

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 67  
3204999

BETWEEN

MATTHEW COOPER  
Applicant

AND

NXT LEVEL CONSTRUCTION  
LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Robert Morgan, advocate for the Applicant  
David Buckingham, advocate for the Respondent

Investigation Meeting: 5 December 2023 in Queenstown

Submissions Received: 5 December and 15 December 2023 from the Applicant  
5 December 2023 from the Respondent

Date of Determination: 7 February 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Matthew Cooper was employed by NXT Level Construction Limited (NXT) as an apprentice builder in Queenstown from 15 July 2022 until 16 August 2022.

[2] Mr Cooper claims he was unjustifiably dismissed.

[3] By contrast, NXT contend the dismissal was a fair and reasonable decision after they had concluded Mr Cooper engaged in an act they viewed as serious misconduct that destroyed the essential duty of trust and confidence they were entitled to place in him.

[4] The parties attended mediation but the matter remained unresolved.

### **The Authority's investigation**

[5] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence.

[6] Mr Cooper attended the investigation meeting and so did NXT's co-directors and owners, Henry Dawson and Kendra Dawson. Mr Cooper provided a written brief and gave evidence at the investigation meeting. Henry Dawson and Kendra Dawson did not provide briefs of evidence prior to the investigation meeting but with Mr Morgan's consent, Henry Dawson provided a brief on the day of the investigation meeting and oral evidence. Kendra Dawson also gave oral evidence without a written brief. In the circumstances I heard evidence from the Dawsons first.

[7] NXT's advocate did not, as directed, identify witnesses that were likely to appear (other than Henry Dawson) or file briefs of evidence prior to the investigation meeting. The investigation meeting initially scheduled for 22 August 2023 had been adjourned to accommodate NXT. Kendra Dawson in correspondence after the investigation meeting, suggested their advocate had been provided with additional statements of two of their employees but had not disclosed such to the Authority. I was asked to let NXT submit the statements for my consideration after the investigation meeting. In response, I asked for more contextual background of the statements before I could consider the admissibility of such given NXT had the ability to call the two people involved as witnesses. NXT provided no further response. I am satisfied that the material I have before me allows me to complete the investigation.

[8] At the end of the investigation meeting Mr Morgan tabled and spoke to a submission and Mr Buckingham made an oral submission.

### **Issues**

[9] The issues I must determine are:

- (a) Was Mr Cooper dismissed in accord with a valid 90 day trial provision in his employment agreement that was compliant with s 67A and 67B of the Act and if so, is he prevented from advancing an unjustified dismissal claim?
- (b) If NXT cannot rely upon a valid trial period, did NXT's actions in dismissing Mr Cooper meet the standard of a fair and reasonable employer or was the dismissal unjustified?
- (c) If Mr Cooper's personal grievance is established what remedies should be awarded considering the claims for:
  - i. Lost wages.
  - ii. Compensation under s 123(1)(c)(i) of the Act; and
- (d) If Mr Cooper is successful in all or any element of his personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct?
- (e) An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[10] The commencement of Mr Cooper's employment was informal. In mid-July 2022, Mr Cooper after seeing an apprentice or qualified builder's job being offered on Facebook, messaged Henry Dawson and in text of 13 July, an offer was made of "a couple of day trial with us to see if we can work together payed (sic) of course". Mr Cooper had some experience working in the building industry and was seeking a pathway to becoming a qualified builder.

[11] Mr Cooper says from a conversation, he was not sure of whether Henry Dawson was seeking an employee or a contractor but he was subsequently provided with an employment agreement on 24 July that contained a trial period provision. This agreement was not signed by either party and there was no discussion of a trial period. The commencement date in the employment agreement is noted as 25 July 2022. Mr Cooper says he is aware of the operation of a trial period from previous employment.

[12] The 'informal trial' started on 21 July that led to Mr Cooper working up to 25 July and then he received a text from Henry Dawson on 22 July to confirm he was ordering his uniform and would sort out and provide a "contract" for the following Monday. A further exchange of 26 July, formalised Mr Cooper's ongoing engagement and enrolment in the Kiwi Saver scheme. NXT disclosed pay records showing PAYE was deducted from Mr Cooper's wages.

[13] Mr Cooper first started on a house building job in Lumsden working alongside NXT's young foreman and then working in Glenorchy. Mr Cooper recalled a concern that the foreman drove a bit recklessly and him raising this later with Henry Dawson.

#### *The incident*

[14] On Saturday 30 July, Mr Cooper was involved in a verbal altercation whilst attending a job at Glenorchy working alongside the foreman and another worker. Mr Cooper says soon after commencing work whilst working on putting up some framing, the foreman was yelling at him and shortly afterwards he had cause to ask the foreman to turn down his music that was drowning out music Mr Cooper was playing. Mr Cooper says the foreman was not accommodating and a little bit later there was a negative exchange over the use of a grinder. Matters then escalated over a specialist marking pencil usage that Mr Cooper had lent from Henry Dawson. Mr Cooper says while he was marking stud heights, the foreman approached him and remonstrated with him on the pencil's use and ownership. Mr Cooper says the foreman in a verbal exchange that increased in volume, then moved toward him and in fear of a physical assault, Mr Cooper suggested the foreman back off or he would "put a nail through your skull". At the time Mr Cooper had a nail gun in his possession.

[15] Mr Cooper says the foreman then ordered him off the worksite saying he was fired. Mr Cooper says he remained on the site for a further 30 minutes, when either he called or Henry Dawson called him and, it was suggested he leave the work site. Mr Cooper says later on 30 July, he received a text from Henry Dawson saying an HR person would be in touch and when Mr Cooper responded indicating he was available to answer any questions, he received a text back from Henry Dawson indicating “it’s only investigation and it’s our policy is to make it fair on everyone”.

### *The aftermath*

[16] On 31 July, NXT emailed the following three letters to Mr Cooper:

- **The first letter** sent at 4pm over the signature of a person purporting to be “HR Consult, NXT Level Construction Ltd” indicated they would be investigating a complaint of threatening behaviour made against Mr Cooper. An attached email was a copy of a short, emailed statement by the foreman that he had provided the writer the evening prior. It was noted the complainant had also reported the matter to the Police (although he did not press any charges and the Police did not take the matter any further). The letter noted the writer would carry out the investigation and Mr Cooper should be aware: it was not disciplinary action; no decision had yet been made; his response on the incident would be considered; the matter would be “fully investigated” and only after a conclusion to the investigation had been made would a decision on any further action (including disciplinary action) be taken. The writer also said she would be in contact with Mr Cooper to set up a meeting and said Mr Cooper “will be stood down on pay which will be laid out in a separate letter”.
- **The second letter** from the same writer of the first one, confirmed the suspension to enable an investigation to proceed but did not specify a time to meet. It noted that the suspension should not be seen as NXT having already concluded the existence of misconduct or serious

misconduct and, reiterated the investigation would determine what action would be taken.

- **The third letter** again emailed at the same time as the second one but from Henry Dawson, purported to dismiss Mr Cooper on two weeks' notice under "the 90-trial period in your employment contract". It also noted, somewhat contradictorily, that during the notice period:

... we will be completing our investigation to the alleged altercation that happened on site on Saturday 30<sup>th</sup> July 2022 and we welcome your input into this matter as to treat all employees fairly.

If at any stage you wish to terminate your employment earlier than the notice we have given please get in touch with us so we can make it as seamless as possible.

We wish you best wishes for your future and we are sorry that this employment has not been successful for either party.

[17] In a somewhat unusual development, despite the above correspondence NXT convened a meeting with Mr Cooper by phone at 10 am on 2 August, ostensibly to allow him to provide an explanation of his conduct during the 30 July incident. Present on the telephone call were Mr Cooper and his advocate, Henry Dawson, and the HR Consultant.

#### *The investigation*

[18] On the day of the Authority investigation meeting I was provided with a typed report of the 2 August telephone meeting prepared by the HR Consultant. I was unable to verify the accuracy of this report as the HR Consultant did not give evidence. However, an email to Mr Cooper's advocate of 24 August 2022 shows the HR consultant in a response to Mr Cooper's personal grievance, disclosed it as "findings from investigation".

[19] Henry Dawson disclosed that the HR consultant was his sister-in-law who had provided them with free, informal guidance (having an HR background). However, it was recorded and not contested by Mr Cooper, that at the beginning of the 2 August teleconference it was confirmed that regardless of the outcome of their deliberations the decision to dismiss Mr Cooper would not be reversed. Despite this, the meeting proceeded and Mr Cooper

explained his recollection of the 30 July incident. This included him explaining the context leading up to the final negative exchange, suggesting the foreman had been the ongoing aggressor and 'got in his face' but Mr Cooper conceded he said: "You need to back up a meter [sic] now in case you want a nail gun in your head" and in response the foreman had said "Pack your stuff up your fired no job cunt". Mr Cooper said he did not take the nail gun out of his apron and point it at the foreman (as alleged) and had made the threat figuratively. On the latter issue, it is noted in an email of 30 July and a brief incident report the foreman logged in NXT's HazardCo App on 1 August 2022, it referred ambiguously to Mr Cooper as "holding the nail gun".

[20] The investigation report suggested that from the foreman's statement and that of another builder who was present on the job, it was concluded that Mr Cooper was holding the nail gun when he threatened the foreman. I note however, that the foreman and the other builder did not give evidence during the Authority investigation meeting and I had no documentation establishing conclusively, when the other builder's statement was disclosed. Mr Cooper contends he was given the foreman's statement after the dismissal and only later apprised of the other builder's statement. Confusingly, despite the notes of the meeting describing the dismissal as being unalterable at the beginning, by the end the notes say it was suggested the outcome was not decided and any disciplinary action was yet to be communicated. I am not wholly satisfied that NXT sufficiently inquired into whether the threat made by Mr Cooper was intentional. This admittedly would have been a difficult assessment given Mr Cooper specifically referenced the nail gun in the exchange.

[21] NXT during the Authority investigation meeting, provided the investigation "Findings" document (I note Mr Cooper failed to disclose this). The factual findings were that the foreman's version of events was to be preferred. It wrongly recorded that "two others" had witnessed the incident but also in balance, noted that the foreman had overstepped his role and not handled the situation "in a more professional manner". After the findings were recorded, the document suggests from NXT's perspective, that the decision to end Mr Cooper's employment in reliance on the 90 days trial period was made to spare him the local ignominy of being summarily dismissed for a disciplinary offence. This premise suggested Mr Cooper was being afforded the opportunity to "walk away with no disciplinary action

being taken against him”. When asked why he proceeded with the 2 August ‘investigation’ meeting, Henry Dawson said he had no idea other than on his sister in law’s prompting and that she ran the meeting.

[22] On being further questioned, Henry Dawson said that on becoming aware of the incident of 30 July (relayed to him by the foreman and Mr Cooper) he on his sister in law’s advice, determined he needed to investigate it and that was communicated to Mr Cooper. He however, promptly decided not to proceed with an investigation while continuing Mr Cooper’s employment, in the belief that Mr Cooper could be dismissed pursuant to the 90 days’ trial period. Henry Dawson then communicated the decision to dismiss without talking to Mr Cooper beforehand or getting any external legal advice.

[23] Kendra Dawson suggested they were unaware of legal process being a newly established business and they relied on Kendra’s sister giving advice and drafted emails. However, Kendra acknowledged Henry and her, had been shown and agreed with the content of the prepared correspondence. Despite being confused about whether Mr Cooper’s dismissal was prompted by the existence of a trial period or conclusion of the disciplinary process (such as it was), Kendra Dawson says she was involved, with her sister and Henry Dawson, in the decision to dismiss Mr Cooper on 31 July and conceded that on this day, they had decided Mr Cooper would not be returning to work.

[24] Kendra Dawson explained the basis of the decision was on health and safety grounds given they had concluded (after speaking to the other two workers) Mr Cooper had the nail gun in his hand when he threatened the foreman. Kendra Dawson confirmed they also concluded the foreman had contributed to the incident and they had counselled him about his approach to Mr Cooper (essentially an oral warning).

[25] In an email of 2 August sent at 8:30 pm to Mr Cooper, the HR consultant referred to the 31 July correspondence “ending your employment” pursuant to the trial period and advised Mr Cooper was not to turn up at work and they would be in touch to recover and exchange tools.

*The personal grievance*

[26] In a letter of 16 August 2022, Mr Cooper raised a personal grievance claiming he had been unjustifiably dismissed. In a response of 24 August, NXT reiterated a view that it was legitimate to end the employment in reliance on the employment agreement's 90 days' trial provision and the investigation findings had otherwise found Mr Cooper had made an inappropriate physical threat to the foreman whilst having a nail gun in his hand.

[27] The parties then attended mediation but the matter was not resolved.

### **Issue 1 – A valid trial period?**

#### *The law*

[28] Sections 67A and 67B of the Act are the relevant governing provisions, that state:

#### **67A When employment agreement may contain provision for trial period for 90 days or less**

- (1) An employment agreement containing a trial provision may be entered into by a small-to-medium-sized employer and an employee who has not previously been employed by the small-to-medium-sized employer.
- (2) For the purposes of this section and section 67B, -

**small-to-medium-sized employer** means an employer who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into

**trial provision** means a written provision in an employment agreement that states, or is to the effect that -

- (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- (b) during that period the small-to-medium-sized employer may dismiss the employee; and
- (c) if the small-to-medium-sized employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

## **67B Effect of trial provision under section 67A**

- (1) This section applies if a small-to-medium-sized employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.
- (2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.
- (3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (j).
- (4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.
- (5) Subsection (4) applies subject to the following provisions:
  - (a) in observing the obligation in section 4 of dealing in good faith with the employee, the small-to-medium-sized employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and
  - (b) the small-to-medium-sized employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

[29] NXT provided sufficient evidence to establish they were at the time a small-to-medium-sized employer with fewer than 20 employees at the time they engaged Mr Cooper and came within the ambit of s 67A (2) of the Act. However, in submissions their advocate sensibly conceded that they were in error in trying to rely upon the 90 days' trial period provision as at the time Mr Cooper commenced employment it had not been agreed. This concession is consistent with the statute that at s 67A (1) only provides a trial period is operative where the intended employee has not previously been employed and well-established case law on both the strict requirement that a trial period must be agreed upon and

evidenced in writing before employment commences<sup>1</sup> and that regardless, informal trial periods can be deemed as the actual commencement of employment.<sup>2</sup>

### **Finding on first issue – validity of the trial period**

[30] I find Mr Cooper commenced employment on 21 July 2022 and NXT cannot rely upon the shield of a valid trial period exempting them from facing an unjustified dismissal claim as they subsequently offered an employment agreement on 24 July 2022 that was to take effect on 25 July but by this point in time, Mr Cooper had already been employed. It was therefore inexplicable that NXT's HR consultant responded to the personal grievance letter by stating Mr Cooper had been validly dismissed under the 90 days' trial period. In addition, given the dismissal was on notice and Mr Cooper was paid in lieu, the incorrect notice period was given (two weeks). The correct notice period in the employment agreement both parties provided, was four weeks.

### **Issue 2: was the dismissal justified?**

[31] Given the finding that NXT cannot rely on the trial period, I now consider whether Mr Cooper's dismissal was justified.

[32] The legal test contained in s 103A of the Act broadly looks at whether NXT's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred and, I must also have regard to the Act's good faith provisions. This requires that I consider various contextual factors, including basically whether concerns were raised by the employer with the employee before dismissing the employee, whether a reasonable opportunity to respond to those concerns was given, and whether the employer genuinely considered the employee's explanations (if any) before dismissal.

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<sup>1</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111.

<sup>2</sup> *Salad Bowl v Howe-Thornley* [2013] NZEmpC 152 at [27]. See also Authority application of *Salad Bowl* principles in both *Hu v Biform Ltd* [2019] NZERA 436 and *Smith v Sun Kissed Tan Limited* [2022] NZERA 380.

### *Reasons for dismissal*

[33] The first issue given the somewhat unusual fact circumstances, is to identify the timing of the dismissal. I find from the documentary evidence and the questions the Dawsons' answered that the decision to dismiss Mr Cooper was made prior to the investigation meeting held on 2 August 2002 having been communicated to Mr Cooper on 31 July. In this sense, although I accept NXT acted in the genuine but wrong belief, they were entitled to dismiss in reliance on the 90 days provision, the decision to dismiss was pre-determined.

[34] No reason other than the ending of the trial period, was given for the dismissal in NXT's 31 July letter or in the email confirming the dismissal of 2 August on two weeks' notice (that was paid in lieu albeit, that Mr Cooper was also suspended at the time).

[35] NXT's 24 August response to Mr Cooper's personal grievance suggests NXT also relied upon previous issues prior to the 30 August incident. These were described as Mr Cooper being upset when he lost a chisel on a job site, his reporting to Henry Dawson on the foreman's driving and when he injured his foot a failure to complete an incident report. In addition, the letter attached the findings of the investigation into the 30 July incident that noted two witnesses had confirmed Mr Cooper was holding a nail gun when he threatened the foreman but no disciplinary outcome was recorded.

[36] Regardless, I conclude from the evidence that although not explicitly stated to Mr Cooper, the predominant reason for his dismissal was his involvement in the 30 July incident.

### **Submissions/assessment**

[37] NXT's advocate suggested that there was some common ground on what had occurred (with Mr Cooper conceding he had made a verbal threat that referred to the use of the nail gun) and that the Authority should consider 'but for' the procedural failings the outcome would still have been a finding of serious misconduct warranting dismissal. NXT's advocate asserted s 103A(5) of the Act prevailed, suggesting the conceded procedural defects did not render the dismissal unjustifiable. NXT's advocate then suggested from the factual finding, his client was entitled to conclude after hearing from the parties, that during the incident, Mr

Cooper threatened to use the nail gun as a weapon. As an alternative, it was suggested if the Authority found the dismissal to be unjustified, any remedy granted should be substantially reduced to take account of Mr Cooper's contribution.

[38] In contrast, Mr Cooper's advocate submitted that NXT had ongoing access to advice who they portrayed as a human resource specialist and regardless of the time they had available.

[39] Once they suspended Mr Cooper, they chose to dismiss him too hastily and despite commencing an investigation after the communicated dismissal, NXT did not resile from the decision to dismiss that was communicated as solely reliant on the trial period.

[40] I find, while there were ostensibly grounds to consider dismissal for serious misconduct, the actual dismissal was enacted before any investigation or semblance of a fair process commenced. In addition, the investigation that did proceed was flawed in that the information provided to Mr Cooper was incomplete and the findings were not provided until after the dismissal was challenged.

[41] I was not provided with sufficient corroborating evidence to suggest that in NXT preferring the foreman's view of the 30 July incident, it was clear that Mr Cooper 'drew the nail gun' during their angry exchange. If that had been conclusively the case, then the nature of Mr Cooper's conduct could have been reasonably viewed as more serious. The limited evidence suggested the foreman significantly provoked Mr Cooper and while the threat could be regarded as serious and objectively unacceptable, it had to be viewed in the context of what was evidently an uneasy relationship with the foreman contributing to the confrontation. On the evidence provided, I am persuaded that even when NXT proceeded to meet Mr Cooper and hear his explanation, they had a closed mind in considering any alternatives to dismissal.

[42] To complete the application of the statutory justification test, I find 103A(5) of the Act does not prevail as the procedural defects were not minor and they resulted in Mr Cooper being treated unfairly.

[43] I also have considered the resources available to the employer and the context of them being a small and relatively inexperienced employer (s 103A(3)). However, I find this does not adequately explain why, once they had suspended Mr Cooper and decided to investigate the incident, they then quickly resorted to a decision to dismiss Mr Cooper. This was not in my view, the act of a fair and reasonable employer in all the circumstances.

### **Finding on second issue**

[44] I find Mr Cooper was unjustifiably dismissed and is entitled to consideration of the remedies he seeks.

### **Issue 3: remedies**

#### *Lost wages*

[45] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Cooper should I find that he has established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration. Here I find Mr Cooper's lost remuneration was attributed to the personal grievance. Mr Cooper says he secured alternative work with another building company commencing on 12 September 2022 and he is also assisting with running a camping ground. Mr Cooper says there was a period of four weeks when he had no wages but he was receiving an MSD benefit. Mr Cooper's claim was for a weekly sum based upon forty hours at \$26 per hour (less his benefit). This amounted to a claim of \$488 (net) per week.

[46] Accordingly, NXT is ordered to pay Mr Cooper four weeks lost wages (noting that two weeks of this would have been his correct notice period) in the sum of \$1,952.32.

*Compensation for hurt and humiliation.*

[47] Mr Cooper gave evidence of the impact of dismissal and the affect upon him emotionally and financially including that his new position is a contracting one and less secure.

[48] With some justification, Mr Cooper felt NXT dismissed him in a peremptory fashion and that the Dawsons were unwilling to consider his perspective of the situation. I find Mr Cooper was afforded no dignity and he suffered humiliation as a direct result of how he was summarily dismissed.

[49] While I am convinced at the time, Mr Cooper suffered humiliation, loss of dignity and injury to feelings, he relatively quickly found an alternative position and was able to put this unfortunate experience behind him.

[50] Considering the circumstances and awards made by the Authority and Court in similar situations and how NXT effected this dismissal, I consider Mr Cooper's evidence warrants relatively moderate compensation of \$10,000 under s 123(1)(c)(i) of the Act.

**Contribution**

[51] Section 124 of the Act states that I must consider the extent to what, if any, Mr Cooper's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted should be reduced I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*.<sup>3</sup>

[52] Given the circumstances including Mr Cooper's admission he verbally threatened his co-worker and acknowledged he could have walked away from the confrontation or taken other steps to deescalate the situation, it was apparent he contributed to the events that gave rise to his personal grievance. Regardless of provocation, the threat was objectively, unnecessarily aggressive in its tone and capable of being categorised as at least misconduct

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<sup>3</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

(in isolation). However, the hasty decision to dismiss in all the circumstances, was a disproportionate response and a reasonable employer could have approached the situation in a more balanced and fairer way.

[53] On balance, I find a reduction of 20% in the compensation awarded for distress is warranted.

### **Summary**

[54] I have found that:

- (a) Matthew Cooper was unjustifiably dismissed by NXT Level Construction Limited.
- (b) NXT Level construction Limited must pay Matthew Cooper:
  - (i) \$8,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.
  - (ii) \$1,952.32 lost wages pursuant to s 123(1)(b) Employment Relations Act 2000.

### **Costs**

[55] Costs are reserved. The parties are invited and encouraged to resolve the matter. If they are unable to do so, the party that considers it is entitled to seek a costs contribution has 14 days from the date of this determination in which to file and serve a memorandum on costs with the Authority and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[56] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>4</sup>

David G Beck  
Member of the Employment Relations Authority

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<sup>4</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)