's disobeying the instruction not to deal with brokers, and breaches of the code of conduct. In the light of my overall findings on Mr Trotter's use of empowerment I regard the claim in (a) as raising a simpler question of whether Mr Trotter received incentive payments to which he was not entitled – in short whether he was overpaid.

[114] I have not been addressed in any detail on the operation of the incentive scheme or payments made to Mr Trotter under it. If the bank believes Mr Trotter has been overpaid and seeks to recover the overpayments, it will need to take the appropriate steps. In the process it will need to bear in mind that it is already obvious that not every transaction involving Alliance also involved the use of empowerment, and where empowerment was used it did not necessarily comprise a monetary payment every time. The bank will also need to consider whether, in cases where there may be no more than an excess of the discretion to make such payments, it is appropriate to disallow any credit for the associated business. Leave is reserved to return to the Authority to determine the matter if necessary.

[115] Regarding (b) above, there has not been enough evidence to persuade me the payments ostensibly made under empowerment were really broker's fees. I therefore find Mr Trotter has no liability under this head of claim.

### 2. Mr Parkinson

[116] Mr Parkinson's breaches of the employment agreement were said to concern his conspiring with or allowing Mr Trotter to write loans and make payments in the nature of a broker's fee, knowing that payments would be made to Alliance. This conduct was said to be a breach of the empowerment guidelines because the guidelines permitted payments only in specific circumstances.

[117] For the reasons detailed in the background to Mr Parkinson's personal grievance, I am not persuaded Mr Parkinson acted as alleged. Accordingly I find against the bank on liability.

## **Penalties**

[118] Mr Trotter effectively lost his job because of his misuse of empowerment guidelines. Not only that, but at most he exceeded his discretion regarding payments under empowerment. I do not consider a penalty is warranted.

[119] No breaches of agreement on Mr Parkinson's part have been proved.

[120] Accordingly I decline to order the payment of any penalties.

**Summary of orders**

[121] The bank is to pay to Mr Trotter the sum of:

- (a) Four months' pay as reimbursement of remuneration lost as a result of his personal grievance; and
- (b) NZD10,000 as compensation for injury to his feelings.

[122] The bank is to pay to Mr Parkinson the sum of:

- (a) Five months' pay as reimbursement of remuneration lost as a result of his personal grievance; and
- (b) NZD20,000 as compensation for injury to his feelings.

**Costs**

[123] Costs are reserved.

[124] The parties are invited to reach agreement on the matter. If they are unable to do so they are to file and serve memoranda setting out their positions within 28 days of the date of this determination.

**R A Monaghan**  
**Member, Employment Relations Authority**