

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 212
5350121

BETWEEN JOSHUA MCCLUNG
 Applicant

AND FENCING WORX (BOP)
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Nicholas Elsmore, counsel for the Respondent

Investigation Meeting: 14 and 15 March 2012 in Tauranga

Determination: 21 June 2012

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Joshua McClung by Fencing Worx (BoP) Limited (FWL) on 9 July 2010 was unjustified. To settle that personal grievance FWL must pay Mr McClung \$2232 in lost wages and \$4000 in compensation for injury to his feelings. The remedies awarded have been reduced by one-third because of blameworthy conduct by Mr McClung which contributed to the situation giving rise to his grievance.**
- B. In respect of an earlier period of around nine weeks in 2009 during which he was employed by FWL, Mr McClung had not properly raised personal grievances about whether FWL had acted unjustifiably by not employing him from an earlier date that year and then later dismissing him without proper notice. He is denied leave to pursue those grievances now.**
- C. In respect of his employment by Darryn Maguire for around six**

months during 2004 and by FWL for around five months during 2005, Mr McClung is denied leave to pursue grievances about how his employment ended in those years and whether he should have been paid a bonus in 2004.

D. No wage arrears for travel time are owed to Mr McClung.

E. Costs are reserved.

Employment relationship problem

[1] Fencing Worx (BoP) Limited (FWL) dismissed Joshua McClung on 9 July 2010. FWL was in the business of providing fencing and framing services, mostly for kiwifruit orchards, in the Bay of Plenty. It employed Mr McClung to do fence cabling and wiring work.

[2] FWL director Darryn Maguire admitted during the Authority investigation meeting that he had not carried out the dismissal in a procedurally fair way. He was driving through the main street of Katikati during the late afternoon that day, a Friday. He saw Mr McClung at a petrol station. He parked his truck and walked over to where Mr McClung was sitting in his car. In his oral evidence to the Authority Mr Maguire confirmed he said the following words to Mr McClung:

“I’m sick of your fucking texts mate. I’ve got enough shit going on already. I don’t need your fucking shit. Pick up your holiday pay on Monday and fuck off. There’s no more work, the rammer’s broken.”

[3] Mr Maguire said, as best he could recall, he then walked away without saying anything further to Mr McClung.

[4] On Sunday 11 July Mr McClung sent Mr Maguire a text checking that he could pick up his holiday pay the next day. Mr Maguire confirmed a time to do so and Mr McClung collected that money. Their next contact was on 19 July when Mr McClung sent Mr Maguire a text seeking a payment of “\$12 grand” – an amount he was claiming for unjustified dismissal – and Mr Maguire rang Mr Clung to offer him further work. The two men disagree about whether any conditions were set on that offer but Mr McClung did not accept it and did not return to work. Mr Maguire also

had his lawyer prepare a letter – dated 22 July 2010 – which asked Mr McClung to contact Mr Maguire if he “*wish[ed] to take up his offer of further casual employment*” and suggested that “*an ongoing contract be properly documented and that there is a clear code of conduct agreed upon between you*”. Mr Maguire said he delivered that letter by hand to Mr McClung’s letter box on 23 or 24 July but Mr McClung said he did not get the letter until 20 August, which was after he had sent Mr Maguire a six page letter on 13 August raising his personal grievances. Mr McClung’s letter of 13 August referred to a phone call from Mr Maguire on 19 July and made the following comment about what Mr Maguire said during the call: “*...[F]or some strange reason, you do a complete U-turn and decide there is work again, same time, same work site I was sacked from one week earlier*”.

[5] Although FWL’s statement in reply and Mr Maguire’s witness statement did not accept the termination of Mr McClung’s employment was unjustified, its final submissions acknowledged the procedure was unfair and the dismissal was a “*rash decision*” made when Mr Maguire lost his temper.

[6] FWL initially gave three reasons for Mr Maguire’s decision:

- (i) Mr McClung’s recent conduct in sending abrasively-worded texts to Mr Maguire about work matters; and
- (ii) News Mr Maguire had received that day about the deferral of two work contracts; and
- (iii) The breakdown of a post rammer which affected how much work was available for Mr McClung and other employees.

[7] During the Authority investigation meeting Mr Maguire added a fourth factor – that on 9 July Nick Shirtcliffe, a supervisor told him Mr McClung had “*gone mad*” and threatened to kill Mr Maguire and his children because Mr Maguire had refused a request from Mr McClung to be paid a \$100 cash advance on his holiday pay.

[8] Mr McClung’s application to the Authority, lodged on 12 July 2011, sought determination of a number of other personal grievances and a wage arrears claim as well as his grievance about his dismissal in 2010. The other grievances concerned earlier periods of employment during 2004, 2005 and 2009.

[9] In its reply FWL maintained those earlier grievances were “*statute barred*”, that is they were not raised within the required 90-day period of the events giving rise to them. Mr McClung maintained he had raised the grievances in 2009 within the necessary timeframe and that he should be granted leave to raise the grievances for 2004 and 2005 because the delay was due to exceptional circumstances: s114(4) and s115 of the Employment Relations Act 2000 (the Act).

Issues

[10] From the statement of problem, the statement in reply and the background documents provided by the parties the Authority identified the following factual and legal issues for investigation and determination:

A. Personal grievance - 2010

- (i) What was the nature of the employment – casual or permanent?
- (ii) What were the notice requirements?
- (iii) Was dismissal due to broken equipment causing a lack of work or was Mr McClung dismissed for other reasons, and if so, was he subsequently replaced by a contractor?
- (iv) Was Mr Maguire’s decision to dismiss Mr McClung on 9 July 2010 and how it was carried out, what a fair and reasonable employer would have done in all the circumstances at the time (that is, was it justified)?
- (v) Had FWL subjected Mr McClung to unjustified actions or discrimination by:
 - (a) allowing other employees’ advances on their holiday pay but denying the same benefit to Mr McClung; and
 - (b) providing another employee with work which would otherwise have gone to Mr McClung; and
 - (c) paying him \$18 an hour as an employee while a subcontractor was paid \$27 an hour?

B. Personal grievance - 2009

- (i) Did Mr McClung notify his employer of grievances in 2009 within 90 days of those grievances occurring, and if not, should he now have leave to raise them due to exceptional circumstances and it being just to do so?

- (ii) Was Mr McClung advised he would work from a set date in 2009 and then not actually employed until four weeks later, and if so, was he entitled to be paid compensation of four weeks wages for that delay?
- (iii) Was Mr McClung not properly advised of the termination of his employment in September 2009, such that he was unjustifiably dismissed?

C. Personal grievances – 2004 and 2005

- (i) Was Mr McClung's delay in raising personal grievances in 2004 and 2005 caused by exceptional circumstances and would it be just now for Mr McClung to have leave to raise personal grievances over whether he was unjustifiably dismissed in the 2004 and 2005 seasons and whether he should also have been paid a bonus in 2004 which was paid to some other staff?

D. Wage arrears

- (i) Was Mr McClung short paid travel time on four days in May 2010 (\$100 claimed)?

E. Remedies

- (i) If FWL was found to have unjustifiably dismissed or acted unjustifiably towards Mr McClung in 2010, should he be awarded remedies of:
 - (a) lost wages (claiming 23 weeks from the date of dismissal up until late December 2010 as the period he likely otherwise would have worked); and
 - (b) compensation for humiliation, loss of dignity and injury to his feelings?
- (ii) If Mr McClung were awarded any remedies, should they be reduced due to blameworthy conduct by him contributing to the situation giving rise to his grievance: s124 of the Act?

The investigation

[11] For the purposes of the Authority's investigation written witness statements were lodged by Mr McClung, Mr Maguire and his brother Shaun Maguire (who worked for FWL from 2007 to July 2010). These three men, under oath or affirmation, attended the investigation meeting, confirmed their statements and gave further oral evidence in answer to questions.

[12] Two further witnesses attended under witness summons – Mr McClung’s brother, Nathan McClung (who worked for FWL from 2004 to 2011) and Mr Shirtcliffe (who worked for Darryn Maguire’s fencing business from 1997 and then for FWL from 2004 until the present day). They both gave oral evidence under affirmation and in answer to questions.

[13] The five witnesses include two sets of brothers. For ease of reference this determination refers to Joshua McClung as Mr McClung and his brother as Nathan McClung and to Darryn Maguire as Mr Maguire and his brother as Shaun Maguire.

[14] Mr McClung and FWL’s counsel, Mr Elsmore, delivered closing submissions at the investigation meeting.

[15] As permitted by s174 of the Act this determination has not set out all evidence and submissions received but has stated the Authority’s findings of facts and law and expressed conclusions on matters requiring determination. The Authority’s findings are made on the civil standard of the balance of probabilities, assessing the evidence to determine what is more likely than not to have happened.

[16] Mr McClung’s statement of problem and witness statements included allegations of wrongdoing by Mr Maguire and FWL regarding various immigration, taxation and criminal matters. Those allegations are not dealt with in this determination because they were either not relevant to these proceedings or were not within the Authority’s jurisdiction.

The nature of the employment

[17] Mr McClung first worked for Mr Maguire’s fencing business in 2004. He had met Mr Maguire’s ex-wife while working at a fruit picking job and she suggested he contact Mr Maguire about work. Mr McClung said Mr Maguire told him at that time there would initially be five to six months work and he would be trained to use the post rammer.

[18] FWL was not yet a registered company when Mr McClung started work in May 2004. Mr Maguire employed Mr McClung directly that year. The terms of

employment were agreed orally and not reduced to writing. Those terms were sparse – an hourly rate and some indication of starting and finishing times.

[19] I find that from the outset Mr McClung's employment was intended to be seasonal and related to the amount of work that the business had secured from orchardists and farmers to build fences, frames, shelters and retaining walls.

[20] In August 2004, on the advice of his accountant, Mr Maguire arranged for a written employment agreement to be distributed to his employees by Mr Shirtcliffe. A version was prepared for each employee. On the one given to Mr McClung the employer was referred to as "*the Company*" but then defined as "*Darryn Maguire*", not a registered limited liability company. According to Companies Office records FWL was not incorporated until 30 August 2004.

[21] Mr McClung did not sign the employment agreement because, on what he said in his oral evidence was "*a quick look*", he was dissatisfied with its terms, mentioning two in particular. One term referred to employees having three days to seek advice on the agreement but Mr McClung understood from Mr Shirtcliffe that he was expected to sign and return the agreement that day. Another term referred to hours of work generally continuing to 5.30pm on Monday to Friday. Mr Clung considered that term conflicted with the practice of finishing work around 4pm on Fridays.

[22] He left the worksite soon after receiving the agreement, leaving the copy given to him behind. Mr McClung said when he and Mr Maguire spoke about the written agreement by telephone the next day, Mr Maguire said that if he did not like it, Mr McClung should "*look for another job*". Mr McClung did not sign the agreement but continued to work for Mr Maguire until late October that year.

[23] I have not accepted FWL's submission that Mr McClung was subsequently bound by the terms of that agreement because he had continued working for Mr Maguire in 2004 and returned to work for what had become FWL in May 2005. From 2005 Mr McClung's employment relationship was with FWL but Mr Maguire's oral evidence to the Authority investigation was that the written agreement "*never did*" apply to Mr McClung.

[24] Rather, I find, the terms of employment were those agreed orally by Mr Maguire and Mr McClung at the beginning of the periods of employment in 2004, 2005, 2009 and 2010 and confirmed by their conduct during those periods. They agreed Mr McClung would do the various fencing tasks required of him for an agreed hourly rate of pay and the work would continue during the year until Mr Maguire advised that the work had run out. The evidence of Mr Maguire confirmed that the work was to be more than casual day-to-day labouring and was intended to be continuous through that season.

[25] In terms of the analysis followed by the Employment Court in *Jinkinson v Oceana Gold (NZ) Limited*¹ Mr McClung had agreed to be available for work and Mr Maguire had agreed to provide ongoing work for as long as it was available

Notice

[26] No written employment agreements were offered to Mr McClung for his work in the 2005, 2009 and 2010 seasons and he had not signed the agreement offered to him in 2004. After 2004 Mr Maguire had not offered written agreements to any employees. In his oral evidence he said this was because his accountant had not told him he needed to do so.

[27] In the absence of a notice period agreed in writing, I find Mr McClung was entitled to one week's notice of the termination of his employment in those years. That was the period of reasonable notice that could be implied from his pay period – which was one week – and industry practice for work of that type. It was also the length of notice stated in the 2004 agreement offered to him.

Reasons for dismissal

[28] I accept Mr Maguire had business difficulties that put him under pressure on 9 July – the news of deferral of two contracts and the need to find a replacement post rammer. However it was the texts he got from Mr McClung – and information from Mr Shirtcliffe about comments said to have been made by Mr McClung earlier on 9

¹ [2009] ERNZ 225 at [52].

July – that resulted in what I find was Mr Maguire’s spur of the moment decision to dismiss Mr McClung when he saw him at the petrol station.

[29] On 8 July 2010 Mr McClung had sent Mr Maguire a text asking if he could have \$100 of his holiday pay paid with his wages the next day as he was a “*bit short of cash this week*”. Mr Maguire decided not to agree to the request and had Mr Shirtcliffe pass that information to Mr McClung the next day. In his oral evidence Mr Shirtcliffe said that Mr McClung “*lost it*” when he was given that message and “*said some things he shouldn’t have said*” but Mr Shirtcliffe “*laughed it off*”. Mr Shirtcliffe did not tell the Authority exactly what words Mr McClung had used but Mr Maguire, in his oral evidence, said Mr Shirtcliffe rang him during 9 July and reported Mr McClung’s angry reaction as including a reference to killing Mr Maguire and his children.

[30] At 2.41pm Mr McClung sent Mr Maguire a further text demanding some of his holiday pay be added to his wages due that day or otherwise he would “*raise a claim through employment relations authority*”.

[31] Mr Maguire was already annoyed about some other texts from Mr McClung. A text on 28 June asked for pay due to Mr Maguire’s son Jarrod for work done for FWL to be paid directly to Mr McClung instead. Mr McClung said Jarrod owed him \$350 and should pay the money “*b4 he gets killed in jail*”. Mr Maguire said the latter reference was because his son was due to be sentenced on a drink driving charge at the time. Mr Maguire’s text in reply to Mr McClung’s request about the money owed by Jarrod was: “*Sort it out with him not me*”.

[32] Mr McClung had also sent Mr Maguire a number of texts asking about the immigration status of a Japanese man (referred to only as Yuki) who had done some work for FWL.

Justification for dismissal

[33] Mr Maguire admitted he had dismissed Mr McClung when he was “*fired up*” and “*wasn’t really listening or reasonable*”. He admitted he “*did it the wrong way*”

but said he was “*provoked into it*” and (because of the reference to his children) “*any other bloke would have done more*”.

[34] I accept on the balance of probabilities that Mr McClung did say something on 9 July about harming Mr Maguire and his children and that comment was offensive to Mr Maguire. In his evidence Mr McClung did not recall if he had made the threatening comments attributed to him by Mr Shirtcliffe and Mr Maguire but accepted it “*may well be*” that he had. Shaun Maguire also gave evidence about a different and earlier conversation with Mr McClung in which Mr McClung talked about taking a personal grievance against a previous employer (in 2009) and then made a similar comment about harming that employer’s children. Shaun Maguire said he believed he had told his brother Mr Maguire about that conversation soon after it occurred. Mr McClung said he could not recall making such a comment to Shaun Maguire but “*it didn’t mean I didn’t make it*”.

[35] Accepting that such comments by Mr McClung most likely occurred and were provocative, the law nevertheless required Mr Maguire’s response to be that of a fair and reasonable employer, not just that of ‘any other bloke’.

[36] There were issues of conduct or behaviour which needed to be addressed with Mr McClung – and they might have required a disciplinary sanction, potentially even to the level of dismissal. He wrongly insisted on a right to be paid holiday pay in advance. He had sent abrasive texts about that and other matters.

[37] A fair and reasonable employer would have addressed concerns about Mr McClung’s conduct or behaviour up to and including 9 July by giving him notice of a disciplinary meeting, an opportunity to explain (and perhaps even apologise), and then consider with an open mind whatever explanation might have been offered. There may, for example, have been some medical or psychological cause which motivated Mr McClung’s behaviour or a personal circumstance that compelled him to press for the money. Whatever explanations Mr McClung could have offered may not have excused his behaviour but might have influenced Mr Maguire’s view on what level of sanction was fair (and which may have fallen short of dismissal). Having failed to follow such a procedure, Mr Maguire’s action in dismissing Mr McClung on the spur of the moment at the petrol station was unjustified.

[38] Mr Maguire's own judgement only ten days after the dismissal was that Mr McClung's outburst on 9 July was not so provocative or offensive that the employment had to be ended permanently. Instead, on reflection, Mr Maguire offered Mr McClung his job back.

[39] Mr McClung claimed some related acts of unjustified discrimination and disadvantage to him. On those claims I find:

(a) he had no right to be paid a cash advance on his holiday pay.

Mr Maguire had, on previous occasions paid some holiday pay in advance to Nathan McClung, including once because Nathan McClung needed the money to buy a birthday present for his daughter. However those occasions were a favour granted at the employer's discretion, not by right. I accept Mr Maguire's evidence that his willingness to agree to such requests depended on FWL's cash flow and he had checked with his accountant before declining Mr McClung's request.

(b) there was, most likely, sufficient work for Mr McClung to keep working after 9 July.

Work was available in subsequent weeks for two independent contractors – Vaughan Price and Steve Bowles – and a casual worker called Sam as well as Mr Shirtcliffe and Nathan McClung, although the work schedule did need to be rearranged as a hired replacement rammer was not as effective as the damaged rammer. Mr Maguire's offer to re-employ Mr McClung on 19 July also confirmed there was work available for him from that date onwards.

(c) a higher hourly rate paid to an independent contractor was not discriminatory.

FWL was entitled to arrange different terms with a contractor than it did with Mr McClung as an employee.

Notification of 2009 grievances

[40] Mr McClung claimed he notified Mr Maguire of two grievances in 2009 but, if his evidence of that was not accepted, he sought leave to pursue those grievances now: s114(4) of the Act.

[41] Mr McClung said he raised a grievance about FWL not honouring what he believed was an undertaking to employ him four weeks earlier in the 2009 season. He said he raised a second grievance when he went to pick up his holiday pay after finishing work in 2009. That grievance was about inadequate notice of being laid off. Mr Maguire denied either grievance was raised with him.

[42] I consider there was inadequate evidence to accept Mr McClung's account. He believed WINZ records would corroborate his contention that Mr Maguire had agreed to an earlier start but the paperwork Mr McClung was able to get did not go that far.

[43] It is more likely than not that if Mr McClung had such grievances against FWL in 2009 he would have raised them in writing. I have reached that view because Mr McClung raised a personal grievance in June 2009 against a dairy farming partnership that had employed him in 2008 and had made him redundant in February 2009. As the Authority file on that matter showed, Mr McClung raised that grievance in writing on 2 June 2009. In September he finished work for FWL and in November lodged an application to the Authority about his previous dairy farm employers. In that light it is unlikely that he lacked the knowledge or ability to do what was necessary to pursue a grievance against FWL at the same time.

2004 and 2005 grievances

[44] Similarly there was insufficient evidence of exceptional circumstances preventing Mr McClung from having raised grievances he said he had against Mr Maguire and FWL in 2004 and 2005. He was presented with an individual employment agreement in 2004 which I consider, more likely than not, had a suitable clause regarding the need to raise a grievance within 90 days. Mr McClung does not now recall the clause being in the document given to him. He had read that document quickly at the time, refused to sign it and did not keep a copy. He suggested he may have been given a version of the agreement without such a clause but I consider it most likely that he was given the standard document prepared by FWL's accountants, which included a clause about raising a grievance within 90 days.

[45] There was no reliable evidence corroborating his claim that he was too traumatised by the end of his employment in each of those two seasons to raise a grievance within 90 days.

[46] However if I was wrong in concluding the delay in Mr McClung raising grievances about 2004 and 2005 events was not occasioned by exceptional circumstances, his application leave should fall at the second hurdle set by s114(4) – that I consider it would not be just to grant leave now. The substantive grounds for the grievances are weak – he sought payment of a bonus that had been paid to some other workers who worked through to the end of 2004. However I accept and prefer the evidence of Mr Shirtcliffe and Mr Maguire that the bonus was paid only to those employees who worked on a particularly lucrative project late in 2004. No bonus was paid to any employees in 2005 or in subsequent years. On the evidence I heard, Mr McClung did not appear to have any real entitlement to be paid the bonus some other workers got late in 2004.

Wage arrears

[47] Mr McClung also claimed he was entitled to more travelling time than he was paid in 2010. However I accept Mr Maguire's evidence that the arrangement was for Mr McClung to be paid for the time from being picked up from his home gate at the beginning of the day until he left the client's gate at the end of the day – that is he was paid for the time taken travelling to work but not the time travelling home.

Remedies

Lost wages

[48] Mr McClung sought an award of lost wages for the period from his dismissal until the Christmas holidays in 2010 – a period of around 23 weeks. His average weekly earnings for the nine weeks of the season he worked that year were \$558, so the total claim is around \$12,834.

[49] Mr McClung was under a duty to make reasonable endeavours to mitigate his loss during that time. Two particular factors needed to be considered in his case:

- (i) his capacity to work; and
- (ii) whether he should have mitigated his loss by taking up Mr Maguire's offer on 19 July to return to work.

[50] There was no independent medical evidence apart from a copy of some notes provided by Mr McClung's doctor. Those showed Mr McClung was assessed as eligible for a sickness benefit shortly after he was dismissed. He remained on that benefit through the period claimed for lost wages and at the time of the investigation meeting. The notes give his diagnosis as "*anxiety with depression*". Mr McClung's own evidence was that his ill-health was caused by FWL's actions in dismissing him but he had previously suffered depression and anxiety as far back as mid-2006 and had been on a sickness benefit on other occasions.

[51] In the absence of direct evidence from a medical practitioner who had assessed Mr McClung I consider I cannot rely on his own assessment that he could not have worked at all during that period, including by returning to work for FWL as offered by Mr Maguire on 19 July.

[52] Rather, I find, there was a strong and realistic prospect he could have significantly mitigated his loss by accepting Mr Maguire's offer of returning to work – either when it was made orally on 19 July or (on Mr McClung's account) after 20 August once he saw the letter making that offer. Mr McClung argued he could not have accepted the offer because Mr Maguire threatened him during the phone call on 19 July – by saying he would "*knock his block off*" – and wanted conditions would have made his employment insecure.

[53] I do not accept that was the impediment Mr McClung made it out to be. Instead I accept Mr Maguire's evidence that he did make the 'knock his block off' comment initially but only in reference to what Mr McClung had said about his children and that Mr Maguire did – acting with the benefit of legal advice – then genuinely attempt to restore the employment relationship (by the phone call, his lawyer's letter and two requests by text on 20 July to meet and talk with Mr McClung). Had Mr McClung made similar reasonable endeavours to respond to those overtures, he could have restored his income.

[54] There is an alternative analysis. Because Mr McClung was on a sickness benefit throughout this period, he could not have worked for FWL or elsewhere anyway and therefore did not lose any remuneration he would otherwise have earned. That analysis might alter if FWL's actions were sufficiently established as the cause of Mr McClung's illness. On the evidence before me, I cannot say that was more likely than not. However, for the reasons given, I have preferred the view that wages were lost up to 20 August and an award for that period was warranted.

[55] Accordingly I assess the loss of remuneration as being for a period of six weeks only (from 12 July to 20 August 2010). The sum of \$3348 is awarded under s123(1)(b) and s128 of the Act (subject to any reduction for contribution under s124).²

Distress compensation

[56] The circumstances of Mr McClung's dismissal – in a public place and without warning – support his claim for compensation for hurt and humiliation. However I do not except that all of the psychological distress that his medical notes indicate he suffered in the following months can be attributed to the actions of Mr Maguire on that day. Those notes indicate Mr McClung already suffered some mental ill-health and there were some difficult family circumstances he had to deal with, which were not caused by or related to his dismissal. He also had some problems which he believed were created by his employer previous to FWL.

[57] Against that background I assess the appropriate level of an award under s123(1)(c)(i) as \$6000 (subject to any reduction for contribution under s124).

Contribution

[58] FWL sought a significant reduction of any remedies awarded to Mr McClung because blameworthy conduct by him contributed to the situation giving rise to his personal grievance. I agree this is required in the circumstances of Mr McClung's abrasive texts demanding money and his intemperate comments made on 9 July. He was not entitled to be paid the money on that day as he had demanded and his reaction

² Calculated on basis of \$558 times 6 weeks.

to being told no was disproportionate. The remedies awarded to him are to be reduced by one third because of that conduct.

Costs

[59] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so and a determination of costs by the Authority is necessary Mr McClung should lodge and serve a memorandum by no later than 28 days from the date of this determination. FWL should lodge any reply memorandum by no later than 14 days from the date of service. No application for costs will be considered outside this timetable without prior leave being sought and granted.

[60] While Mr McClung may not have incurred costs for legal advice and representation he may, under clause 15 of Schedule 2 of the Act, still seek reimbursement of expenses for the filing fee, the hearing fee charged for the second day, and serving witness summonses (including the travel allowance paid to those witnesses). Otherwise costs are determined under the principles summarised in *PBO Limited v Da Cruz*, including whether any award should be adjusted in light of without prejudice settlement offers, if any were made.³

Robin Arthur
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.