

feelings under s 123(1)(c)(i) of the Employment Relations Act 2000.

D. MRP's counterclaim, seeking orders for Mr Halwala to refund some of the relocation costs he was paid and to pay for data charges incurred on his work mobile phone, is declined.

E. From the date of issue of this determination until 27 October 2015 the name of Mr Halwala, the name of his wife Chula Halwala, and any reference to Mrs Halwala's jewellery is prohibited from publication in relation to this matter under clause 10 of the Schedule 2 of the Act.

F. Costs are reserved (with a timetable for memoranda).

[1] Mighty River Power Limited (MRP) dismissed Mettaloka Malinda (Mal) Halwala from his employment as a senior civil engineer on 30 January 2015. Mr Halwala is a Sri Lankan-born citizen of Australia. He had worked as an engineer in Australia in various posts since 1990 until he was recruited by MRP and began work at its Hamilton office on 22 July 2014.

[2] By letter from his team leader Kenyon Schur on 27 January 2015 Mr Halwala was called to a disciplinary meeting to address three concerns Mr Schur described this way:

- The use of your company cell phone off shore and the charges associated with this
- Safety concerns of driving on January 20th from Hamilton to Ohakuri in a fatigued state
- Unauthorised leave on Monday the 9th January 2015

[3] The disciplinary meeting was held at MRP's Hamilton offices on 29 January. MRP was represented by its infrastructure manager Graeme Hill, its HR business partner Jenny Oakley and Mr Schur. In response to a request for assistance by Mr Halwala Ms Oakley has also arranged for Wayne Richards, an MRP operations co-ordinator, to travel up from Taupo and attend the meeting as Mr Halwala's support person.

[4] After around one hour's discussion with Mr Halwala Mr Hill adjourned the meeting at 4.35pm. He reconvened the meeting on the following morning at 9am. Mr Halwala, at his own request, attended this 30 January meeting by telephone from his home rather than travelling into the Hamilton office. During the call Mr Hill told Mr Halwala that he had decided to dismiss him effective immediately. A letter dated 2 February and signed by Mr Hill formally confirmed the dismissal decision. The letter stated the 30 January meeting had discussed concerns regarding "use of the company cell phone off shore, ... poor judgement with regards to driving a company vehicle after 2-3 hours of sleep and absence without authorised leave". It included these conclusions as having been made by Mr Hill:

... Your responses to my inquiries did not give me any reason to believe my concerns about these items were wrong. Further with regard to your driving and questions regarding fatigue you informed me at this meeting that you did not consider this wrong and were comfortable to do this again.

Following the discussions and after careful consideration of the facts presented by you during the meeting I consider you have knowingly driven a company pool vehicle and worked in an unfit state, have taken unauthorised leave outside the company policy, and used the company cell phone with disregard to the cost for personal use. These all constitute serious misconduct under the code of conduct. My decision to terminate your employment is due to these facts and my lack of trust and confidence in our employment relationship.

[5] Mr Halwala raised a personal grievance for unjustified dismissal. By statement of problem lodged in the Authority he sought orders for reinstatement to his position, reimbursement of lost wages, and compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[6] MRP, by statement in reply, said it had "reasonably concluded that there was at least one ground that justified [Mr Halwala's] dismissal" and had done so "after following a process that was (at least) fair and reasonable in the circumstances". It also raised a counterclaim seeking orders that Mr Halwala should reimburse MRP for costs incurred through his use of his work mobile phone while on leave (quantified in its final submissions as being for the amount of \$23,500) and a further \$7500 as repayment of a pro-rata portion of \$10,000 paid to him for relocation costs when he moved from Brisbane to start work for MRP in Hamilton. It relied on a term in his employment agreement to seek repayment of a proportion of the relocation costs. MRP relied on a clause in its Acceptable Use policy for electronic devices, including mobile phones, to seek reimbursement of phone costs.

Interim order prohibiting publication of some details

[7] Shortly before the release of this determination Mr Halwala sought an order prohibiting publication of his name and Mrs Halwala's name along with various other information including identifying details about their two adult daughters and any reference to family jewellery. A reason given by Mr Halwala for returning to work in Hamilton one day later than expected under his approved leave was that, while returning from a family holiday in Sri Lanka and en route to Auckland, Mrs Halwala had wanted to collect some jewellery from a bank deposit box in Brisbane.

[8] Mr Halwala's application said the non-publication order was sought for "various safety, security and many personal reasons" but provided no elaboration of those reasons. MRP opposed the application as having been made too late, for unsubstantiated reasons, and as unnecessary.

[9] Some of the details mentioned in Mr Halwala's informal application were not relevant and would not have been mentioned in the determination in any event. There was no need, for example, to refer to his daughters' names and addresses. However this determination did need to refer to Mr and Mrs Halwala and the evidence about collecting her jewellery. I considered the request for a non-publication order in relation to just the question of their names and that evidence.

[10] As explained by the Employment Court in *H v A Limited* the Act allows for a change to the presumption that there should generally be no restriction on publication of names and other identifying particulars recorded in Authority determinations and court decisions.¹ Orders changing that presumption will, however, be exceptional and made in a very small minority of cases. The Court gave some examples of situations where the exception had been applied. They were where commercially sensitive information might be misused by a competitor, where prison staff might be endangered if certain security information was released, where proceedings involving professional health staff might identify patients, and where individual people subject to criticism in evidence had no opportunity to refute such criticism. A further example justifying such an order was, as found in *H v A Limited*, where evidence established that publication of information

¹ [2014] NZEmpC 92 at [79] referring to the provisions at Employment Relations Act 2000 Schedule 2 clause 10 (for the Authority) and Schedule 3 clause 12 (for the Court).

identifying particular persons created a real but avoidable risk of adverse consequences to a child.²

[11] I was not satisfied the evidence in Mr Halwala's case warranted exercise of the discretion to prohibit publication of the names and mention of the jewellery. The names of witnesses and parties and their affairs are generally in the public domain as a reality of litigation.³ There was no evidence establishing that a real and appreciable security risk or safety issue would likely result from mention of Mrs Halwala's jewellery in this determination.

[12] However as the parties have rights of challenge to the whole or part of this determination – including its refusal to grant the non-publication order sought by Mr Halwala – it was appropriate to make the order, set out in paragraph E at the head of this determination. Without such an interim order a challenge could be futile (and so not a real right at all) because the details for which non-publication was sought and denied could meanwhile have been published (possibly by the print or broadcast media and, certainly, by the Authority determination being posted on the Employment Law Database publicly accessible through the Authority's website: *www.era.govt.nz*). The period of 35 days for that interim order includes the 28-day challenge period and then a further seven days as a practical margin if the Court needed some time to consider whether it might impose an ongoing interim order of its own until the challenge was heard.

The Authority investigation

[13] For the purposes of the Authority investigation I received written witness statements from Mr Halwala, Mrs Halwala, Mr Hill, Mr Schur and Ms Oakley. Under oath or affirmation they each confirmed those statements and gave further oral evidence in answer to questions from me and the parties' representatives. The representatives also provided written submissions on the facts and law. As permitted by 174E of the Act this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

² *H v A Limited*, above, at [80] and [89]-[90].

³ *White v Auckland District Health Board* [2007] NZCA 227 at [16].

[14] This determination, reserved at the conclusion of a two day investigation meeting, has been issued six days outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

The issues

[15] The issues for determination, as they emerged during the investigation, broadly were:

- (i) Did MRP's disciplinary process meet the statutory standards of justification?
- (ii) If not, was Mr Halwala's dismissal nevertheless justified due to established serious misconduct by him?
- (iii) What remedies, if any, should be awarded to Mr Halwala?
- (iv) Should any remedies awarded to Mr Halwala be reduced due to actions by him contributing to the situation giving rise to his grievance?
- (v) Was MRP entitled to reimbursement from Mr Halwala for phone costs and repayment of a portion of the relocation costs he was paid?
- (vi) Should either party contribute to the reasonably incurred costs of representation of the other party?

The relevant events

[16] At the time he was recruited by MRP Mr Halwala gained agreement that he could take leave to attend a family wedding in Sri Lanka at the end of 2014. He confirmed those arrangements with Mr Schur in November. He was given approval for a period of leave in excess of his entitlement at the time. The leave Mr Halwala asked for and was granted ran from 23 December 2014 to 16 January 2015 (inclusive). Approval was confirmed on 25 November.

[17] Mrs Halwala still lived in Brisbane at that time. Mr Halwala had purchased a house for him and his wife about 20 minutes' drive from the centre of Hamilton. The

couple planned that Mrs Halwala would also move there, with their four pets, in January 2015 once they returned from the Sri Lankan holiday. Between July and November 2014 Mr Halwala had made five personal trips from Hamilton to Brisbane and had also attended a work conference in Australia.

[18] On 27 November Mrs Halwala made their online bookings for travel to Sri Lanka, return to Brisbane and then travel to Auckland. The bookings she made provided for her and Mr Halwala to return to Brisbane on 17 January but not to leave Brisbane and fly to Auckland until the evening of 19 January. Their scheduled arrival in Auckland was 12.30am on 20 January.

[19] Mrs Halwala's evidence was that she made those booking arrangements so that she and Mr Halwala could spend some of his birthday on 19 January together with their two Australian-based daughters in Brisbane. Their daughters' own travel plans changed subsequently so they would not be in Brisbane on that day and Mr Halwala had told her, as Mrs Halwala put it in her witness statement, that "he needed to be at work on 19th". Mrs Halwala had not changed the booking before they left for Sri Lanka on 23 December as she said she had spoken to a Qantas representative who told her the booking could be changed within a 24 hour timeframe closer to the date of travel. Mrs Halwala said she "left it at that" because she was busy with arrangements for the trip to Sri Lanka and her move to New Zealand.

[20] The evidence of Mr Schur and Mr Hill indicated there was some tension between Mr Halwala and Mr Schur about a number of work matters during the latter part of 2014. Mr Schur had told Mr Hill of doubts he had about how Mr Halwala was performing his work. Mr Schur was not impressed by a request from Mr Halwala for a further \$5000 in addition to \$10,000 relocation costs MRP had agreed to pay him. Mr Schur was also unhappy with how Mr Halwala had handled arrangements for repair of a concrete beam in a powerhouse. This resulted in a discussion between Mr Schur and Mr Halwala shortly before Mr Halwala left on his leave as to whether he would continue to work on arrangements for that repair project while he was away. Mr Schur told Mr Halwala that he should not do any work while away as he should enjoy his holiday but Mr Schur could not stop him working if he chose to do so. Mr Halwala subsequently relied on that conversation to say that Mr Schur knew he would be doing work while away and that, by inference at least, Mr Halwala would need to

have and use his work mobile phone for those purposes. Mr Halwala said he was expecting to receive a report from a structural engineer on a repair methodology and a quotation for costs of the repair work, neither of which had arrived before his leave started.

[21] Mr Halwala began the approved period of leave by leaving work early on the afternoon of 22 December 2014 to catch a flight to Brisbane that evening.

[22] On 24 December Mr and Mrs Halwala travelled to Sri Lanka. Their two daughters joined them on that holiday during which they visited various places in Sri Lanka for the family occasion, including a resort area in the highlands. On 8 January Sri Lanka had a presidential election. The evidence of Mr and Mrs Halwala was that they were concerned, based on historical events around elections in Sri Lanka, that there might be some instances of violence or public disorder that could make some roads unsafe to travel around this time and some roads could be closed for public security reasons. It was a factor relevant to later explanations regarding the use of Mr Halwala's work mobile phone.

[23] On 13 January Mr Hill was contacted by an MRP employee who dealt with his team's mobile phone bills. He was told a bill received during December showed a cost of more than \$7000 on the phone allocated to Mr Halwala. Mr Hill arranged for an MRP human resources advisor to contact Mr Halwala immediately to tell him to turn off the data roaming function on his phone. Mr Halwala was contacted by telephone that day and he then disabled the phone's data roaming function. Mr Hill also instructed Mr Schur to talk to Mr Halwala about the situation when he returned from leave.

[24] On 16 January Mr and Mrs Halwala left Sri Lanka and arrived in Brisbane on 17 January.

[25] According to Mrs Halwala's evidence she remembered during that return flight that she had jewellery stored in a bank vault in Brisbane. She wanted to collect it before going to New Zealand. The bank was not open on the weekend so their only opportunity to get the jewellery was on Monday, 19 January. Mrs Halwala said Mr Halwala told her "he did not have any work lined up for that day and it should not be a problem".

[26] At 11.53am New Zealand time (8.53am Australian Eastern Standard Time) on 19 January Mr Schur telephoned Mr Halwala on his work mobile number. Mr Schur was concerned Mr Halwala had not turned up for work as expected that morning. Mr Halwala's written evidence for the Authority investigation said he was woken by Mr Schur's call but he had intended calling him later in the morning. During their brief telephone conversation Mr Halwala told Mr Schur that he was still in Brisbane and they discussed arrangements for an inspection visit to the Ohakuri dam scheduled for the following day. Mr Halwala confirmed he would be there. Mr Schur also told Mr Halwala that he had planned to have a meeting with Mr Halwala that morning. Mr Halwala suggested having a discussion by telephone but Mr Schur said it should wait until he was back in the office. Mr Halwala subsequently described the conversation as indicating that Mr Schur was "ok with my delayed travel plan".

[27] Mr and Mrs Halwala left Brisbane on their booked flight on the evening of 19 January and arrived in Auckland around 12.30am on 20 January. They then drove south to their house near Hamilton, arriving sometime between 2am and 3am. Mr Halwala's evidence was that he slept for some time on the drive from Auckland as Mrs Halwala drove their vehicle and that he also later slept at home before waking and driving in to Hamilton to start work that day.

[28] Mr Halwala arrived at MRP's Hamilton office around 8.00am on 20 January. After collecting a pool car he drove to the Ohakuri dam and power station site. The site is around 120 kilometres south of the city with an expected driving time of around one-and-a-half hours. The inspection was due to start at 10am. Mr Schur was there with other people involved in the inspection work due to be carried out that day. Mr Halwala arrived around 10.30am. Mr Schur asked why Mr Halwala was late and why he was not at work on the previous day. Mr Halwala said he had not got to sleep until 4am. He said his travel plans changed because of the need to get his wife's jewellery in Brisbane.

[29] Mr Schur left the inspection group to return to his Taupo office around 3.30pm. When Mr Schur was leaving Mr Halwala told him he was tired and wanted to go home. Mr Halwala then left the site around the same time as Mr Schur. Soon after Mr Schur telephoned Mr Halwala and said MRP would reimburse the cost of Mr

Halwala staying at a nearby hotel if he felt too tired for the drive home (which would take him around two hours). Mr Halwala continued his journey home.

[30] On 21 January Mr Schur held a video conference meeting from Taupo with Mr Halwala and Mr Schur's acting manager Mark Kirsopp in Hamilton. Mr Schur described the meeting, in his witness statement, as being "to assess if there were reasonable explanations for the phone bill and skipping work on Monday". He said Mr Halwala looked shocked on being told \$12,000 of charges had been incurred on the phone while he was on holiday. The figure for the charges was based on the latest information MRP had from Spark at that time. Mr Halwala was asked to provide copies of text messages he had received from the service provider Spark while he was on leave. He said he had the phone on for work purposes.

[31] Mr Schur said Mr Halwala explained that his absence on 19 January was to get his wife's jewellery from a safety deposit box in Brisbane. He said, according to Mr Schur's evidence, that he had not let Mr Schur know about not being at work on 19 January because he did not think anything important was happening that day.

[32] Following the meeting Mr Schur contacted Ms Oakley and began the process that led to the 29 January disciplinary meeting. Mr Hill was responsible for conducting MRP's inquiry, with Ms Oakley's assistance, and for making the decision to dismiss Mr Halwala.

The standard of justification for MRP's actions

[33] Section 103A of the Act placed the onus on MRP to establish that its actions in investigating concerns about Mr Halwala's conduct, and its decision to dismiss him on the basis of conclusions reached by Mr Hill in that investigation, met the objective standard of what was within the range of what a fair and reasonable employer could have done in all the circumstances at the time.⁴

[34] Under s103A(3) of the Act application of that test of justification required the Authority to consider whether:

- (i) MRP, given its resources, had sufficiently investigated its concerns before dismissing Mr Halwala; and

⁴ *Angus v Ports of Auckland* [2011] NZEmpC 160 at [25].

- (ii) Mr Hill raised with Mr Halwala all the concerns he had about his conduct before making that decision; and
- (iii) Mr Hill gave Mr Halwala a reasonable opportunity to respond to those concerns before making that decision; and
- (iv) Mr Hill genuinely considered Mr Halwala's explanations before doing so.

[35] Other appropriate factors in applying that test could also be considered.⁵ One such factor, in a situation that involved the prospect of dismissal, was whether MRP had met its statutory good faith obligations to provide Mr Halwala with access to relevant information, and the opportunity to comment on it, before making a decision adverse to the continuation of his employment.⁶

[36] However the dismissal could not be found unjustified solely because of any defects in the process MRP followed that were minor and did not result in Mr Halwala being treated unfairly.⁷

[37] Failure to meet any of the s 103A(3) tests was likely to result in the dismissal being found to be unjustified.⁸ Prior to the statutory enactment of those tests the decision of the Employment Court in *Kaipara v Carter Holt Harvey* described the requirement for procedural fairness in this way:⁹

Compliance with fair and reasonable procedures is not, and never has been, a requirement simply for its own sake. For it to constitute a personal grievance of unjustified dismissal, it is usually necessary that procedural unfairness be such that it would have brought about a substantive outcome that was also unfair or unreasonable. Put another way, if the procedural failing nevertheless led to the same substantive outcome as would have occurred if the process had been correct, then, whilst in some cases it may amount to an unjustifiable disadvantage in employment, it should not usually cause an otherwise justified dismissal to be declared unjustified.

[38] A more recent decision of the Court characterised that description of the relevant principles as consistent with the statutory direction (enacted since *Kaipara*) not to find a dismissal unjustified due solely to minor defects of process that did not

⁵ Employment Relations Act 2000, s 103A(4).

⁶ Employment Relations Act 2000, s 4(1A)(c).

⁷ Employment Relations Act 2000, s103A(5).

⁸ *Angus*, above, at [26].

⁹ [2012] NZEmpC 40 at [21].

result in the employee being treated unfairly.¹⁰

Was MRP's investigation adequate?

[39] MRP's disciplinary inquiry into its concerns about Mr Halwala's conduct that made failures of fairness that were certainly more than minor. Mr Hill, as MRP's decision-maker in that process, had the resources of a large electricity company (including the assistance of a professional human resources advisor) available but the investigation he, Ms Oakley and Mr Schur conducted was insufficient for the following reasons:

- (i) Mr Halwala was not provided with some relevant information about the data use on his phone and consequently not given an adequate opportunity to comment on it – and what it meant – before a decision was made; and
- (ii) Mr Hill had concerns about Mr Halwala's conduct that were operative in his dismissal decision that were not properly put to Mr Halwala for his response before the decision was made; and
- (iii) Mr Halwala did not have a properly informed opportunity to get advice and representation, if he wished, for the disciplinary meeting.

[40] There were two arguments regarding alleged defects in MRP's process that I have not accepted. Firstly, Mr Halwala was said to have been wrong-footed by a reference in the 27 January letter to his absence from work on 9 January rather than 19 January. It was plainly a typographical error and he knew from his prior discussion with Mr Schur that the concern was really about why he was not at work on 19 January. His reply witness statement noted that before the 29 January disciplinary meeting he had "prepared loosely for both dates".

[41] Secondly, I have not accepted Mr Halwala's submission that MRP failed to adequately investigate what its 27 January letter described as "safety concerns of driving on January 20th from Hamilton to Ohakuri in a fatigued state". He relied on the notion that Mr Hill should have found out more about sleep Mr Halwala had prior to arriving at his home between 2am and 3am that morning and by making inquiries of other people who were at the Ohakuri dam on 20 January about whether Mr Halwala appeared fatigued. Mr Halwala placed an overly technical emphasis on use

¹⁰ *Howard v Carter Holt Harvey* [2014] NZEmpC 157 at [53] and Employment Relations Act 2000, s103A(5).

of the word ‘fatigue’ when the safety concerns about his fitness to drive were self-evident from the information he provided MRP. Although he later quibbled about whether he had not got to sleep until 4am on that morning, he accepted that he had said that to Mr Schur on 20 January. Even allowing for an hour or so longer of sleep that morning, he nevertheless presented late for work at Ohakuri dam on 20 January after having arrived in the country at 12.30am, having got to sleep by 3am at the earliest, getting up around 7.15am and, after collecting a pool car at the Hamilton office by 8.30am, driving for just under two hours to the dam site. It was unlikely that he could fairly be described as fresh and ready for what was a long-planned, full day of work walking and talking around a site. The day’s work included what he described in his witness statement as “five hours crawling around in tight spaces” and after which he due to drive for another two hours homeward at the end of that day. His employer was entitled to have real safety concerns about him and for other road users in those circumstances. Asking other people who saw him at work that day for their subjective views on whether he looked ‘fatigued’ would not have assisted in that assessment. Mr Hill’s concern was well within the range open to a fair and reasonable employer in those circumstances even if, for reasons given later in this determination, there was some doubt about Mr Hill’s assertion that Mr Halwala had said he was “comfortable” or “ok with” repeating such behaviour in the future.¹¹

[42] Reasons for the findings as to three significant defects in what MRP did on 29 and 30 January are set out under the following three headings.

(i) Not provided relevant information and an adequate opportunity to comment before a decision was made

[43] On 14 January – 13 days before the disciplinary meeting – Mr Hill received, by email, a report from an MRP analyst who had reviewed the data use information for Mr Halwala’s mobile phone during December 2014 and January 2015. The analyst’s report described the data use as “quite consistent” and advised that “could indicate that the phone was trying to do the same thing over and over again (e.g. syncing)” rather than the irregular usage pattern normally seen with use for browsing various internet sites. The analyst’s view was relevant to the issue of whether Mr Halwala was aware, or likely to have been aware, of the data use for which such high

¹¹ See paragraph [63] below.

‘roaming’ charges were incurred when he was in Sri Lanka. Mr Hill’s view on 15 January – according to what he wrote in an email to MRP’s ICT operations manager that day – was that it was “clear from the pattern as per [the analyst’s] review that nothing untoward was occurring given calls were minimal and data appears to be emails [sic] syncing”. However Mr Hill did not share the information from the analyst with Mr Halwala. Mr Halwala was thereby denied the opportunity of the assistance of that informed view in giving his own explanation of what had happened.

[44] MRP also had a very detailed report, obtained from Spark, of data use on Mr Halwala’s phone while he was on leave. It had that information well before Mr Schur met Mr Halwala on 21 January in a meeting where the issue was first raised him. No copy of it was provided along with the 27 January letter advising him of the disciplinary meeting (although the letter identified phone use as an issue for discussion). Neither was it provided to him at any other time before the 29 January meeting. His support person asked for the information during the meeting and Mr Schur arranged for it to be sent to Mr Halwala after the meeting ended. Mr Halwala received a copy of it electronically that evening and attempted to read it on his phone. Mr Schur left a hard copy of those data spreadsheets (which amounted to 22 A4 pages in the copy of that document lodged in the Authority investigation) on Mr Halwala’s desk after he had left the office. Mr Halwala did not have a reasonable opportunity to study that information and then comment on it before being told on the morning of 30 January of Mr Hill’s decision to dismiss him.

(ii) Not all concerns resulting in the dismissal properly put for response

[45] Mr Hill’s written and oral evidence to the Authority investigation identified what were, in reality, five concerns on which his decision to dismiss Mr Halwala was based. Three were the allegations made in the 27 January letter notifying Mr Halwala of the disciplinary charges and confirmed in the 2 February letter of dismissal – about phone use off shore, driving while tired, and taking a further day’s leave without authorisation.

[46] The other two concerns were Mr Halwala’s performance in the job to date (about which Mr Hill and Mr Schur had talked in late 2014) and the view that Mr Hill

formed during the 29 January meeting that Mr Halwala was untruthful in what he said about the arrangements he had made for his flights.

[47] Mr Hill denied, when asked in the Authority investigation, that performance concerns about Mr Halwala, raised with him by Mr Schur, were a factor in his decision. I have not accepted that was so because the evidence from him and Mr Schur detailed a number of concerns that were clearly present in their minds during discussions with Mr Halwala in January 2015 and that had plainly affected their view of his character and credibility. One example involved Mr Halwala's attempt to get further payments for items that were not relocation costs and another concerned an email in which Mr Hill considered Mr Halwala had attempted to undermine Mr Schur in a manner not "consistent with MRP's values". Mr Hill's written evidence said he was "not impressed" by Mr Halwala's behaviour on those occasions.

[48] Mr Hill also described himself as being "left with a high degree of uncertainty" as to when, or whether, Mr Halwala had changed his flight booking for 19 January. He found it surprising that Mr Halwala was not able to recall details about that and, along with Mr Halwala's other responses about phone use, Mr Hill said he was left with "real doubt about ... whether he was being straight with us". In his oral evidence he described himself as feeling Mr Halwala was "trying to pull the wool over my eyes". It was an important impression because it was about whether Mr Hill could rely on Mr Halwala to be truthful with him and other MRP managers – something at the heart of the trust and confidence in the employment relationship. No new or re-started disciplinary process was needed to deal with that concern that had arisen during his inquiry but it was an issue that Mr Hill could, and should, have explored further – by putting that impression to Mr Halwala and giving him the opportunity to respond, including by asking him to provide his flight booking documentation that would have objectively confirmed what had happened and when.¹² MRP did not seek that documentation from Mr Halwala until after he was dismissed and had begun challenging that decision.

[49] A fair and reasonable employer could not have proceeded to make and announce a dismissal decision without having put those two additional concerns about performance and truthfulness to Mr Halwala for his response. Mr Hill did not do so.

¹² *George v Auckland Council* [2014] NZCA 209 at [35].

Instead Mr Hill made his decision to dismiss Mr Halwala, either in the evening of 29 January or the morning of 30 January, and proceeded to deliver it when he reconvened the disciplinary meeting by telephone that morning. The evidence of Mr Hill and Ms Oakley confirmed Mr Hill read from a script he had prepared which set out his view of the various facts and his reasoning for the decision. He did so without further inquiry of, or opportunity to comment from, Mr Halwala.

(iii) Inadequate opportunity to get representation

[50] The letter given to Mr Halwala on 27 January included this notice on his right to representation and the potential outcome of the disciplinary inquiry:

Due to the seriousness of these concerns, you are advised of your right to bring a representative or a support person with you to this meeting. Please be advised that the outcome of this meeting may result in disciplinary action being taken up to and including dismissal.

[51] Mr Halwala clearly understood there was some risk to his employment. In an email Mr Halwala sent to an MRP colleague on the morning of 29 January, and referring to an event in the following week, he wrote: “if I still have a job by that time”. Mr Hill’s evidence was that Mr Halwala had also put his head around the door of Mr Hill’s office that morning and asked in a serious tone: “should my wife unpack her bags” (which Mr Hill understood to refer to the prospect that Mr Halwala might not be at MRP for much longer). Mr Hill said he simply replied “well, we have to go through a process”, or words to similar effect, and nothing more.

[52] While Mr Halwala held a senior position requiring tertiary and specialist qualifications and had lived in Australia for many years, it was not clear he fully understood what he might need to do to properly participate in that disciplinary process. By at least some stage on the morning of 29 January he had realised he needed some help because, according to Ms Oakley’s evidence, he contacted her in her office in Taupo, said he was “new to New Zealand” and asked if MRP had any sort of representation it could provide him. She suggested two MRP employees who might help. Mr Halwala accepted one of those – Mr Richards, who worked at a different MRP division and site and did not know Mr Halwala. Ms Oakley had suggested Mr Richards because he had previously attended a disciplinary meeting for an apprentice. She drove Mr Richards up from the Taupo office that day for the

disciplinary meeting in Hamilton with Mr Halwala and then drove him back afterwards. There was nothing to suggest Mr Richards did not do his best to support Mr Halwala in the meeting on 29 January but it did not change the fact that Mr Halwala did not have access to expert advice and representation in the disciplinary process.

[53] MRP's Code of Conduct includes a statement that it "will be a good employer, balancing the needs of the business, its owners and its employees". Part of that balance may, fairly, include advising an employee facing severe disciplinary consequences that they may need to do more to effectively participate in an inquiry of that type.

[54] Alive to Mr Halwala's interests as an employee, and not just MRP's interests as his employer, Mr Halwala's query on 29 January should have given Ms Oakley more pause for thought. The 27 January letter advising of the meeting had not included advice that the meeting could be delayed if necessary. Mr Halwala's naïve inquiry about MRP providing him with representation was a reason that a fair employer – meeting its declared commitment as a good employer to balance its business needs with those of its employees – could have delayed the meeting and done more to make sure he understood his rights to advice, how to get it if necessary and a better opportunity to do so. The bare 48 hours' notice given to him about the disciplinary meeting was not sufficient for those purposes in all the circumstances.

Were the process defects minor and with no resulting unfair treatment?

[55] Each of those three categories of defects in MRP's disciplinary process were more than minor because they affected Mr Halwala's ability to participate fully and properly in responding to MRP's concerns. However s103A(5) of the Act required a further question to be answered about such defects, that is whether they resulted in him being treated unfairly. That assessment is made in relation to the justification test's requirement that asks whether what MRP did was what a fair and reasonable employer could have done "at the time" of its meetings with Mr Halwala and making the decision to dismiss him. The emphasis is on whether what has been described as "the ultimate outcome" would have been different if those defects had not occurred at

that time.¹³ There is an inevitably speculative or counterfactual nature to such an assessment. In Mr Halwala's case I concluded the defects had resulted in him being treated unfairly, at the very least because it deprived him of the opportunity of responding differently (and perhaps more persuasively) in the disciplinary meeting on both 29 and 30 January. Particularly relevant here was the fact that Mr Hill proceeded directly to delivery of his dismissal decision on 30 January when, *sans* defects, he could not have done so without providing Mr Halwala with a better opportunity to respond to the information about data use (and to better explore and explain what had happened to generate the use that resulted in the high charges).

[56] Similarly if Mr Halwala had a proper opportunity (and, fairly, some encouragement) to take independent external advice and possibly have professional representation at the disciplinary meeting, he was less likely to have taken what was a relatively bullish response to the concerns raised with him. Appropriate concessions of fault or oversight may well have, accepting Mr Hill would have acted fairly on hearing them, resulted in him making a different assessment in his selection of the appropriate disciplinary option to impose as an outcome. Mr Hill's evidence confirmed he had considered the alternative options for warnings but settled on a dismissal as necessary because Mr Halwala's responses suggested he did not accept he had failed to meet expected standards of conduct and he could not be trusted to act differently in the future. Properly advised, and with access to all the information on which Mr Hill relied, Mr Halwala may well have responded differently. By not getting a proper opportunity to do so he was treated unfairly on aspects that had some real prospect of a different ultimate outcome.

Was Mr Halwala's conduct capable of amounting to serious misconduct?

[57] While Mr Halwala consequently had established a personal grievance on the basis that MRP's actions at the time that it carried out its disciplinary process were not justified (as what a fair and reasonable employer could have done), the circumstances of this case required a further stage of inquiry to establish whether the ultimate outcome (of his resulting dismissal) was justified or unjustified. By its nature it is a further speculative or counterfactual assessment – on the *Kaipara* standard – as to whether the same outcome could have occurred if the process had been carried out

¹³ *Waterford Holdings Limited v Morunga* [2015] NZEmpC 132 at [32].

correctly. If the answer was yes, the procedural defects would amount to an unjustified disadvantage but his subsequent dismissal could not be declared unjustified.

[58] Another way of putting that question was whether a fair and reasonable employer, on a full and fair investigation, could have found what Mr Halwala had done (in respect of the three concerns put to him) was serious misconduct. Answers on that point were also relevant to any subsequent consideration needed on remedies because blameworthy conduct by him could result in reduction of those remedies under s 124 of the Act (depending on the extent to which his behaviour contributed to the situation giving rise to his grievance).

[59] A further filter in considering the assessment of his conduct was whether he had acted deliberately or carelessly – in respect of phone use, driving and returning late from leave. While a single instance of carelessness may sometimes amount to serious misconduct, case law suggests that mere inadvertence or oversight generally will not. Objective assessment of what the employee did focuses not on its *consequences* but whether the *actions* (by commission or omission) were of such a nature that an employer, following a full investigation, could justifiably believe the employment relationship was thereby irreparably broken. An irreparable breakdown is one where a fair and reasonable employer could have concluded their trust and confidence in the employee was so deeply impaired or destroyed that the relationship could not continue.¹⁴

[60] Put shortly, in a way relevant to the phone charges issue in this case, the focus was not on the cost consequences of what he did in taking his work phone with him on holiday but whether Mr Halwala's actions were more than mere inadvertence and (fairly assessed) could have damaged MRP's trust in him beyond repair.

[61] The issue of deliberate or careless behaviour was also important because of how the reasons for dismissal were put in the 2 February notice of termination sent to him. Mr Hill decided Mr Halwala had "knowingly driven a company pool vehicle, and worked in an unfit state, ... taken unauthorised leave outside the company policy,

¹⁴ See *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 at [36] (CA), *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 at [78]-[81] (EC) and *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 3111 at 319 (EC).

and used the company cell phone with disregard to the cost for personal use”. Disregard, meaning to ignore or not pay attention to something, can be deliberate action or can occur by carelessness and inadvertence.

(i) The driving

[62] Mr Halwala’s actions on 20 January in driving to the dam inspection and back, relying just on his own account of the sleep he had earlier that day, were careless as to its risks. The safety concern was self-evident and not ameliorated even if, as he asserted, he slept well on the flight back from Sri Lanka, while in Brisbane on the weekend, and (after 12.30am on 20 January) for some of the drive to Hamilton.

[63] However Mr Hill’s dismissal decision was based on his further finding that Mr Halwala had said on 29 January that he “did not consider this wrong and [was] comfortable to do this again”. Mr Hill repeated that assertion in his written witness statement saying that Mr Halwala had “reiterated that it was ok for him”. Ms Oakley in her oral evidence referred to Mr Halwala’s attitude as being that he “would do it again tomorrow”. While Mr Hill and Ms Oakley may be relying on their memory or extrapolating from what they took to be gist of what Mr Halwala said on 29 January about his driving experience, the documentary evidence generated by Mr Hill and Ms Oakley on that day did not show any such statement actually having been made by Mr Halwala. Those documents comprised Ms Oakley’s typed notes, her handwritten notes and notes made by Mr Hill in his diary during the 29 January meeting. The evidence supported a conclusion that Mr Halwala acted carelessly on 20 January but not that he had expressly said he would deliberately do so again. While a single instance of negligence may be serious misconduct, in this case and in the absence of evidence confirming the supposed declaration of a willingness to repeat the impugned behaviour, a fair and reasonable employer could not safely have concluded the employment relationship was irreparably broken by Mr Halwala driving to and from work on 20 January. In short it was a serious mistake of judgement by him but not necessarily serious misconduct in all the circumstances.

(ii) The phone use

[64] MRP’s Acceptable Use policy for electronic devices issued to employees, including mobile phones, permitted “limited personal use” that did “not impact the

business”. It stated an employee breaching the policy could be subject to disciplinary action and “reimbursement of costs may be sought”.

[65] Mr Halwala’s use of his phone while on leave between 23 December 2014 and 16 January 2015 resulted in charges from Spark to MRP that totalled \$23,356. The Spark accounts showed 21 “included international mobile calls” at no charge, seven international roaming calls costing \$5.60 and seven international texts costing 0.34. The remainder of the charges, of around \$23,350, were listed as being for “international roaming”. The Spark information showed data use for various applications including iTunes, Facebook, Amazon, Google, Snapchat, Instagram, Gmail, Akamai and Dropbox. The data use stopped from 13 January once Mr Halwala had turned off the roaming function after being telephoned by an MRP representative.

[66] Oral evidence from MRP witnesses indicated that the total amount of data used was around 1.5GB. I checked the data size figure was correct because the charges seemed extraordinarily high for a relatively small amount of data. I was told it was correct and a result of the high international roaming charges incurred while the phone was on in Sri Lanka.

[67] There was no authorised or essential business purpose for Mr Halwala to use his work phone during that period. In that respect I preferred the evidence of Mr Schur over Mr Halwala. Email records showed Mr Halwala sent two brief emails to Mr Schur on 23 December and forwarded a document by email to another MRP employee on 24 December but there was no legitimate business reason for use of his work mobile phone after then. While Mr Schur knew Mr Halwala said he would do some work while away, Mr Halwala was not ‘on call’ and was not expected to do any work until he returned from leave. Use made of the phone during the remainder of his leave was for personal reasons only.

[68] The relevant issue about the data use was whether Mr Halwala knew or should have known it would occur and at such a high cost while he was in Sri Lanka and was careless in not taking steps to avoid that happening. Mr Halwala was aware, as a matter of general knowledge and personal experience, that higher data charges were incurred for international calls and data use outside New Zealand. He received some

international roaming advice texts from Spark on arrival in Australia and Sri Lanka. What was not satisfactorily established (either during MRP's disciplinary investigation or since) was whether he had received a particular automated text Spark asserted was sent on 29 December advising that around \$2486 of roaming charges had been incurred. After MRP challenged the charges sometime later Spark advised such a text had been sent but no proof of its despatch or receipt was provided.

[69] Mr Halwala had taken the precaution of buying a \$5 local sim card for his personal phone on arrival in Sri Lanka so he did not incur international costs and could make local calls to family and friends while there. In that respect he was careful of his personal interests (and demonstrated that he knew international roaming costs were higher). In using his work mobile phone he was obliged as an employee to be careful of MRP's interests.¹⁵ It could not reasonably be established from the evidence, however, that he was aware of the very high actual level of international roaming costs that could be incurred and was not aware of the extent of the data use that was occurring on the work phone. He had used the phone for some calls and for some internet use on part of their holiday (checking maps and news sites after the election for the purposes of their travel plans). Neither was it established that he was aware 'background syncing' and updating of applications on the phone could be occurring and incurring data use costs without his knowledge. The result of his ignorance was that the costs were incurred by his inadvertence or oversight rather than by any deliberate action.

[70] Some time was spent in the Authority investigation meeting in questions from MRP's counsel to Mr Halwala about whether the data use information, and whether what could be discerned in patterns in it for the days between 23 December and 13 January, supported the 'background syncing' hypothesis or disclosed other less regular but deliberate instances of use. Ultimately the distinction was not relevant as Mr Hill had accepted some limited but occasional personal phone use (for some calls or internet searches of maps or news sites) would not have been of real concern to MRP and Mr Halwala accepted he had made some calls on his work mobile when there was no signal on his own personal mobile phone during their visit to a highland region. The real concern was the extensive data use through the whole period for which the most likely explanation was background 'syncing' of which Mr Halwala

¹⁵ *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* ERNZ Sel Cas 59 at 81.

was unaware and had been caused by ignorance and inadvertence. In the circumstances a fair and reasonable employer, following a thorough investigation, could not have concluded the phone use was serious misconduct. To reach a different view because of the resulting high cost would have wrongly focussed on the consequences rather than the nature of the careless action itself.

(iii) Returning late from leave

[71] By contrast Mr Halwala's conduct in respect of his leave and not attending work on 19 January was deliberate, with full knowledge of the necessary information.

[72] As matters of fact I concluded from his evidence, and that of Mrs Halwala, that he knew what leave he had applied for (ending on 16 January), knew he was due in the office on 19 January, knew on 16 January that his wife had not changed their tickets to fly to Auckland in time for him to get to work on 19 January, and he decided on 16 January that he did not need to attend work that day (preferring his own family interests over those of his employer). He did not take reasonable steps to advise his supervisor of that situation or his decision. He had with him both a personal mobile phone and a work mobile phone from which he could have sent a text or called Mr Schur on 17, 18 or 19 January. He had not called by the time Mr Schur rang him at 8.53am Australian Eastern Standard Time (NZT 11.53am) on 19 January. His evidence that Mr Schur had then either expressly or tacitly approved additional leave during that call was unconvincing. The reality was that Mr Halwala had granted himself an extra day's leave and was in breach of the requirements of MRP's code of conduct not to absent himself from work without proper authority. It was conduct identified in the code as "likely to result in instant dismissal".

[73] The real issue was about more than what Mrs Halwala described as "the fuss of one day unauthorised leave". It concerned whether Mr Halwala could be trusted to meet his positive obligations to his employer. Having been granted (by special arrangement) leave in excess of his entitlement, choosing not to return to work by the agreed date and failing (despite reasonably being able to do so) to promptly advise his supervisor of the situation, Mr Halwala acted in a deliberate, knowing manner that a fair and reasonable employer could have found was serious misconduct in all the circumstances. His carelessness in respect of the phone use overseas and driving on 20 January – while not meeting the threshold of serious misconduct in isolation –

were part of those circumstances in which a fair and employer could have concluded Mr Halwala's failures on 19 January (to attend and to inform) demonstrated an attitude heedless to its interests and that consequently deeply impaired its trust and confidence in him.¹⁶

[74] Further, on the evidence, it was also within the range of reasonable responses for an employer, following fair inquiry, to have concluded on the balance of probabilities that Mr Halwala knew throughout that he would not return to work on 19 January. He initially had birthday plans to be in Brisbane that day. A supposed sudden change of plans as a result of a realisation by Mrs Halwala that she had forgotten to collect jewellery from a safety deposit box was, in light of what their flight booking documentation showed, open to reasonable doubt as a matter of credibility. Some employers might have taken a kinder or more generous view but ultimately a fair and reasonable employer could have concluded Mr Halwala's conduct in this instance was not an oversight but a deliberate dereliction of his duty with the effect of deeply impairing its trust in him.

[75] From those conclusions it followed Mr Halwala could have been justifiably dismissed – for not returning to work on 19 January and not advising his supervisor of the situation – if the process followed by MRP had been correct. Accordingly his dismissal grievance foundered on the *Kaipara* bar.¹⁷ He was unjustifiably disadvantaged by how MRP acted during its disciplinary process but – because the same substantive outcome could have been reached if the process had been correct – his dismissal could not be determined to be unjustified.

Remedies

[76] Because Mr Halwala was not found to have been unjustifiably dismissed his application for remedies of reinstatement and lost wages could not be considered further. He was entitled to consideration of a remedy for his personal grievance of unjustified disadvantage due to defects in how MRP carried out its disciplinary process.¹⁸

¹⁶ *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* ERNZ Sel Cas 59 at 84

¹⁷ See paragraph [37] above.

¹⁸ Employment Relations Act 2000, s 122.

[77] From the totality of the evidence of Mr Halwala and his wife, it was clear he suffered distress and injury to his feelings during the disciplinary process. While some level of anxiety was an inevitable consequence of being involved in such a process, this was heightened by being treated in an unfair way, without the full information or adequate opportunity to get advice and support to which he was reasonably entitled. The sum of \$10,000 was the appropriate level of award under s 123(1)(c)(i) of the Act to compensate him for the resulting loss of dignity and injury to his feelings. It was a modest sum but set mindful of the need not to keep compensatory payments artificially low.¹⁹

Contribution

[78] Section 124 of the Act required consideration of the extent to which Mr Halwala's actions contributed towards the situation giving rise to his grievance and whether those actions required reduction of the remedy awarded. I concluded a 40 per cent reduction was required.

[79] MRP was responsible for the defects in its disciplinary process, not Mr Halwala, but s 124 nevertheless applied in respect of his unjustified disadvantage grievance because the section refers broadly to the "situation" giving rise to the grievance and contributing conduct includes all the employee's actions. Accordingly Mr Halwala's carelessness in respect of use of the phone, and driving on 20 January with very little sleep, was relevant as well as his actions in taking unauthorised leave. Some reduction was necessary but not so much that it amounted to a 'double counting' for conduct already taken account of in rejecting his dismissal grievance (and for which he was consequently denied remedies of lost wages and reinstatement).

MRP's counterclaim

Relocation costs

[80] MRP sought repayment of \$7500 of the \$10,000 relocation costs paid to Mr Halwala. It did so because, by the time of his dismissal, he had served around six months of the two year period referred to in the following term in the letter of offer of employment that he accepted in July 2014:

¹⁹ *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

In the event that your employment with the Company ceases within 24 months of the date of commencement of your employment, you agree to repay the Company a pro-rata portion of this amount at the time your employment ceases.

[81] I concluded the order sought should not be made because the end of Mr Halwala's employment (although occasioned by his fault) was not at his initiative. It was different from a situation where an employee took the benefit of the relocation costs and then chose to leave for a better or different job in that period. It was not equitable for MRP to have ended the employment and then relied on a term of its employment agreement to extract a payment from him as a result of its decision, particularly in circumstances where MRP's conduct of its disciplinary process had not honoured its own statutory and contractual obligations of fair dealing. Applying by analogy the principles relating to forfeiture provisions about notice, the supposedly proportionate amount was not related to any actual estimated loss to MRP (such as having to pay recruitment costs for, and possibly relocation costs to, a replacement employee). Generally such a clause would also operate to compel continued performance by holding it as a threat over the head of the employee, so becoming a penalty and not enforceable.²⁰

Phone charges

[82] MRP sought an order requiring Mr Halwala to pay \$23,500 as damages for the charges incurred for data services on his mobile phone during his leave.

[83] Its application had to be considered in light of the finding in this determination that the charges resulted from ignorance and carelessness on Mr Halwala's part rather something he did deliberately. Different considerations would apply if Mr Halwala had knowingly, by deliberate or calculated actions, gained personal benefit or advantage, at his employer's expense.

[84] While the House of Lords decision in *Lister v Romford Ice & Cold Storage Co Ltd* [1957] 1 All ER 125 is regarded an authority for the proposition that employers may sue employees for damages caused by carelessness, the Employment Court has

²⁰ *Ozturk v Gultekin (t/a Halikarnas Restaurant)* [2004] 1 ERNZ 572 at [5].

expressed doubts about its present day application:²¹

... [I]t is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would likely have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking personal grievances which would undermine the statutory framework for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal. It also raises policy concerns about the fair allocation of risk and which party is best placed to mitigate potential liability.

[85] The Court has further described the rationale for that analysis in this way:²²

... There is some attraction to [the] argument that if a reasonable bystander had asked the parties at the outset of their employment relationship: “What happens if the employee does not perform his/her duties to a satisfactory standard?” the answer would be: “disciplinary action which could result in dismissal”, rather than “the employer could undertake disciplinary action which could result in dismissal and also sue the employee for damages for the losses associated with the poor performance”.

[86] In that light I doubted that, while held justifiably dismissed for serious misconduct in relation to other actions (his unauthorised absence and failure to inform his supervisor), Mr Halwala could be subject to an award of damages for what has been found to be carelessness in incurring the phone charges (that did not amount to serious misconduct in the circumstances). In reality the dismissal on other justified grounds was already a sanction for his negligence in that respect as well.

[87] An award of the type sought by MRP would also have a chilling effect on someone such as Mr Halwala pursuing a personal grievance. While MRP made it clear at the time of his dismissal – and before Mr Halwala had raised a personal grievance – that it would seek payment from him for the phone charges, the practical effect of its counterclaim was also to discourage him from pursuing a personal grievance which has been found to have some substance. In that respect it would undermine the statutory regime for resolution of employment relationship problems to allow the counterclaim.

²¹ *George v Auckland Council* [2013] NZEmpC 179 at [147].

²² *Rainbow Falls Organic Farm Limited v Rockell* [2014] NZEmpC 136 at [57].

[88] Further MRP was better placed than Mr Halwala to mitigate potential liability for such charges by having better systems in place to avoid them being incurred either deliberately or by oversight or ignorance. Email correspondence between Mr Schur, Mr Hill and MRP's ICT operations manager in mid-January raised questions about whether Spark should have provided earlier notification, what monitoring systems were in place within MRP, and whether an automatic roaming data cap available for business customers should have been in place. Mr Hill described the situation as "a trigger for business improvement".

Costs

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

[90] If they are not able to do so and an Authority determination on costs is needed Mr Halwala may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum MRP would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[91] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis adjusted upwards or downwards to account for particular circumstances or factors of the case.²³

Robin Arthur
Member of the Employment Relations Authority

²³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].