Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 207
3001460

	BETWEEN	MICHEAL MURPHY Applicant
	A N D	NORTHEND HOTELS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Micheal Murphy, in person Graeme Riach, Counsel for Respondent
Investigation Meeting:	26 and 27 October 2017 at Christchurch
Submissions and further information received:	2 and 17 November 2017 from Applicant 10 November 2017 from Respondent
Date of Determination:	4 December 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The applicant was not unjustifiably dismissed.

B. The applicant is owed arrears of pay in the gross sum of $1,654.63 in relation to an agreement that he be a full time employee from 22 January 2016.

C. Mr Murphy is not owed any arrears of pay in relation to his secondment to Greymouth.

D. I decline to order Mr Murphy to pay to the respondent $12,500 in damages.

E. Costs are reserved.

Prohibition from publication order

[1] Written evidence submitted by the parties together with oral evidence given at the investigation meeting referred to a customer of the respondent who took no active part in the investigation meeting. A lot of the evidence about this person was negative, and I proposed at the start of the investigation meeting that a prohibition from publication order be issued by the Authority to prevent his identity being made public.

[2] Mr Murphy opposed that proposal, on the grounds that the principle of open justice should mean that all relevant information be made public. The respondent did not oppose the proposal.

[3] On balance, I have decided to make the order. This is because the individual has had no opportunity to comment on any of the allegations about him, and his whereabouts are apparently not known. It is possible that the allegations could have an impact not only upon him, but also his family members.

[4] The customer shall therefore be referred to in this determination as "Mr X". I prohibit from publication any information which may disclose the identity of Mr X.

Venue for the investigation

[5] The Authority's investigation was originally set down to take place in Te Anau as this was where Mr Murphy's employment was and where Mr Murphy still resides. However, at the request of the respondent, in which it pointed out the logistical difficulties of arranging travel to, and accommodation in Te Anau for its witnesses and its counsel, and upon an undertaking by the respondent to pay Mr Murphy's reasonable travel and accommodation costs, the Authority changed the location of the investigation meeting to Christchurch. That was the least disruptive option for all parties.

[6] In making this change the Authority had in mind clause 20 of the Employment Relations Authority Regulations 2000 which provides that the investigation meeting interview must be held at such place as the Authority considers appropriate. Taking into account the saving of costs and time by having the investigation meeting at Christchurch I considered that Christchurch was the most appropriate venue for the investigation meeting.

Application for adjournment

[7] At the start of the Authority's investigation meeting Mr Murphy made an application to adjourn the meeting, as he had been advised to do so by a representative (who was in Auckland) whom he had spoken to by telephone only that morning. The respondent had called five witnesses to give evidence, four of whom had travelled to Christchurch from elsewhere. It had also paid for Mr Murphy's travel to and from Christchurch and for accommodation in Christchurch so the investigation meeting could take place in Christchurch instead of Te Anau.

[8] Mr Murphy says he did not know the representative's surname and would not put him on a speaker phone so that I could talk to him. Mr Murphy confirmed that he has not recently been working, and had no cogent reasons why he had not been able to obtain legal advice well before the morning of the meeting. Mr Riach said that, if I adjourned the matter and made a costs order against Mr Murphy for the wasted costs, it was unlikely that Mr Murphy would be able to afford to pay those costs. Mr Murphy did not deny that.

[9] Taking all these factors into account, as well as the fact that Mr Murphy would not have been prejudiced by not having representation at the investigation meeting given the investigative nature of the proceedings, I declined to adjourn the investigation, and warned Mr Murphy that if he declined to take part I would dismiss his claims.

[10] Mr Murphy did take part in the proceedings, and I am satisfied that he was able to present his case more than adequately, and in full, without any prejudice to him. Indeed, he was well prepared, understood his claim well, and had a number of relevant questions for each of the respondent's witnesses.

Employment relationship problem

[11] Mr Murphy claims that he was unjustifiably dismissed from his employment. He also claims that he is owed wage arrears in relation to the period from 10 April to 8 May 2016 when he was paid a salary but fell below the minimum wage rate in force at the time because of the excessive hours he worked. Mr Murphy also says he should have been allowed to have worked 40 hours a week from the start of his employment, as had been agreed, but that he was prevented from doing so. He therefore claims arrears of pay in respect of that alleged breach of contract.

[12] Mr Murphy also claims a personal grievance of unjustified disadvantage by not having been trained properly to carry out his duties as a trial venue manager, although this allegation relates to a lack of training in the TAB rules, which is one of the reasons why he says his dismissal was unjustified. I shall therefore treat this as part of the investigation into the fairness of the dismissal.

[13] Mr Murphy originally sought a penalty to be imposed against the respondent for failing to provide an employment agreement but said at the investigation meeting that he was no longer pursuing that.

[14] The respondent denies Mr Murphy was unjustifiably dismissed and denies that he suffered an unjustified disadvantage in his employment. The respondent also denies that it owes Mr Murphy any pay in arrears.

[15] On 19 October 2017 the respondent lodged a Statement of Counterclaim in which it sought the sum of $12,500, plus interest, from Mr Murphy in relation to a loss that it made through the actions of Mr Murphy in allowing credit betting. Mr

Murphy has not formally defended that counterclaim by way of a statement in reply, but confirmed at the investigation meeting that he wished to do so.

Brief account of the events leading to the dismissal

[16] The respondent owns and operates a number of hospitality outlets in the South Island of New Zealand, including hotels, bars and taverns. One of these outlets is the Moose Tavern in Te Anau.

[17] Mr Murphy was initially employed by the respondent as a service person at the Moose Tavern. There is a dispute between the parties as to whether Mr Murphy was employed on a part time contract, whose hours fluctuated between 10 and 40 hours per week, or whether he was employed on a full-time contract. Mr Murphy says that a 'verbal' agreement had been entered into between him and the venue manager at the time, Mike Taylor, but that his hours were reduced after he had an argument with Mr Taylor. This is denied by the respondent.

[18] Mr Murphy says that, when he was first employed, he did not receive a written employment agreement, but eventually got one in early November 2015, which was back dated to January 2015. In this agreement, it states that Mr Murphy was a part time employee. That is, according to the terms of the agreement, someone who works less than 40 hours a week and whose hours cannot be guaranteed. Mr Murphy says that, when he saw this, he spoke to the General Manager of the respondent, Andrew Geldard, who said that the terms of the agreement could be up for negotiation once Mike Taylor had left and the new venue manager started (Glen Taylor, who is no relation of Mike Taylor).

[19] Mr Murphy says that he spoke to Glen Taylor when he started as venue manager, and that Glen Taylor agreed to change the reference in the agreement from part time to full time. All other terms and conditions stayed the same. The Authority saw a cover sheet dated 22 January 2016 signed by Mr Glen Taylor, but no employment agreement. Glen Taylor denies that he changed the agreement, saying that he had no authority to do so. The respondent denies that there was an agreement with Mr Murphy to ever work 40 hours a week.

[20] Mr Murphy says that, in or around April 2016, he was asked to move to Greymouth to assist running an outlet there, but was placed on a salary which caused him a loss of pay. Whilst this was originally pleaded as an unjustified disadvantage claim, during the Authority's investigation meeting it emerged that Mr Murphy had willingly agreed to go on a salary, but that he had allegedly worked around 450 hours during his stint at the pub in Greymouth, so that he fell below the minimum wage rate at the time ($15.25 an hour). As this was new evidence, I allowed Mr Murphy to gather further details and for the respondent to address it. That further evidence has been submitted, and I shall address it below. Suffice to say for now that Mr Murphy's further evidence resulted in him claiming that he had worked 485 hours over a 34 day period, with one day off.

[21] In September 2015, Mr Murphy obtained his Duty Manager certification from the Liquor Licensing Authority and, at the time of his dismissal, he says he also held the role of trial venue manager, after Glen Taylor had been seconded to an outlet in Nelson. The venue manager is in overall charge of an outlet. The respondent says Mr Murphy was a trainee venue manager, although there is no dispute that he was the most senior person at the Moose Tavern on a day to day basis in September 2016.

[22] The Moose Tavern is licensed by the New Zealand Racing Board to take bets from customers through its TAB facility. Mr Murphy was one of the staff at the Moose Tavern who operated the TAB outlet. As a Duty Manager he had been trained in gaming, and harm minimisation in relation to gambling and consumption of liquor, although there is a dispute between the parties as to the extent to which Mr Murphy had been trained in the procedures and regulations governing the TAB.

[23] On 21 September 2016 Mr Murphy was the trial venue manager in charge of the Moose Tavern and was working the evening shift. Upon arriving at work, he was told by the duty manager for the day shift, Darren Hanham (known as Daz), that he had been taking bets via text message from Mr X. Mr X was a well-known customer of the Moose Tavern who frequently placed large bets with the TAB.

[24] Mr Murphy says that he asked Mr Hanham if it was okay to be taking bets from Mr X by text and that Mr Hanham said that "It was fine", although Mr Hanham denies he said that. It is common ground that Mr Murphy asked Mr Hanham if taking bets by text made the venue "a bookie", and that Mr Hanham said that the Moose Tavern was a bookie, as they took bets.

[25] It is germane to note at this point that placing bets from a customer by telephone when the money for the bet has not been tendered amounts to "credit betting" which is prohibited under s.63 of the Racing Act 2003 and s.15 of the Gambling Act 2003. It was also prohibited by the respondent's house rules. Mr Murphy says that he told Mr Hanham that he was relying on him because he had very little experience and no formal training in the TAB. Mr Hanham denies Mr Murphy said that, and disputes that Mr Murphy had little experience or knowledge of the TAB rules.

[26] Mr Hanham says that Mr Murphy told him that Mr X had a betting voucher for $5,000, for a bet that he had won but not yet cashed in, that Mr X kept "for a rainy day". He says he remembers Mr Murphy saying, "He does have the voucher", as if he were answering his own concerns.

[27] When Mr Murphy took over the shift from Mr Hanham, Mr Hanham had already placed a number of credit bets for Mr X and Mr X's total loss at that point was around $580. At one point, whilst Mr Hanham was placing the bets for Mr X, the losses had reached $1,500. In Mr Hanham's evidence he said that he was starting to feel worried when Mr X's losses reached around $1,000 towards the end of the shift.

[28] Mr Murphy took over the shift from Mr Hanham and continued to place bets on behalf of Mr X which he was communicating to Mr Murphy by text. Two further bets were placed for Mr X by Mr Murphy on the following day, 22 September. According to the respondent, the total amount of credit extended to Mr X on 21 and 22 September was $39,100 and, after successful bet pay-outs had been applied, eventuated in an outstanding amount of $12,500. The respondent says that this sum

has never been recovered from Mr X, and that it has had to account to the TAB itself for that sum. If it had been unable to have done so, it says that it would have breached its contract with the TAB, and likely lost its account with it.

[29] The respondent says that it has strict systems in place to monitor and regularly account for the handing of cash. One of the systems involves each outlet being required to submit a daily report, after trading has ceased, in respect of various aspects of its operation including bar and restaurant takings, gaming takings, TAB revenue, float levels, and the amounts of cash being held on the premises in its safes. These reports are called "the ongoings". Mr Murphy did not refer to the shortfall in cash in relation to the TAB bets in his ongoings for 21 September, nor in any subsequent ongoings.

[30] It is not disputed by Mr Murphy that he facilitated credit betting for Mr X. It is also not disputed by him that he did not report to his managers the $12,500 shortfall in the ongoings for that week. The weekly trading summary which he submitted suggested by omission that $12,685 of TAB money was being held in the venue's safe, which it was not. In fact, only $185 was actually there. Mr Murphy knew this.

[31] Mr Geldard gave evidence to say that he had spoken to Mr Murphy on the morning of Friday 23 September for around 15 minutes regarding balancing and the float and that, although Mr Murphy knew that $12,500 was missing, Mr Murphy did not mention it to him. Mr Geldard says that the banking in respect of the TAB revenue was due to be done on Tuesday, 27 September and that required payment to the TAB of the $12,500 outstanding in respect of the credit bets. As Mr X had failed to make payment (despite having been asked to do so several times by then) the respondent had no option but to fund that banking from its own resources and to make payment of the $12,500 to the TAB.

[32] Mr Murphy first disclosed what had happened on the morning of Tuesday, 27 September 2016, six days later, when he sent an email to Glen Taylor, in which he said the following:

> Subject: Sorry bro …

> I've messed up big, and I'm disappointed that it was just a dumb thing to do that messed it up …
>
> I took bets off [Mr X] over the phone, he lost and hasn't got the money like he keeps telling me …
>
> It's 12.5k …
>
> I should have told you straight away but trying to get into pay first to clear to debt …
>
> I came into work last Wednesday to take over from daz … [Mr Hanham].
>
> He was already taking bets over the phone for [Mr X] …
>
> I asked daz, cos I had put a few on for [Mr X] over the phone before, if it was ok to do? He said it was fine … I pressed further and asked if it was legal or are we being a bookie? He said we are a bookie … I told him I was relying on his knowledge cos I've done no tab training yet … he said it's fine …
>
> [Mr X] was already down about a k …
>
> That night James and I did 75mains with just the two of us on … [Mr X] would text the bets, and if I had time I would put them on … I told him I was busy and unable to count up, [and] asked him how he was doing … He's already told me in the past he writes them down … He stated he was winning …
>
> I put in two bets the following day for him … I still expected him to pay …
>
> Mr [X] is a local and is known to be a big punter … I simply did what a thought was right, I'm amazed that he has hung me out like this …
>
> Once again im sorry for letting the whole company down, I've put an awful lot of effort into the moose since I've been here and is all wasted by a dumb mistake …
>
> Mike

[33] When Mr Taylor received this email, he advised Mr Crosbie, the director of the respondent, and Mr Geldard. Mr Geldard travelled immediately to the Moose Tavern to investigate the matter with Glen Taylor. They met with Mr Murphy on 28 September and then later with Mr Hanham and another staff member separately to enquire what had happened. Mr Geldard says that Mr Murphy did not have any real explanation at the time as to how the losses had been accounted for in the reports.

[34] Mr Geldard also met with Mr Hanham who admitted that he had placed credit bets for Mr X and, after those meetings, Glen Taylor told Mr Geldard that he had placed bets for patrons who were not in the venue, via phone calls or texts, but funding the bets with his own money, not the company money or on credit.

[35] Mr Geldard initiated disciplinary proceedings against Glen Taylor, Mr Murphy and Mr Hanham.

[36] A letter was given to Mr Murphy by Mr Geldard on 27 September advising him that he wished to meet with him on 29 September in relation to the following three issues:

(a) Concerns regarding potential credit betting happening at the Moose TAB in Te Anau;

(b) Concerns regarding $12,500 shortfall in TAB banking;

(c) Concerns regarding senior management not being notified regarding TAB banking not balancing.

[37] Mr Murphy was told that he could have a representative present and was encouraged to do so. He was told that he would be given every opportunity to have his say in response to the issues and that no disciplinary action would be considered or taken until his responses and explanations had been considered and investigated. He was also told that the matters were serious and that his continued employment could be in jeopardy. With the letter Mr Geldard included copies of the relevant betting tickets, a copy of the weekly trading summary, excerpts from the company manual, a copy of Mr Murphy's employment agreement and a copy of the TAB administration book that had not been completed as required.

[38] The disciplinary investigation meeting took place on 29 September and Mr Murphy declined to have a representative present. According to Mr Geldard, Mr Murphy accepted some accountability but did not accept that he was 100% in the wrong. Mr Murphy admitted placing bets on credit in the past without checking the legality of it as he had seen both Mike Taylor and Glen Taylor do it, and as they are managers had assumed that it was ok.

[39] In the disciplinary meeting Mr Murphy said he did think that "perhaps it wasn't legal though" and so had spoken to his partner about it, and "she questioned the legality of it too", and asked if it meant they were acting as bookies. Mr Murphy said that he had no formal training on the TAB but that he now accepted accountability for the shortfall of $12,500 and now saw the harm of it.

[40] Mr Murphy also said in the disciplinary investigation meeting that Glen Taylor had shown Mr Murphy how to hide issues from company management, and that he had not felt the need to advise Mr Geldard about the shortfall at first as he had been taught that they should try to fix the problem before reporting it to senior management. He had expected that Mr X would pay the debt.

[41] Mr Geldard met with Mr Glen Taylor who denied that he had been involved with credit betting, but accepted that he had taken bets from patrons from time to time over the telephone using his own money for which he had been reimbursed. Mr Geldard said that, as that was not a practice that was acceptable to the company, he was given a final written warning. He says that Glen Taylor denied teaching Mr Murphy to hide discrepancies from management. Mr Geldard said that it was only the fact that the bets were not on the company's credit that stopped him from being dismissed.

[42] Mr Geldard then undertook a disciplinary investigation with Mr Hanham who admitted that he had, from time to time, placed bets on credit, all for Mr X and for relatively low amounts. He said that he had received only basic TAB training and did not realise that placing bets on credit was wrong and a breach of policy. Mr Geldard said that he did not necessarily accept those submissions by Mr Hanham, but an important factor was that he had not tried to conceal what he had done in any way but had reported it to his manager, Mr Murphy, at the end of the shift.

[43] Mr Geldard said that the value of the bets placed by Mr Hanham was also relevant as the amount involved was significantly less than the bets placed and losses incurred by Mr Murphy. Therefore he decided that Mr Hanham's conduct was serious enough to be given a final written warning but not to be dismissed.

[44] Mr Murphy was given a letter dated 30 September 2016 in the following terms:

> Dear Michael,
>
> On Thursday 29th September at 9.20am you attended a formal meeting at which I was present along with Shelly Byers where we discussed some matters surrounding your employment at the Moose Tavern.
>
> We discussed:
>
> 1) Concerns regarding potential credit betting happening at the Moose TAB in Te Anau
> 2) Concerns regarding $12,500.00 shortfall in TAB banking
> 3) Concerns regarding senior management not being notified regarding TAB banking not balancing
>
> You were provided with an opportunity to explain your actions and comment on these matters. You were also informed that the matters were serious and your continued employment may be in jeopardy as a result, but before any decision was made your comments would be considered by us.
>
> I have considered the points which you raised regarding the above matters, however:
>
> 1) You admit to being responsible for causing a loss of $12,500 but claim your culpability was low compared to others. I do not accept that your culpability was low given your position of authority, sole responsibility for all TAB banking and exclusive access to the safe.
> 2) The shortfall of $12,500 is a significant sum of money and you showed little remorse or concern for retrieving the deficit. I also find it seriously concerning that this was not reported immediately and in [sic] contrary to acting in good faith.
> 3) It is clear that no senior management were advised over the 5 days of the $12,500 deficit until TAB banking had to be deposited, even though there was ample opportunity to bring the matter to our attention:
>   a) Glen Taylor & I both spoke to you late last week and neither of us were informed of the $12,500 deficit. I directly asked how your balancing had been going and you informed me that all was well.
>   b) What is quite concerning is that Glen Taylor assisted your weekly balance up on Monday 26th September and even questioned your TAB commission due to it being much higher than usual. Other Moose employees were informed of the deficit on Thursday 22nd September.

c) You have provided no valid reason or explanation as to why there was a delay in bringing this matter to our attention.

4) The high degree of dishonesty and significant breach of trust and confidence is incapable of repair given your overall attitude about the situation. When you finally notified management of the error it was clear that you did not understand the severity of the situation.

5) You have allowed an unauthorised IOU facility to a customer who has not repaid the IOU of $12,500. You are well aware that the business does not offer an IOU facility to customers and it was completely negligent to allow a credit facility to the sum of $12,500. You took a significant risk, which was not yours to make, without having any regard to the consequences of your actions on the business. Based on your comments at the meeting it is clear that you still do not understand or care about the consequences of your actions.

6) There has been absolutely no sympathy or suggestion as to how the situation can be put right. Instead the debt had to be paid by Northend Hotels. The debt itself may bring the reputation of the business into disrepute with the TAB and it was completely fortunate that funds were able to be borrowed to pay the debt.

Having considered your responses regarding dismissal this letter now constitutes formal notice that you are dismissed from your employment without notice for serious misconduct.

Yours sincerely
Andrew Geldard
N E Hotels
General Manager

[45] The respondent put before the Authority a number of documents, and the following extracts are relevant to the matter to be determined. From the disciplinary procedures:

The following acts are serious misconduct and may result in summary dismissal:

- Dishonesty of any kind, including falsification of timesheets or any other document.

Under the company's house rules, the following was stated:

CREDIT is not to be extended to customers or staff unless approved by General Manager

Under the job description for the position of Duty Manager the duties included the following:

> 4) Completing all systems and procedures as directed by the GM
> …
> 9) All issues are to be documented and reported to the GM.
> …
> 14) All company moneys including OPM's (Other peoples money) must be accounted for at all times on your shift. Balance systems are in place to assist you so please use these and ask your GM for any assistance you may require.

[46] The following was stated: under the heading "Cash Management"

> 11) NEVER falsify the float, Andrew audits the venues at sporadic times and what is on the float sheet must be in the safe. This is serious misconduct.

[47] The Authority saw a copy of a photograph of the TAB till above which there were signs saying "Cash only! No Eftpos", and another sign saying, "Cash only".[1]

[48] Mr Geldard in his evidence said that, in Schedule C of the individual employment agreement between the company and Mr Murphy, it is stated: "Money may not be borrowed from any float or till under any circumstances". Mr Geldard also stated that there was a prohibition in Schedule C on gambling on shift. However, I regard these prohibitions as being a prohibition on the individual staff member from personally borrowing money, and gambling for their personal benefit. Mr Murphy's actions did not give him any pecuniary advantage.

The issues

[49] The following issues must be determined by the Authority:

(a) Whether Mr Murphy was unjustifiably dismissed from his employment by the respondent;

(b) Whether there was a breach of contract by the respondent in relation to an agreement for him to work 40 hours a week;

[1] Mr Murphy says that this was because there was no eftpos machines at that till.

(c) Whether there was a breach of the minimum wage legislation when Mr Murphy went on to a salary during the period he was working in Greymouth.

(d) Whether the respondent can recover $12,500 and interest from Mr Murphy.

Was Mr Murphy unjustifiably dismissed?

[50] The key statutory provisions governing the determination of this question are s 4 and s 103A of the Employment Relations Act 2000 (the Act). These provide as follows:

> **4 Parties to employment relationship to deal with each other in good faith**
>
> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
>
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
>
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly

[51] The Authority must not substitute its views for that of the respondent, but must assess whether the dismissal was what a fair and reasonable employer could have done in all the circumstances.

[52] Mr Murphy is relying on a number of propositions to argue that his dismissal was overly harsh. These are as follows:

a. He had not been adequately trained in the TAB, and did not know what credit betting was or that it was prohibited;

b. He had seen two venue managers credit betting;

c. He had asked Mr Hanham, who was "the TAB guru", whether taking bets from Mr X by text was acceptable and had been told it was;

d. He had been "taught" to hide problems from senior management if they could be fixed;

e. Mr Hanham and Glen Taylor had not been dismissed, even though they had done the same as he had.

Inadequate training

[53] On balance, I accept that Mr Murphy had not been thoroughly trained in the rules and regulations governing the TAB and so did not have a firm understanding of the term "credit betting" and that credit betting was specifically and definitively prohibited by the respondent, and illegal. I accept this because there is no dispute that he asked Mr Hanham whether the taking of bets by text from Mr X was acceptable. If he had been thoroughly trained, he would not have asked.

[54] However, Mr Murphy was the senior manager in the Moose on the day in question, and he is an intelligent and articulate man. He clearly knew that accepting bets by text was a questionable practice as the money for the bets was not available, or he would not have asked whether it was allowed. His evidence showed that he knew

enough about the risks involved in taking bets generally to enable the respondent to reasonably conclude that "it was completely negligent" when he allowed Mr X to run up debts on 21 and 22 September, as Mr Geldard stated in his letter of dismissal. I therefore accept that this conclusion was one that a fair and reasonable employer could have reached in all the circumstances.

Mr Murphy had seen two venue managers credit betting

[55] There was a discrepancy in the evidence between Mr Geldard's evidence and the oral evidence of Glen Taylor, and between Glen Taylor's oral evidence and his written evidence. Mr Geldard said that Glen Taylor had allowed bets from Mr X by telephone, but that Glen Taylor had covered the bets with his own money. Glen Taylor's oral evidence was that he had not placed bets for Mr X (or did not recall doing so) but had placed his own bets. Unfortunately, I must conclude that Glen Taylor was not being truthful with the Authority. It may be that Glen Taylor was worried about admitting to taking bets off Mr X when he did not have Mr X's payment, but his written warning was issued for doing that. I prefer Mr Geldard's evidence on this point. I suspect that what Mr Murphy saw Glen Taylor do was taking bets from Mr X by telephone, using his own money.

[56] Mike Taylor denied in his evidence to the Authority that had ever done credit betting himself, or allowed others to do it. Mr Geldard says he could not easily check whether Mike Taylor had carried out credit betting when Mr Murphy made that allegation at the time of the disciplinary meeting as he had left the employment of the respondent by then.

[57] The relevance of Mr Murphy's assertions is, I understand, that he had been given a tacit approval of credit betting when he saw his managers doing it. In many cases, this would be a legitimate objection to a finding of justified dismissal. That is, where an employee sees a practice carried out by more senior managers which he or she cannot otherwise have known was prohibited, it would not be just to impose a disciplinary penalty upon that employee for also carrying out the practice. Similarly,

in some cases, it would not be just to do so where the employee had been threatened with dismissal or some other adverse action if she or he did not also carry out the practice.

[58] However, it is a different matter when the employee knows, or ought reasonably to have known that the practice is prohibited and has had no pressure on him or her repeat it. Otherwise, there could be triggered a proliferation of unauthorised actions by employees using the actions of a maverick manager as an excuse.

[59] I do not accept that Mr Murphy did not know that credit betting created an unacceptable risk for the respondent, nor that he was in any way pressurised by anyone to take bets by text from Mr X.

[60] So, even if Mr Murphy is right that he had seen two venue managers do credit betting, I do not accept that Mr Murphy did not know that it was a practice which exposed the respondent to risk. This is confirmed in my mind when Mr Murphy said "Mr X always paid" and when he said that Mr X had a betting voucher for $5,000. In other words, Mr Murphy knew that there was a risk of non-payment, and Mr X covering his bets was the key to eliminating the risk of the entire transaction. However, Mr Murphy could not 'know' definitively that Mr X would always pay in the future. To think otherwise would have been either a wilful shutting of his eyes to the risk, or demonstrating complete naivety, which I do not accept Mr Murphy suffered from.

[61] Mr Murphy also knew that the voucher he believed Mr X had was only for $5,000 but he did not keep track of the outcome of the bets, to see whether Mr X was losing bets beyond a value of $5,000.

[62] Therefore, as above, I believe that a fair and reasonable employer could have concluded in all the circumstances that, even if Mr Murphy did see venue managers do credit betting, Mr Murphy still knew it was an activity that exposed the respondent to unacceptable risk and that he shut his eyes to that risk.

Mr Hanham said that taking bets from Mr X by text was acceptable

[63] I accept that this occurred, as did the respondent I believe, although Mr Hanham did not agree that he had said that taking bets by text from Mr X was fine, or that Mr Murphy had said to him that he was relying upon him. However, Mr Geldard concluded that Mr Murphy should have asked a superior about his doubts, not Mr Hanham.

[64] Mr Murphy made much in his evidence of being the trial venue manager. He accepted that role when it was offered to him (on his evidence), and he relished the responsibility by all accounts. However, when he had an uncertainty about the legitimacy of taking bets from Mr X by text, on his own evidence he took the word of a more junior employee regarding it, rather than checking with his manager Glen Taylor, or Mr Geldard. Alternatively, he could have asked the TAB itself.

[65] On this basis, I accept that the respondent not accepting Mr Murphy's assertion that Mr Hanham's reassurance excused Mr Murphy's actions was a conclusion that a fair and reasonable employer could have come to in all the circumstances.

Mr Murphy had been "taught" to hide problems from senior management if they could be fixed

[66] Mr Murphy relies on this argument to seek to persuade the Authority that him failing to immediately tell his managers of the $12,500 deficit in TAB takings was not out of the ordinary, and should not have been used by the respondent as a reason to dismiss him.

[67] The respondent's witnesses accepted that the staff and managers would try to find the cause of variances and deficits, but said that that was not hiding the problem. Mr Murphy pointed out a text exchange he had had with Glen Taylor on 27 September 2016 in which the deficit was discussed. Mr Murphy suggested that Glen Taylor was indicating that he would only tell Mr Geldard and Mr Crosbie if he did not hear from Mr X soon. That is, that Glen Taylor was prepared to hide the deficit from Mr Geldard and Mr Crosbie to give Mr X time to pay.

[68] The next text from Glen Taylor nine minutes later says that he was going to tell Mr Crosbie. However this is because Mr Crosbie was about to book a flight for Mr Hanham to attend training in another town. Glen Taylor knew that Mr Hanham would be needed at the Moose to help in the investigation of the deficit, and so told Mr Crosbie.

[69] On balance, I believe that there was a policy operating at the Moose not to tell senior management of problems if the problem could be fixed. I also believe this went beyond small matters, and encompassed matters which senior managers would otherwise have liked to have known. However, I do not accept that Mr Murphy was 'taught' to do this, in the sense that Mr Murphy knew no better. I believe that it is much more likely this was a practice in which the staff (including Mr Murphy) and the venue manager were complicit. Mr Murphy is an intelligent man who will have known that hiding problems from senior management was against company policy and against its interests.

[70] Furthermore, Mr Murphy did more than simply fail to tell his managers of the deficit for six days. He positively allowed several daily ongoings and a weekly summary report to be sent to head office in which the impression was created that $12,500 was in the venue safe. That is to say, he deliberately misled his employer. He did this while hoping that Mr X would make good the deficit, but one of the express written rules of the house applying to duty managers was that what was 'on the float' must be in the safe. The same principle must apply to TAB takings.

[71] It is clear from Mr Geldard's letter of dismissal that a significant factor in his decision to dismiss was that Mr Murphy had chosen not to tell Glen Taylor of the shortfall for five days, despite having had opportunities to do so. He regarded this as dishonesty, and concluded that this was a significant breach of trust and confidence which was incapable of repair.

[72] On balance I believe that the respondent's conclusion that Mr Murphy had been "taught" to hide matters was not a valid excuse was one that a fair and reasonable employer could have come to in all the circumstances. I also agree that, in all the circumstances, a fair and reasonable employer could have concluded that deliberately hiding a matter which he knew his employer would have wanted to know, when he was tasked with delivering daily ongoings, amounted to dishonesty on the part of Mr Murphy. I also agree that a fair and reasonable employer in all the circumstances could have concluded that there had been a significant breach of trust and confidence which was incapable of repair.

Mr Hanham and Glen Taylor had not been dismissed, even though they had done the same

[73] This is a disparity of treatment argument that Mr Murphy is raising. In the case of *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)*[2] the Court of Appeal agreed with the plaintiff that the Court (and hence, the Authority) must consider three issues when a disparity of treatment argument is being considered. These three issues are:

a. Is there disparity of treatment?

b. If so, is there an adequate explanation for the disparity?

c. If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[74] Addressing the first question, I am satisfied that there was disparity of treatment, as Mr Murphy was dismissed while Mr Hanham and Glen Taylor were not.

[75] Is here an adequate explanation for the disparity? In Glen Taylor's case, I believe there is, as Mr Taylor was found to have carried out credit betting using his own money; that is, without exposing the company to risk of financial loss. He did not admit he had been doing this until Mr Murphy's shortfall emerged, but then there

[2] [2005] ERNZ 767

was no loss to admit to. I believe that there is enough of a significant difference between the cases for Glen Taylor's situation to be distinguished.

[76] It is less clear cut in Mr Hanham's case. He allowed credit betting and put the company's money at risk. Mr Geldard said he did not necessarily believe Mr Hanham when he said he had had only basic training and did not know what he had done was wrong.

[77] Mr Geldard said that an important differentiating factor was that Mr Hanham did not attempt to conceal what he had done in any way, "but reported it to his manager". I regard this explanation as somewhat disingenuous. Mr Hanham simply told Mr Murphy that Mr X was placing bets by text when Mr Murphy took over the bar. He did not 'report' it in the sense that something bad had occurred, but was simply doing a hand over. Indeed, Mr Hanham's evidence to the Authority was that Mr Murphy saw a text come in and had asked if it was Mr X who had sent it.

[78] On balance, I believe there is no significant difference between what Mr Hanham did and what Mr Murphy did. They both allowed credit betting, knowing, or suspecting that what they were doing was not allowed. They both did it taking a risk, and both jeopardised the company's money and reputation.

[79] This takes me to the third element of the test. Was Mr Murphy's dismissal justified notwithstanding the disparity for which there is no adequate explanation? On balance I believe it was. It is not the case that Mr Murphy carried out the actions he did knowing that a previous employee had been disciplined for the same action and not been dismissed. I believe that the dismissal of Mr Murphy was justified, and I do not accept that Mr Hanham being treated more leniently renders Mr Murphy's dismissal unjustified. Mr Hanham was lucky not to have been dismissed, but that does not render Mr Murphy's dismissal unjustified. Indeed, Mr Murphy said in his submissions that Mr Hanham should have been dismissed, but also said that Mr Hanham 'didn't know about credit betting either'.

The overall finding

[80] Mr Murphy has not complained about the procedure adopted by the respondent in the disciplinary investigation meeting, and I find no obvious or material flaws in it that could have rendered the decision to dismiss unsafe. I find that there was a sufficient investigation; the concerns were fairly put to Mr Murphy; he was given a full opportunity to respond to the concerns, and I believe that the respondent genuinely considered Mr Murphy's responses.

[81] As for the substantive justification for the dismissal, I find it was sound, for all the reasons I have set out above. Mr Geldard found that he had lost all trust and confidence in Mr Murphy, and I find that a fair and reasonable employer could have made the same finding in all the circumstances. The dismissal was therefore justified.

Is Mr Murphy entitled to the shortfall between the hours he worked and the 40 hours a week that he said he was entitled to work?

[82] Mr Murphy says that Mike Taylor agreed with him that he could work 40 hours a week (or at least as a full time service person) from the beginning of his employment. Mike Taylor denies this. I accept Mr Taylor's evidence as it is inherently unlikely that a tavern would have agreed to take a service person on full time, especially someone without any hospitality experience. In addition, the employment agreement signed by Mr Murphy when he was first employed says that Mr Murphy was a part time employee.

[83] Mr Murphy also says that Glen Taylor changed his employment agreement to a full time one on 22 January 2016 when a cover sheet was signed by both of them. Mr Murphy relies on the cover sheet and a letter from Mike Taylor dated 4 November 2015 in which he stated that the terms and conditions of Mr Murphy's contract would be reviewed when Glen Taylor was in place at the Moose.

[84] Glen Taylor says he signed the coversheet to say that he had given a copy of the agreement to Mr Murphy when he asked for it and that he did not amend the agreement to a full time one. However, the cover sheet states "I Micheal Murphy agree that I have been provided with a complete copy of my employment contract upon returning it to the Moose Tavern". It would not have stated that if Mr Murphy was simply being handed a copy of his existing agreement.

[85] On balance, I accept Mr Murphy's evidence that, with effect from 22 January 2016, he was employed as a full time employee.

[86] The definition of a full-time employee in the agreement is an employee "employed for a minimum of forty (40) hours. This means that, where Mr Murphy was employed for less than 40 hours in any week from 22 January 2016, he is entitled to be paid the shortfall. This occurred on 15 occasions according to a spreadsheet produced by the respondent, which also shows an aggregated shortfall in hours of 121.25 hours. However, taking into account annual leave taken during the period, this reduces to 14 occasions and 101.25

[87] Mr Murphy received a pay increase from $16 an hour to $16.50 an hour in the week ending 21 February 2016. The dollar shortfall for the period when he was entitled to $16 an hour amounts to $512 gross, whereas the dollar amount of the shortfall after his pay had increased amounts to $1,142.63 gross. This is a total shortfall of $1,654.63.

Was there a breach of the minimum wage legislation when Mr Murphy went on to a salary during the period he was working in Greymouth?

[88] Mr Murphy has estimated the hours he worked while seconded to the Australasian Hotel in Greymouth. He has estimated that he worked 485 hours over a 34 day period, with one day off. The period in question starts on 4 April 2016, and ended on 7 May 2016. He estimates that he worked 19 hours on 4 consecutive occasions and 20 hours on 6 occasions.

[89] This estimate is denied by the respondent and it has produced a number of documents in evidence, including flight details of Mr Murphy's journey to and from Greymouth, ongoings, and alarm records for the venue.

[90] The respondent says that Mr Murphy was seconded to Greymouth to assist in the restaurant, as they were short staffed and needed Mr Murphy to address some training issues. It says that Mr Murphy did not complete timesheets, and it seems it does not have time records for the period in question.

[91] The records that were produced show that Mr Murphy worked in Te Anau on 4 April, and that, although he claims to have worked 12 hours that day, a timesheet produced by the respondent shows he only worked for 5 hours. On two other occasions, alarm records show that Mr Murphy has claimed to have started work before the alarm was deactivated. He also claims to have finished work after the alarm was set on 9 occasions.

[92] In addition, Mr Murphy implies that he worked open to close shifts during his entire secondment, which the respondent says was not the case, as he only signed onto the float sheets on two occasions.

[93] The respondent also produces other evidence that tends to show that Mr Murphy has overstated his hours, in some cases significantly. Mr Murphy was given the opportunity to comment on this evidence from the respondent, but he declined to do so.

[94] Section 132 of the Act provides that, where the employer has failed to keep wage and time records, and that failure has prejudiced the employee's ability to bring an accurate claim under s 131 (which includes a claim where payments of wages have been made at a rate lower than is legally payable) the Authority may, unless the defendant proves that the claims are inaccurate, accept as proved all claims made by the employee in respect of, inter alia, the hours worked by the employee.

[95] In this case, I am satisfied that the respondent has proved that Mr Murphy's claims are inaccurate. It would appear that the problem lies in Mr Murphy not having signed a time sheet each day. Given that Mr Murphy appears to have seriously overstated some of the hours he says he worked, I cannot safely accept his evidence in this regard. I therefore, reject his claim.

Can the respondent recover $12,500 and interest from Mr Murphy?

[96] The basis for this claim is a breach of contract. Section 162 of the Act provides that the Authority may, in any matter related to an employment agreement, make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts, including Part 2 of the Contract and Commercial Law Act 2017 (the 2017 Act) and the Fair Trading Act 1986.

[97] The 2017 Act provides, at s 49, that a party to a contract may recover damages for the breach of a contract by another party to the contract.

[98] Under clause 10.1 of the employment agreement, Mr Murphy was contractually obliged to "at all times comply with all reasonable and lawful instructions issued by the employer and [the employee] shall comply with all rules and procedures established for the conduct of the employee or employees in general".

[99] At clause 11.1 the agreement also requires employees to comply with house or work rules and policies. It also refers (at clause 17.1) to the employee being "required to perform a number of duties under this Agreement that are subject to statutory governance including, but without limitation, the Sale of Liquor Act 1989, the Gambling Act 2003 and the Smoke-free Environments Amendment Act 2003 and related regulations". In clause 17.2, it states:

> Failure by the employee to meet the standards, satisfy the criteria or in the event of a breach of any requirement of any relevant statute or regulation, either before commencing employment or during the employment may adversely affect on-going employment".

[100] The respondent also refers to the agreement stating that money may not be borrowed from any float or till and that there was to be no gambling on shift. I do not consider that these obligations were breached by Mr Murphy as I believe they apply to money being borrowed for the employee's own use, and the employee gambling personally.

[101] However, I accept that the terms of the Operations Manual, which included, in two separate parts, a prohibition on credit being extended to any customer without the prior consent of management, come under the description of house or work rules, which paragraph 11.1 of the agreement states must be complied with by the employee.

[102] The respondent argues that Mr Murphy, having allowed credit betting in breach of express terms of his employment agreement, has caused it a direct loss of $12,500 which it has been unable to recover from Mr X. I accept that submission.

[103] Applying the normal considerations when assessing the recovery of loss after the breach of a contract, I can find that the loss of $12,500 flowed directly from Mr Murphy's breach of clause 11.1 the employment agreement. The loss was within the reasonable contemplation of the parties (so that the test of remoteness is satisfied) and the respondent took steps to mitigate its loss (by making several attempts to recover the $12,500 from Mr X, who refused flatly to pay the money and whose whereabouts are now unknown). It appears therefore that, all other things being equal, the respondent can make out a case for the recovery of the $12,500.

[104] However, there are two other considerations that are particularly pertinent to the employment context to consider. The first is the effect of *JP Morgan Chase Bank NA v Robert Lewis*[3]. In this the Court of Appeal examined the jurisdiction of the Authority to determine matters that arise between an employee and an employer and whether they will always constitute an 'employment relationship problem', for which the Authority has exclusive jurisdiction under s 161 of the Act. Section 5 defines an employment relationship problem as including a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship.

[3] [2015] NZCA 255

[105] In *Lewis* the Court of Appeal, at [97], came to the view that the recovery of damages from an employee who had stolen from her employer was not within the exclusive jurisdiction of the Authority because, although the claim may have had its origins in the employment relationship in the sense that the relationship created the opportunity for the theft, the employee's conduct was such as would have made her liable to the employer without any such relationship. The Court stated:

> "In other words, the existence of the employment relationship was not a necessary component of many of the causes of action that could have been asserted against her. That indicates that the essence of the claim was not employment related and should not have been regarded as within the Authority's jurisdiction."

[106] Applying the test of whether Mr Murphy's employment was a necessary component of the loss caused to the respondent by his breach of his employment agreement, I conclude that it was. What Mr Murphy did was an authorised act (placing TAB bets on behalf of the respondent's customers, which was part of his duties) but in an unauthorised manner. Unlike theft, which is an unauthorised act unrelated to the employee's duties, the loss of $12,500 would not have occurred except by Mr Murphy operating the TAB terminal as part of his duties, but not taking the money for the bets. *Lewis* therefore does not prevent the Authority from having the jurisdiction from determining the claim of the respondent.

[107] There is a second consideration. The Employment Court has addressed the issue of an employer trying to recover losses from an employee in *George v Auckland Council* [4] and *Rainbow Falls Organic Farm Ltd v Rockall*.[5] Those cases involved acts of negligence in the first case and what was characterised as poor performance by an employee in the second. In *George*, Judge Inglis, as she was then, stated at [146] and [147] (citation omitted):

> [146] An elderly House of Lords judgment, *Lister v Romford Ice & Cold Storage Co Ltd*, has generally been thrown up to ward off arguments aimed

[4] [2013] NZEmpC 179
[5] [2014] NZEmpC 136

> at limiting an employer's ability to recover against an employee for damage caused by them in the course of their duties. The House of Lords found that the employee owed his employer an implied duty to exercise skill and care in the performance of his duties and that there was no implied term in the employment contract precluding the employer from seeking indemnity from the employee where the employer had been found vicariously liable for the employee's negligence.
>
> [147] I have reservations about whether *Lister* remains the stumbling block that it has previously been perceived to be. Rather it 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.

[108] Whilst *George* does not definitely find that an employer may not recover damages caused by an employee's act of negligence, it is generally followed by the Authority as persuasive authority for declining to do so.

[109] It is my view that Mr Murphy was not negligent, but was actually reckless, knowingly taking a risk in allowing the credit betting. Negligence is in essence an act of carelessness, whereas what Mr Murphy did was, in my view, a degree higher than that in culpability; that is, knowing the risk but recklessly shutting his eyes and mind to it and to the consequences of the risk eventuating.

[110] However, in the dismissal letter the respondent characterised Mr Murphy's act as "completely negligent". It is arguable that it would be unjust to allow the claim against Mr Murphy when it has found negligence and when *George* is strongly persuasive that a claim against a negligent employee should not be entertained.

[111] In addition, the obiter remarks in *George* also discuss the difference between wilful misconduct causing loss on the one hand and negligence on the other. Whilst Mr Murphy's misconduct was not borne out of negligence, it was also not wilful, in the sense that he wilfully caused loss to the respondent. He was reckless as to the risk of causing loss. It is not clear that there is a bright line with negligence on one side and recklessness on the other, whereby a claim for damages arising from negligence should not be permitted whereas a claim for damages caused by recklessness should be.

[112] In addition, in *Rainbow Falls*, Judge Inglis made reference to the "double-whammy" effect of dismissal plus a damages claim sitting uncomfortably with the statutory mechanisms for resolving employment relationship issues, which "may have a chilling effect on employees considering a personal grievance, concerned not to prompt a retaliatory damages claim in response"[6].

[113] I note that the claim against Mr Murphy was not lodged until 19 October 2017, nearly 10 months after the statement of problem was lodged, and only three working days before the start of the Authority's investigation meeting. It is therefore tempting to conclude that this was also a retaliatory action. If the respondent was genuinely concerned to recover the $12,500, one may have expected it to have lodged the claim when it lodged its statement in reply.

[114] There are a number of cases in which the Authority and the Employment Court have awarded damages to employers, but all of those which I have found

[6] At [57].

preceded *Lewis*, *George* and *Rainbow Falls*[7]. It is therefore arguable that their binding and/or persuasive authority has been undermined by the latter judgements.

[115] Whilst the financial situation of Mr Murphy is not relevant to the Authority's jurisdiction to award damages to the respondent, it is worth noting as an aside that Mr Murphy has almost no chance of paying the damages sought. He is on a benefit and does not work. He said he could not even afford to travel to Christchurch for the investigation meeting, which the respondent accepted, as it paid for his travel and accommodation. To order him to pay $12,500 damages to the respondent would not only be pointless, but would result in him being burdened with a debt which he would be likely to have hanging over him for many years.

[116] For all these reasons, and in the absence of binding authority to persuade me to the contrary, I decline to award damages to the respondent.

Conclusion

[117] Mr Murphy does not succeed in his personal grievance for unjustified dismissal or his claim for arrears arising from an alleged breach of the minimum wage legislation. He does succeed in his claim for arrears of wages arising out of the failure of the respondent to provide him with 40 hours of work each week after 22 January 2016 until his dismissal.

[118] Finally, the counterclaim against Mr Murphy does not succeed.

Orders

[119] I order the respondent to pay to Mr Murphy the gross sum of $1,654.63 in relation to arrears of pay owing since 22 January 2016.

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[7] I refer, for example, to *Mason Engineers (NZ) Ltd v Hodgson* [2011] NZEmpC 147, *Raukura Hauora Trust v Nathan* [2010] NZEmpC 156, *Recon Professional Services Ltd v Andrews* ERA Wellington, WA157A/05 and *Flight Center t/a Infinity Holidays v Latu* ERA Auckland AA187/04 *Goodman v Rooney Earthmoving Ltd* [2012] NZERA Christchurch 102.

Costs

[120] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. However, if they are unable to reach agreement within 14 days of the date of this determination, if the respondent seeks a contribution to its legal costs, Mr Riach must, within a further 14 days, serve and lodge a memorandum of counsel setting out what contribution it seeks, and the basis of that. Mr Murphy will then have a further 14 days within which to serve and lodge a memorandum in reply.

David Appleton
Member of the Employment Relations Authority