

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 99  
5334611

BETWEEN IAN GRANT CARROLL  
Applicant

A N D COMMUNITY LIVING  
TRUST  
Respondent

Member of Authority: K J Anderson

Representatives: G O'Brien, Counsel for Applicant  
G Steele, Counsel for Respondent

Investigation Meeting: 10 July 2012 at Hamilton

Submissions Received: 14 September and 18 October 2012 from Respondent  
11 October 2012 from Respondent

Date of Determination: 22 March 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicant, Mr Ian Carroll, claims that he was unjustifiably dismissed on 22 June 2010. Mr Carroll asks the Authority to find that he has a personal grievance and award him reimbursement of lost wages and benefits, and compensation; pursuant to s.123 of the Employment Relations Act 2000.

[2] The respondent, Community Living Trust (the Trust), rebuts the claims of Mr Carroll and says that his dismissal was justifiable on the ground of serious misconduct.

[3] The Authority received evidence from Mr Carroll and for the Trust there is evidence from Ms Beverly Kohleis, Ms Karyn Hughes, Mr John Rangitaawa,

Mr Richard Edghill and Ms Joanne Alder. The Authority has also received a number of relevant documents from the parties. All of the material evidence has been closely considered by the Authority, albeit it may not be specifically referred to within the determination.

## **Background**

[4] Among other things, the Trust provides residential support services to clients who have been assessed to have a degree of intellectual disability.

[5] Mr Carroll was employed as a behaviour support specialist. This is the title that is on Mr Carroll's job description, albeit I note from his statement of evidence that he refers to being employed as a behaviour assessment therapist. In any event, it appears to be accepted that the role of Mr Carroll, under the guidance of a clinical psychologist, was to provide clinical advice and leadership to clients and their caregivers. The evidence of Ms Kohleis, the manager of specialist services for the Trust, is that the role of the behaviour assessment team staff is to develop relationships with the clients and their caregivers. The caregivers and support staff are employed to give day-to-day support to clients. They in turn, rely on clinical staff to give them advice relating to the needs of the respective clients.

[6] At the material times relating to this matter, Mr A and Ms B<sup>1</sup> (the couple) were clients of the trust. They lived in a Trust owned flat, in a de facto relationship, with the assistance of caregivers.

[7] At the beginning of 2010, Mr Carroll was asked to take on a referral to work with the Flating Service of the Trust, relating to the couple. There were concerns that Mr A had been aggressive toward caregivers and was isolating himself and Ms B. Apparently, Mr Carroll had previously been in a working relationship with Mr A and Ms B. The evidence is that Mr Carroll met with the couple and the staff team supporting them. Mr Carroll gathered some information about the circumstances in which Mr A had been aggressive and it was intended that a clinical plan for the appropriate management of the couple would be produced.

[8] Mr Edghill is the consulting psychologist for the Trust. Among other things, in this role, he was Mr Carroll's clinical supervisor. The evidence of Mr Edghill is that

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<sup>1</sup> For privacy reasons, the names of the couple are not revealed.

during meetings he and Mr Carroll discussed the findings of Mr Carroll in regard to the behaviour patterns of Mr A. It appeared that Mr A was following a pattern that had been seen in a previous relationship with a woman; in that when Mr A entered into a relationship, he would become very domineering with his partner, over-protective and aggressive toward anyone that he perceived as getting between his partner and him. Over time, Mr A was found to isolate himself and his partner from other people, withdrawing to their flat and appearing rarely in public.

[9] It had come to a situation in regard to Mr A and Ms B that when staff went to support Ms B; for instance going on an outing or taking part in activities away from Mr A, he would become angry, as he saw this as people interfering in his relationship with Ms B. It seems that Mr Carroll was trying to build a relationship with Mr A that would allow him to work effectively with the couple.

[10] Some serious concerns arose when it was discovered that Ms B was pregnant and Mr A was refusing to allow her to visit the doctor or engage the services of a midwife. There had been several incidents where Mr A had been known to have assaulted Ms B and her caregivers; and on one occasion, he had thrown an item at the midwife who visited their flat. Mr A was adamant that the delivery of the baby would happen at the flat and he became angry when people tried to explain that in the event of complications arising, it would be necessary to go to a hospital for the birth.

[11] The evidence of Mr Carroll refers to an email dated 4 March 2010; following a meeting he had with the couple that day. Mr Carroll records in this email that Ms B had complained of having a “sore cervical spine” as a result of Mr A putting her on the ground and sitting on her.

[12] The evidence of Mr Carroll refers to extracts from a series of emails from him to the flatting team leader and to Ms Alder, the service coordinator in the Flatting Service, from 22 January 2010 to 4 May 2010. These reflect Mr Carroll’s involvement with the couple and his observations. Mr Carroll also gave some advice as to the approach that support staff should take when dealing with Mr A in order to avoid him becoming angry. While the content of the respective emails provides somewhat of a chronological record of Mr Carroll’s involvement with the couple, there is little of particular relevance there in regard to the matters the Authority is required to determine; apart from the not insignificant fact that Mr Carroll was aware of the propensities of Mr A.

**The incident – 27 May 2010**

[13] The evidence of Mr Carroll is that he visited the couple at the flat around 3:00p.m. on 27 May 2010. Mr Carroll attests to the conversation that took place between the couple and himself, including a reference to some discussion about the possibility of Ms B having to be admitted to a hospital to have her baby. It seems that in response to a question from Mr Carroll to Mr A, regarding how long Mr A thought Ms B would be kept in the hospital, Mr A informed that she would have to come home “straight afterwards”. The evidence of Mr Carroll is that then, without any warning, Mr A raised his right hand high, in a fist, and brought it down forcibly, striking Ms B in the region of her nose and mouth, causing her nose to begin bleeding from what was discovered to be a vertical cut to the left of the bridge of her nose with another small lesion as well. It was subsequently found that the nose had three fractures.

[14] Mr Carroll subsequently took Ms B to a medical clinic for treatment with Mr A accompanying them. Following Ms B receiving appropriate medical attention, Mr Carroll returned the couple to their flat. Relevant to the matters before the Authority, Mr Carroll attests that upon arrival at the flat, it was observed that the “staff car” was not there, hence it was concluded that there was not a support person present at the flat.

[15] Mr Carroll testifies that he left Mr A and Ms B at their flat and informed them that he would contact them the next day. Mr Carroll says that he considered contacting other people to inform them of the events that had transpired relating to the assault by Mr A on Ms B. Mr Carroll says that “on balance” he believed it would be “counter productive”. Mr Carroll’s evidence is that:

*Despite the event of [Mr A] seriously assaulting [Ms B], the two were relating well to each other and wished to be home together. Any third party informed of the assault might act precipitously and take actions that would rekindle Mr A’s and Ms B’s disquiet.*

[16] Mr Carroll says that it was his intention to hold discussions with other relevant people within the Trust the following morning (28 May 2010).

[17] The evidence of Mr Carroll is that he went to the offices of Ms Alder and Ms Williams but they were not there that morning. Mr Carroll says that he did speak to another person (Todd). This person had been on duty at the flats where Mr A and

Ms B resided. Todd informed Mr Carroll that Ms B had told him that she had hurt herself when she hit her face on a door. Mr Carroll says that he explained his presence the night before and what had actually happened.

[18] At 9:01a.m, Mr Carroll sent an email to Ms Alder:

Morning Jo.

[Ms B] has a couple of pieces of Steri-strip on her nose, and she will report having a sore nose to her supporters. I supported her and [Mr A] to attend the Anglesea Clinic last night.

I'll catch up with you some time to talk.

Ian

[19] The evidence of Ms Alder is that on the morning after the assault on Ms B, she was at a team meeting and she was informed of it by Ms Williams. Ms Alder says that upon her return to her office, she was (also) informed of the assault by Todd and that Mr Carroll had taken Ms B to the doctor. Ms Alder attests that she was extremely concerned to hear that Ms B had been returned home following a serious assault and that staff had not been informed about what had happened. Ms Alder expressed her concern and disbelief that the details of the assault had taken so long to have come to her attention; around about 18 hours. Ms Alder also expressed her disbelief in regard to the brevity pertaining to the email sent to her by Mr Carroll.

[20] The evidence of Ms Kohleis, the manager of specialist services at the Trust and Mr Carroll's direct line manager, is that she became aware of the incident at approximately 9.15am on the morning of 28 May 2010. Ms Kohleis went to find Mr Carroll but he was not in his office. She later found him in the reception area. Ms Kohleis informed Mr Carroll that she was aware of the incident and wanted to meet with him immediately. Mr Carroll walked away from her stating that he needed to see Ms Alder first.

[21] A meeting subsequently took place with Mr Carroll, Ms Kohleis, Mr Edghill and Mr Rangitaawa, the acting chief executive officer. Mr Carroll outlined what had happened the day before in regard to Mr A and Ms B. He subsequently received a letter dated 28 May 2010 from Mr Rangitaawa, inviting him to attend a meeting on 4 June 2010. The letter refers to the incident of 27 May 2010. Mr Carroll was informed:

It is alleged that:

- [Mr A] punched [Ms B] on the nose on the afternoon of 27 May 2010 at her flat and this was witnessed by you.
- You failed to notify On Call or the appropriate Manager of Mr A's actions or that you had taken Ms B for medical treatment and the outcome of the medical diagnosis.
- Without explicit authorisation from a person with the delegated authority you allowed Ms B to remain in a potentially unsafe situation with the person who had hit her.
- Your clinical supervisor had emailed you on 25 May 2010 with concerns that had been expressed from the Flating Service in regards to your lack of clinical oversight of the Mr A and Ms B situation where it was clearly stated that there were concerns about the potential for violence and indicating a sense of urgency to address these concerns.

It is specifically alleged that:

1. According to information provided by you in your meeting with your Service Manager, Clinical Supervisor and Acting CEO, you stated Mr A assaulted Ms B in your presence by hitting her in an unprovoked attack with the result that her nose was broken in three places.
2. Whilst you ensured that Ms B received appropriate medical attention and that the situation was calm before you left Ms B and Mr A, she was left with Mr A for the remainder of the evening. Given that the initial actions by Mr A were unprovoked, Ms B was left in a potentially harmful environment.
3. By leaving Ms B in this environment you failed to take into account her pregnancy and the potential risk to her unborn child particularly when concerns had been raised by the service and your clinical supervisor regarding her safety and the potential for Mr A's behaviour and actions to escalate to violence.
4. You failed to notify either the Police, Community Living Trust staff, On Call, your manager or the acting CEO of the incident.
5. Your only reporting of the incident was an email on Friday 28 May 2010 at 9.01am to the Flating Service Coordinator stating that:

“Ms B has a couple of pieces of Steri-strip on her nose and she will report having a sore nose to her supporters. I supported her and Mr A to attend Anglesea Clinic last night. I'll catch up with you sometime to talk.”

Under Community Living Trust's Code of Conduct and Policies and Procedures these allegations fall under:

1. Failing to follow Community Living Trust policies and procedures.
2. Neglect of a person we support which is inclusive of, but not limited to:
  - Failing to maintain personal safety or exposing a person to risk, including failure to seek medical attention.
3. Failing to follow safety requirements including the failure to report any accident or incident.
  - This meeting is an opportunity for you to provide an explanation to the allegations stated above. We do consider these actions and inactions, if proven, as serious misconduct under Community Living Trust's Code of Conduct and Policies and Procedures and if your explanation is unacceptable your continued employment with Community Living Trust may be in jeopardy or other formal disciplinary action may result.

[22] Mr Carroll was advised to bring a support person or representative with him to the meeting and due to the seriousness of the situation he was advised also that he was entitled to seek advice.

### **Dismissal**

[23] The meeting that was initially set for 4 June 2010 was subsequently held on 14 June 2010 with a further meeting on 22 June 2010; being a resumption of the earlier meeting. The outcome of the latter meeting was that Mr Carroll was dismissed, as confirmed in a letter dated 29 June 2010. It is appropriate to reproduce the germane aspects of this letter as it sets out clearly the position of the Trust pertaining to the reasons for the dismissal of Mr Carroll; as follows:

According to information provided by you in your meeting with your Service Manager, Clinical Supervisor and Acting Chief Executive on Friday 28 May 2010, you stated Mr A assaulted Ms B in your presence on Thursday 27 May 2010 by hitting her in an unprovoked attack with the result that her nose was broken in three places. It was therefore specifically alleged that:

1. You failed to immediately notify the Service Manager or Coordinator, your own manager, the Acting Chief Executive or report to Police the incident of physical abuse you had witnessed between Mr A and Ms B. You also chose not to immediately report the fact that you had taken Ms B for Medical treatment and the outcome of the medical diagnosis.
2. Without explicit authorisation from a person with the delegated authority you chose to allow Ms B to remain in a

potentially unsafe situation with the person who had physically assaulted her. Whilst you ensured that Ms B received appropriate medical attention and that the situation was calm before you left them, Ms B was left with Mr A for the remainder of the evening. This was despite having received an email from your Clinical Supervisor on 25 May 2010 outlining concerns the Flating Service had in regards to your lack of clinical oversight of the Mr A and Ms B situation. In this communication it was clearly stated there were concerns about the potential for violence indicating a sense of urgency to address these concerns.

3. By leaving Ms B in this environment you failed to take into account her pregnancy and the potential risk to her unborn child. This act by you was considered extremely serious particularly when concerns had been raised by the Service and your Clinical Supervisor regarding her safety and the potential for Mr A's behaviour and actions to escalate to violence. Your only reporting of the incident was in an email on Friday 28 May 2010 at 9.01am to the Flating Service Coordinator stating that:

“Ms B has a couple of pieces of Steri-strip on her nose and she will report having a sore nose to her supporters. I supported her and Mr A to attend Anglesea Clinic last night. I'll catch up with you some time to talk.”

4. Under Community Living Trust's Code of Conduct and Procedures these allegations fall under:
  1. Failing to follow Community Living Trust policies and procedures.
  2. Neglect of a person we support which is inclusive of, but not limited to:
    - Failing to maintain personal safety or exposing a person to risk, ...
  3. Failing to follow safety requirements including the failure to report any accident or incident.

The reasons for the decision of summary dismissal for serious misconduct are:

You admitted you were present when Mr A punched Ms B in the nose and you did not notify the Service Manager or Coordinator, your own manager, the Acting Chief Executive or the Police of the incident. You also admitted Ms B remained at risk once you returned from seeking medical attention for her at the Accident and Emergency Clinic. This constitutes failing to follow Community Living Trust Policies and Procedures which includes neglect of a person we support which is conclusive of, but not limited to, failing to maintain the safety or exposing a person to risk.

You have knowledge of Mr A's violent history and current issues and behaviours and the concerns that have been expressed at all levels for the safety of Ms B and her unborn child yet you chose to make

decisions in isolation without consideration of these concerns. These decisions were outside your delegated authority and contrary to policies and procedures and exposed Ms B and her unborn child to additional risk. In the meeting of 14 June 2010 you made the statement that:

“Mr A, Ms B and the foetus – three very vulnerable people here at the centre of these discussions. I, too, have had significant concerns for the safety of these people for a period of time and have wanted to see some things that will mitigate/ manage the risk to some degree.”

It is clearly stated in Community Living Trust Policies and Procedures the actions required for a serious incident and you deliberately chose not to follow these. We dispute your statement of a lack of knowledge of Community Living Trust Policies and Procedures given your 18 years of employment and the requirements of your role to attend meetings relating to many critical incidents of the people we support.

[24] Mr Carroll was informed that the Trust must have trust and confidence in his ability to make sound judgments and rational decisions in his role as a clinician. Mr Carroll was informed that his actions had eroded the trust and confidence that the Trust must be able to have in him as his employer.

[25] The letter then states:

There was an expectation that you would conduct yourself and your practices in accordance with clinical best practice and these would be carried out with honesty and integrity. There was also an expectation that you would be a role model for other staff and you would comply with policies and procedures. By deliberately ignoring Community Living Trust Policies and Procedures and making the decisions you did in regard to Mr A and the safety of Ms B and her unborn child you placed Ms B, her unborn child and the organisation at considerable risk. This is totally unacceptable for any employee but particularly for an employee in your position.

Community Living Trust has an obligation to report incidents of such a serious nature to the Ministry of Health and Disability Support Link and your actions have put into serious jeopardy your own reputation, the reputation of the Behaviour Assessment Team and more widely Community Living Trust.

It was found that serious misconduct did occur and this breached the employment agreement and prejudiced the safe and proper conduct of the business of Community Living Trust. Accordingly your employment with Community Living Trust was terminated.

### **The claim of unjustifiable dismissal**

[26] It is submitted for Mr Carroll that his dismissal was unjustified because:

- (a) The employer failed in its obligation to undertake a reasonable and thorough investigation;
- (b) The employer failed to consider all of the relevant circumstances surrounding the incident;
- (c) The employer failed to consider Mr Carroll's employment record and the likelihood of a re-occurrence of the incident.

### **Analysis and conclusions**

[27] Pursuant to s.103A of the Act, the question of whether a dismissal is justifiable must be determined by the Authority on an objective basis, by applying this test: Whether the employer's actions and how the employer acted were what a fair and reasonable employer would<sup>2</sup> have done in all the circumstances.

[28] In regard to the argument advanced by Mr Carroll that the Trust failed to undertake a reasonable and thorough investigation, it has not been advanced why this is so. But in any event, on the evidence before the Authority, I conclude that the Trust conducted a fair and reasonable investigation of the circumstances that led to the eventual dismissal of Mr Carroll. I also find that the employer satisfied the minimum requirements in regard to procedural fairness as set out by *New Zealand (with exceptions) Food Processing IUOW v. Unilever New Zealand*<sup>3</sup> and while the amendments to the Employment Relations Act, effective from 1 April 2011, are not specifically applicable to the dismissal of Mr Carroll, because it occurred prior to that date, I believe it is appropriate to recognise that the new s.103A(3) is, essentially, a codification of common law precedent. Applied to the circumstances of Mr Carroll, I am satisfied that the Trust has appropriately met its legal obligations in regard to investigating the circumstances involving Mr Carroll: by raising its concerns with him, giving him a reasonable opportunity to respond to those concerns and then finally, genuinely considering Mr Carroll's explanation in regard to the allegations against him before deciding to dismiss him.

[29] That then takes us to the substantive reasons for the dismissal whereby an examination of two questions is required. First: Was the conduct of Mr Carroll

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<sup>2</sup> Because the dismissal of Mr Carroll took place prior to 1 April 2011, it is this test that applies.

<sup>3</sup> [1990] 1 NZILR 35

capable of amounting to serious misconduct? And if so, in all the circumstances of the case, was the dismissal warranted?

**Was the conduct of Mr Carroll capable of amounting to serious misconduct?**

[30] The submissions for Mr Carroll are somewhat critical of the reliance by the Trust on its policies and procedures in regard to the obligation of Mr Carroll to report the assault on Ms B by Mr A. It is submitted that Mr Carroll did appropriately report the incident. But it is established that Mr Carroll failed to even mention the situation until 9:00a.m. the following morning. And even then, it was only a cryptic reference (in an email) to Ms B having: [“...*a couple of pieces of Steri-strip on her nose and she will report having a sore nose to her supporters*”].

[31] Mr Carroll says that he was not informed of the policies and procedures relied upon by the Trust. But given his 18 years of service, I conclude that it is most unlikely that he was not aware of the appropriate action that should have been taken in the circumstances pertaining to Mr A and Ms B on the night in question.

[32] The evidence of Ms Kohleis is that in addition to the organisational policies and procedures, the previous manager of the behavioural assessment team developed a Practice and Procedures Manual and this was circulated to all behaviour assessment team staff. The manual includes a Code of Conduct and a Code of Ethics and asks the team member to:

Please familiarise yourself with **Community Living Trust’s Policies and Procedures Manual** which is available on the P-Drive. There is also a hard copy in the office.

[33] The manual sets out certain reporting requirements, including:

It is the responsibility of the team member to **immediately**<sup>4</sup> inform the Manager of the following concerns:

- Any situation where the safety of a client or other person is at risk of significant harm. This includes any serious threats that a client may make toward others or themselves, any possible risk of harm to children and any threats from carers/family/ whanau to contact the media.
- Suspicions of evidence of physical, sexual, emotional or financial abuse.

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<sup>4</sup> The emphasis exists in the document.

- Complaints from others of BAT members contact.

The Manager will inform the Chief Executive and appropriate NASCA of any issues regarding harm/abuse. The Children, Youth and Family Service will also be informed of any situation involving the risk of harm to children.

Complaints will be dealt with through the procedures outlined in Community Living Trust's Policies and Procedures Manual.

[34] But even apart from the policy and procedure documents that Mr Carroll was obliged to be cognisant of and act appropriately on, his actions and/or inactions, relating to the aftermath of the assault on Ms B, are inexplicable. The evidence reveals that Mr A was a big, solid man with a history of violence. Conversely, Ms B was medically fragile and pregnant. While Mr Carroll sought medical assistance for Ms B, albeit it has been posited by the Trust that others should have been called in to do that; be that as it may, given that Mr Carroll was a witness to the assault on Ms B and was fully aware of the propensities of Mr A, he nevertheless, returned these two people to their accommodation and left them to their own devices, without any supervision or care close by at that time. By leaving Ms B with Mr A on the evening in question, Mr Carroll failed to exercise even a modicum of appropriate clinical judgment in the circumstances.

[35] It follows that I find that the Trust was clearly entitled to treat the actions and/or inactions of Mr Carroll as serious misconduct.

[36] This finding leads to the second question to be determined: **Was the dismissal of Mr Carroll something that a fair and reasonable employer would do in all the circumstances?**

[37] Mr Carroll says that he believed that he was justified in making the assessment that he did in regard to Ms B's safety in the company of Mr A. Mr Carroll says that Ms B "made it very clear" that she wanted to be at home with Mr A after returning from receiving medical treatment.

[38] Astoundingly, even at the investigation meeting, Mr Carroll failed to acknowledge the fact that the couple have an intellectual disability, to the extent that their ability to make sound decisions was impaired; thus the obvious requirement for support under the care of the Trust. While Mr Carroll's respect for people with disabilities to make their own decisions is no doubt appropriate in certain circumstances, the behavioural history of Mr A (that Mr Carroll was well aware of),

was such that it was simply irresponsible and professionally careless for Mr Carroll to make the assessment that he did. Remarkably, even now, Mr Carroll continues to defend that assessment.

[39] The submissions for Mr Carroll refer the Authority to an Employment Court judgment, *Secretary for Justice v. Dodd* [2010] NZEmpC 84. In *Dodd*, Chief Judge Colgan stated that:

Although serious misconduct, even what is effectively a single incident thereof, may usually constitute good grounds for a justified dismissal, that does not follow necessarily in every case.

[40] His Honour then went on to find that:

I have concluded that this is one of those rare cases where, although there was serious misconduct, the employer was nevertheless not justified in summarily dismissing the employee in all the circumstances.

[41] But apart from the circumstances that applied to Mr Dodd being quite different to those involving Mr Carroll, I find that this is not one of those rare cases that the Employment Court referred to. Indeed, I find that given the overall circumstances, the behaviour of Mr Carroll was of such seriousness that a fair and reasonable employer would make a decision to dismiss.

[42] I note that Mr Carroll had been employed by the Trust for 18 years and clearly that length of service is something that should be taken into account as part of the overall matrix of factors to be considered when deciding if dismissal is an appropriate sanction. It appears that the Trust did take the length of Mr Carroll's service into account, but concluded that he should have been aware of the requirement to adhere to the policies and procedures of the organisation and act appropriately. Given Mr Carroll's seniority with the Trust, there was an expectation that he would be a role model for the behaviours expected of other staff. The evidence also shows that Mr Carroll did not have an unblemished employment record. Finally, the Trust says that the fact that Mr Carroll did not show any remorse made it difficult for the organisation to believe that he would act any differently should similar circumstances arise in the future. Indeed, as referred to earlier in this determination, I find that belief to have been reasonably held.

**Determination**

[43] On the basis of the evidence and the findings set out above, I find that the dismissal of Mr Carroll was an action that a fair and reasonable employer would take in the circumstances that existed at the time that the dismissal occurred. It follows that I find that the dismissal of Mr Carroll was justifiable and his claims are declined.

**Costs**

[44] Costs are reserved. The parties are invited to resolve this issue if they can, taking into account the overall outcome and the daily tariff approach of the Authority. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**