

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 63/10  
5129750

BETWEEN                      BEN PETERS  
   Applicant  
  
AND                              LSG SKY CHEFS NEW  
   ZEALAND LTD  
   Respondent

Member of Authority:      Helen Doyle  
  
Representatives:            Stephen Bradshaw, Counsel for Applicant  
   Garry Pollak, Counsel for Respondent  
  
Investigation Meeting:     17 September 2009 at Queenstown  
  
Submissions Received:    25 September 2009 for Applicant  
   22 October 2009 for Respondent  
  
Determination:              11 March 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Ben Peters was appointed to the position of Customer Services Manager for the Queenstown operation of LSG Sky Chef New Zealand Ltd (LSG) on 31 May 2004. LSG provide services to airlines including the preparation of airline meals. Mr Peters was in his role required to manage and control all daily activities of the Queenstown Customer Service Centre. Mr Peters was a working manager and over 50% of his duties entailed driving and loading.

[2]      Mr Peters says that he was unjustifiably constructively dismissed from his employment following a meeting on 14 April 2008 when he was given a choice of either being dismissed from his position or being demoted to a position without managerial responsibilities consisting of driving and loading at a lower salary.

Mr Peters did not accept the offer of a lesser position and duly resigned on 19 May 2008 giving one months notice.

[3] Mr Peters seeks reimbursement of lost wages from 20 June 2008 until he obtained new employment on 18 August 2008 in the sum of \$8,000 together with compensation of \$20,000 and costs.

[4] LSG do not accept that that Mr Peters was unjustifiably dismissed on or about 14 April 2008. LSG say that an external audit completed on 14 March 2008 showed significant failings in its Queenstown operation and these were considered to be high risk to the business. LSG said it was required to conduct an internal investigation to determine what had gone wrong, and why and how it could be corrected. During a series of meetings with Mr Peters and his representative, LSG said that they were not satisfied that they could have confidence in Mr Peters' ability to be left to solely manage the operation, and put to him that his employment be terminated or that he take up a lesser role with the company.

### **The Issues**

[5] The issues for the Authority to consider in this matter are:

- In accordance with the test set out in s.103A of the Employment Relations Act 2000 as to justification whether actions of LSG and how LSG acted were what a fair and reasonable employer would have done in all the circumstances leading up to and at the time there was an offer of a lesser position;
- If there was a breach or breaches of LSG's obligations then were they of such seriousness so as to be foreseeable that Mr Peters would not be prepared to work under the conditions as they existed at the time;
- Was Mr Peters therefore unjustifiably constructively dismissed; and
- If that is the finding then what remedies is Mr Peters entitled to and are there issues of contribution or mitigation.

**Were the actions of LSG and how LSG acted were what a fair and reasonable employer would have done in all the circumstances leading up to and at the time there was an offer of a lesser position?**

[6] LSG has 200 kitchen facilities in 49 countries and approximately 30,000 employees world-wide. LSG complies with a globally recognised food safety programme called HACCP (hazard analysis and critical control points) in terms of food safety control points. The HACCP programme requires regular audits on food safety and process control and the Queenstown branch is audited twice a year by LSG and a minimum of every two years by an independent auditor.

[7] Mr Peters managed three permanent employees at LSG Queenstown branch of whom two were chefs. In the peak season there were also some temporary employees who fell under his management.

[8] Mr Peters was aware that an audit was to take place on 14 March 2008 and that the audit would involve an external auditor. When the audit was duly carried out it showed significant failings that were considered to be of high risk to the business. The General Manager of Queenstown and Christchurch, David Dear, said that the result of the audit came as a complete shock and surprised all those involved.

**17 March 2008**

[9] Mr Dear had two discussions on 17 March with Mr Peters at separate times about the audit results. Mr Peters gave evidence that he formed the view from that fairly brief meeting that Mr Dear was *not very happy about the audit results*. The notes taken by Mr Dear provide that Mr Peters stated amongst other matters that he did not believe he had training to do for all that was required in the role.

[10] Mr Peters and Mr Dear met again later that same day. Mr Peters advised that Mr Dear that he wanted to stay in his management role and Mr Dear suggested that Mr Peters talk with his partner and decide whether he wished to go down the disciplinary path or consider stepping down with a revised role. Mr Peters advised Mr Dear that he wanted to stay in the role and that he was prepared to take the risk that a disciplinary process could have a worse result.

[11] At that point I accept that Mr Dear decided the matter justified the commencement of a disciplinary process and on 18 March 2008 Mr Peters was given a letter inviting him to attend a disciplinary meeting on 25 March 2008. Mr Peters

was advised in the letter of 18 March that the matter was serious and that he could attend the meeting with a representative.

**25 March 2008**

[12] Mr Peters attended the meeting with his representative John Roach. Mr Dear attended with Marie Park, the Human Resource Manager. Notes were taken of the meeting by Ms Park, although it is accepted by both parties that they were not a verbatim record. Nevertheless the notes are quite full.

[13] The meeting started by Mr Dear emphasising the seriousness of the matter. Mr Peters confirmed that he had read the audit report of which he had been provided a copy, although he did state that he had looked through it quickly. There was some discussion about a dishwasher that was not working at the time of the audit and that Mr Peters had not escalated that to Mr Dear so that he could authorise it to be fixed before the audit.

[14] The meeting then moved to Mr Dear and Ms Park advising Mr Peters what they wanted from the process and in terms of his response. It would have been clear to Mr Peters and his representative from that first meeting that LSG wanted to know in relation to the audit and what went wrong, how Mr Peters would fix it and how that would be sustained in the future.

[15] These issues were referred to several times during the meeting. Mr Peters said at the first meeting that he did not fully understand the audit report. He explained, for example, that the chef Rachel, was more involved than he was in terms of some matters and he did not know for example what a chef's table was. Mr Dear responded that Mr Peters was required to be aware of the requirements and basic rules with respect to chef's tables and the receiving of products, and to ask for help if necessary. Ms Park said that when she had walked around the operation that morning she saw the instructions on the wall. She said that Mr Peters therefore knew the processes to be followed. Ms Park referred to a concern arising from the audit that food was not covered and she said that when she had walked around the operation that morning she had also noted that food remained uncovered.

[16] Mr Peters said that he expected chefs to do what they were required to do and that he *stuck to the practical*. Mr Dear said at the meeting that he did not expect Mr Peters to tell the chefs how to undertake the cooking but in terms of the managerial

role, he was required to ensure that processes were followed. Ms Park said that with the exception of thawing in the audit, the other issues were not solely chef related.

[17] Mr Dear confirmed that he was not stating Mr Peters was responsible for the audit failing but that he needed to manage what was happening and that required to ensure that staff completed tasks, and that matters were escalated if some assistance was required.

[18] Mr Roach wanted clarification as to whether it was a *pull your socks up and pay more attention* situation. Mr Dear and Ms Park confirmed that it was not a *pull your socks up* type of response required because of the seriousness of the issues, and that they expected more than that from Mr Peters.

[19] After a break the meeting proceeded on the basis that Mr Peters and Mr Roach considered that the matter was a team matter and that Mr Peters needed to talk through the issues with the staff. Mr Dear asked whether Mr Peters was saying that he did not have any idea regarding the specifics and was unable to come up with an answer. Mr Peters responded that it was unfair to be asked for an answer at that stage.

[20] Mr Dear reiterated that he needed to ensure that there was a plan in place so that he could understand what went wrong and how to fix it and that he needed to be able to safely leave Mr Peters to run the Queenstown branch. Mr Dear confirmed when asked that no decision had been made about any disciplinary action but that the organisation needed to ensure that food handling was safe and needed to know what Mr Peters was going to do differently to achieve and maintain the standards, or further steps would be taken. Mr Peters agreed he would talk to staff that evening and then would respond to Mr Dear and Ms Park the following day.

## **26 March 2008**

[21] Ms Park had a short meeting with Mr Peters on 26 March 2008 to discuss the Rachel's involvement in the audit. There were some brief notes taken during that meeting and I accept that they broadly reflect the nature and purpose of the discussion. Considering the responses as set out in those notes, I accept it was not unreasonable for Ms Park to conclude from Mr Peters' response that whilst he acknowledged he could have managed Rachel more closely, he did not clearly place any blame for the audit findings on Rachel. Later that same day there was a resumption of the disciplinary process as agreed to the previous day.

[22] Mr Peters and Mr Roach attended the meeting as did Ms Park and Mr Dear. Ms Park took notes at the meeting. Mr Peters opened by saying that at that point there was no quick fix answer but by the next audit he gave an assurance that there would be a marked improvement. Mr Peters said he could not give solutions in writing overnight. Mr Roach responded that they saw it as a *we issue and that in the next audit if there was no improvement then action could be taken.*

[23] A short break was then taken and Mr Dear on return to the meeting said that he was not comfortable with Mr Peters' responses and they did not give him the required level of security he needed in leaving Mr Peters in charge. Mr Dear said that a decision had been made to temporarily relieve Mr Peters of his management duties but that he would retain the same salary and would undertake many of the same duties that he had been up to that time.

[24] Between that date and the next meeting on 14 April 2008 Mr Peters was relieved of his management duties but continued with his driving and loading without reduction of his salary.

[25] It was expected that Mr Dear and Ms Park would talk to Rachel about the audit outcome, but as it transpired, no meeting was ever held because Rachel was unwell and on sick leave and then resigned from her employment.

[26] On 1 April 2008 Mr Peters wrote a letter to Ms Park and requested a copy of the following:

- The minutes of the meeting;
- Clarification in writing about his employment and how long the temporary arrangement would last;
- Description of his new responsibilities;
- The responsibilities of the new manager; and
- A list of issues resulting from the audit and an explanation of how the company would assist him to address these issues.

Mr Peters reiterated in his letter that he was willing to work to the best of his abilities to improve the performance of the Queenstown operation and that he would continue

to act in good faith and co-operate to achieve this. He indicated that he did not believe the process followed to date gave him adequate time to either consider the request for information or put in an adequate response. Mr Peters said that he did not consider his input had been properly considered and the arrangement imposed was not fair.

[27] Ms Park responded by letter dated 2 April 2008 attaching the meeting minutes. She also said in her letter that Mr Peters had a copy of the audit report which specified the issues raised by the auditor. Ms Park said that he would note a number of misconduct and serious misconduct issues were identified arising from the serious failure to comply with the food safety system. Ms Park said that in addition to this LSG required Mr Peters to explain how these issues came about, what corrective action he would take and how the changes would be sustained.

[28] In terms of the response time Ms Park noted that Mr Peters had had a copy of the audit report for approximately one week and that LSG believed that this was sufficient time to review it and formulate a basic plan for corrective action. She confirmed in the letter that LSG were not looking for a detailed written plan, merely an outline of the changes that Mr Peters would make and how they would be maintained.

[29] Ms Park also set out that the audit caused serious concern and required immediate action to ensure compliance with the food safety system. She set out that that meant some steps had to be taken, including temporarily transferring all CSC decisions to either Mr Dear or his delegate. In these circumstances Mr Peters' other duties and responsibilities, pay and benefits would remain the same until the investigation was completed and the decision as to the outcome reached.

[30] A further meeting was not held until 14 April 2008. I accept that the delay in this regard was because LSG was still hopeful that a meeting would be able to be held with Rachel.

#### **14 April 2008**

[31] This was a long meeting. Mr Peters attended this meeting again with Mr Roach and Mr Dear with Ms Park. Ms Park again took notes of the meeting although again they were not verbatim. An overview of the concerns was provided at the start of the meeting, and there was a discussion about some specific issues with respect to

items in the freezer and chiller, date labels, and food being left uncovered. During the discussion it was raised that these related tasks were not directly undertaken by Mr Peters but because he managed the staff, he needed to ensure correct processes were followed. Mr Dear discussed HACCP's logs that Mr Peters knew how to fill out and had done before but these were either not done or were missing, and there was no follow-up. Mr Dear said that some of the matters in the audit may have been beyond Mr Peters' area of expertise, but these were not escalated to Mr Dear's level and other things easily fixed were not in fact fixed or repaired.

[32] There were some breaks during this meeting. Following the first break Mr Roach wanted to know if anything Mr Peters had done could result in his dismissal. There was some discussion about the stress and the delay.

[33] Ms Park advised that some of the issues were serious misconduct as they related to food poisoning which could potentially be lethal and that the delay was because the company had been unable to talk to Rachel for reasons out of its control. There was some unrecorded discussion about responses that were made and then Mr Dear recommended that Mr Peters take a break, ring his lawyer and get some advice about how to respond to the allegations because Mr Dear did not want to make a decision based on what Mr Peters had said, as it was not enough and he wanted a better response. Mr Dear also reassured Mr Peters that he had not made a final decision when asked, and that no one had been arranged to take over the kitchen.

[34] Mr Peters did not take an opportunity to talk to his lawyer and the meeting continued with a discussion about the particular issues. There was then another break and Mr Dear on his return summarised where the issues were. Mr Peters confirmed that he did not have anything further to add.

[35] The meeting concluded with Mr Dear advising that Mr Peters' did not leave him with the comfort that they could reinstate him to his managerial role but they were happy to assist Mr Peters with another role within the organisation. Mr Peters was scheduled at that time to shortly take some leave, and it was decided that he would have a written offer of the new position before he went on leave, so that he could consider it. Mr Peters advised that that would be helpful. Mr Dear advised if Mr Peters did not wish to stay on he was happy to give him a reference but that his desire was for him to remain with LSG.

[36] Mr Dear acknowledged at the same meeting that the change in role would be uncomfortable at times, but said he thought this could be worked through. Overall the meeting was quite friendly and reasonably positive.

[37] Mr Peters took Ms Park to the airport. It is very likely from notes taken by Ms Park at that time and the evidence that Mr Peters advised he thought it might be good not to have a role as a manager and that he appreciated their offer. Ms Park confirmed that she would send a copy of the written offer through to Mr Peters. She said that the matter was not personal and that Mr Dear thought well of him.

[38] By letter dated 21 April 2008 Ms Park forwarded the new offer with an individual employment agreement to Mr Peters before he went on his overseas leave. The covering letter provided that Mr Peters was to formally accept or decline the offer when he returned from leave. The offer of a role as driver/loader was to commence on 5 May 2008. The difference in salary was about \$10,000 although the new role involved some overtime which may have narrowed that sum. On 5 May 2008 Mr Peters requested further time to consider the offer, which was granted. On 16 and 19 May Mr Peters confirmed that he was seeking legal advice. The notes seem to record a suggestion from Ms Park that either she or Mr Dear call Mr Peters' lawyer to discuss any issues because there was a need for an outcome.

[39] On 19 May 2008 Mr Peters resigned giving four weeks notice. On 23 May Mr Bradshaw wrote a letter to LSG giving notification of a personal grievance that Mr Peters considered his employment was terminated by way of an unjustified constructive dismissal and the reasons set out in that letter were that:

*Put briefly your company's treatment of Ben during and following the audit on or about 14th day of March 2008 was unfair and improper to the extent that Ben was unreasonably required to relinquish his status as Queenstown Manager and be significantly demoted in his employment to that of a driver.*

## **Conclusion**

[40] Mr Bradshaw submits that there are three main grounds relied on where there were breaches on the part of LSG. The first is that there was a breach of Mr Peters' employment agreement when he was permanently relieved of his managerial position and demoted to the position of driver/loader. This, he submits, is because in his employment agreement Mr Peters could only be dismissed for sufficient cause, and

that the reasons advanced for the demotion and relied on by LSG were not such to entitle LSG, in terms of the employment agreement, to terminate or demote.

[41] The second ground was that LSG expected Mr Peters to give an assurance in terms of his management that was unreasonable. Mr Bradshaw submits that Mr Peters did provide this assurance in a general way in terms of ensuring an improvement in the audit results in the future and that staff would comply with managerial directions. He submits that LSG breached its duties to act in good faith and trust by not accepting these assurances. He also submits that LSG breached its duty to plainly and clearly set out to Mr Peters what the company wanted him to take ownership or responsibility for in terms of the issues arising from the audit. Mr Bradshaw further submits the specific assurances and details as to how the issues would be managed required the audit matters to be discussed item by item.

[42] Mr Bradshaw referred to an Employment Tribunal case of *Hana Materoa v. New Zealand Aluminium Smelter Ltd* DT35/01, 10 December 2001 (Member Ian McAndrew) where it was found what an employer cannot require an employee to give assurances which were impossible to meet. Mr Bradshaw submits that Mr Peters could not give and should not have been asked to give an 100% assurance that there would never be another audit failure.

[43] The third ground was that there were procedural errors in the disciplinary process. Mr Bradshaw submits that no full investigation was carried out, allegations were only put to Mr Peters in a very general way, and, had they been put in a more specific way, they could have been remedied. Further, Mr Bradshaw submits that the letter of 2 April 2008 did not give sufficient outline or warning of the types of issues that were of concern to LSG and that a fair and reasonable employer would not have arrived at a decision to dismiss or demote in the absence of a fair and full investigation.

[44] LSG considered the failings from the audit very serious, and these failings had not arisen previously this way in Queenstown. LSG did not expect that Mr Peters would resolve all the issues or indeed have an in-depth knowledge of all the chefs' duties, but I find that LSG reasonably concluded that he was responsible for ensuring the maintenance of standards which was set out in his position description – *maintain housekeeping and HACCP standards to a high level.*

[45] One of the criticisms advanced by Mr Bradshaw requires me to consider whether Mr Peters knew what was of concern to the company in order to be able to properly respond to it during the disciplinary process. Mr Peters was provided with a copy of the audit report which set out the issues of concern. In my view that goes far enough in terms of him understanding the nature of the matters that were of concern, though with one reservation. Mr Peters did indicate during the meeting on 25 March 2008 that whilst he had the report and had looked through it quickly, he did not fully understand the audit report. I am satisfied however that Mr Dear indicated he wanted to talk about this matter and that from the notes it is clear that the discussions seemed to be centred about Mr Peters not understanding some of the matters that he considered to be chefs' responsibilities, like the chef's table. That aside, although Mr Peters was represented there never appears to be any clarification sought from LSG on any particular aspect of the report. On that basis I am satisfied that Mr Peters knew what the concerns were and to the extent that if he was unsure he had every opportunity to ask. Having concluded that I do not consider Ms Park was required to go further in terms of the issues for LSG than she did in her letter of 2 April 2008.

[46] Mr Dear made it very clear from the first disciplinary meeting on 25 March 2008 what he wanted from Mr Peters. Mr Dear needed Mr Peters to advise why there were the audit failings and how Mr Peters would fix the situation and sustain that into the future. I have looked through the notes several times and I cannot find anything to the effect that Mr Peters was asked to give an absolute assurance that there would never be another audit failure. I agree with Mr Bradshaw that that would not be a reasonable assurance. In this case however I am not satisfied that such an assurance was asked for. Mr Dear made it clear that Mr Peters was not required, as Mr Peters put it, to tell the chefs *how to boil an egg*, but he was required to manage by ensuring process and policies were complied with. I have read the notes carefully and I cannot see any part of the notes where Mr Peters gave any clear explanation as to why he thought that there had been failings arising from the audit, and there is also nothing specific as to how these issues could be fixed in the future or even the briefest of written outlines about these matters.

[47] LSG did not conclude, or I find investigate on the basis that Mr Peters was responsible for all of the failings in the audit report. It would not have been fair for them to have done that. It was fair and reasonable for LSG to ask Mr Peters to turn his mind to the audit findings, the staff he managed in the Queenstown business and

his role in that, and provide some answers so that Mr Dear could be satisfied that food coming out of the Queenstown operation was safe for the future. I do not find it unreasonable, for example, that a fair and reasonable employer would need to know that Mr Peters could properly supervise staff and if there were difficulties in doing so, be advised as to what those difficulties were.

[48] Mr Peters did advise he would do his best, that he did talk to the other staff and that the next audit result would be better. The evidence does not support that Mr Dear and Ms Park simply rejected that assurance, but they concluded it did not go far enough. Objectively assessed a fair and reasonable employer would need to know that Mr Peters understood or displayed a level of understanding as manager about what had gone wrong in the past so that there could be changes implemented for the future. Mr Peters was in a sole charge position and it was not unreasonable for LSG to want to know that he could be relied on to ensure that the food coming from the kitchen was safe.

[49] I am satisfied that there was discussion of specific matters during the investigation. As Mr Bradshaw properly concedes, Mr Peters did not want to go through the audit document line by line, although that was offered by Mr Dear. There was reference to internal processes, the dishwasher, the extractor fan (which remained an issue despite being referred to in an earlier audit), date labels, HACCP logs, the freezer gauge, scales and some dirty equipment.

[50] I accept Mr Pollak's submissions that the investigation and discussion process leading to the point where a decision was made at the end of the 14 April 2008 meeting to make an offer to Mr Peters of a position without managerial responsibilities was a long, careful and thorough one. I do not find that it was a breach of the duty of good faith and trust on the part of LSG, because they did not ask for specific assurances about specific concerns or accept the general assurance as sufficient in the circumstances. Mr Peters could still have chosen to have responded in a specific way by referring to each of the issues of concern, but he did not do so. I am not satisfied that Mr Peters mentioned training as an issue during the disciplinary process aside from the reference to it before the disciplinary process started on 17 March 2008. Mr Dear said in his evidence that Mr Peters had been sent to training and that he was in fact hoping Mr Peters would respond along the lines that he needed to manage staff better and that he needed help, but he did not do so.

[51] I do not find in the circumstances wherein Rachel never attended a meeting with LSG to affect the fairness or thoroughness of the investigation into Mr Peters' actions. I conclude this because Mr Peters was not held responsible for actions that could be solely attributed to Rachel, but rather for the management of staff in ensuring processes and policies were complied with.

[52] I now turn specifically to the consideration of the circumstances surrounding the offer of another position at a lower level with a reduced salary. Mr Peters was initially appreciative of the offer and was given time to consider it and the opportunity was extended so that he could seek legal advice. Mr Peters remained on full pay until a decision was reached. Mr Peters did not accept the offer of permanent demotion and he therefore did not sign the letter advising that he had either accepted the offer or not, but chose to resign after receiving legal advice. He was not actually dismissed.

[53] I accept Mr Pollak's submission, that if LSG had dismissed Mr Peters then a different assessment under s.103A would be required. The Authority in this matter is required to assess circumstances where there had been an alternative option offered to termination. LSG say that they did not lose trust and confidence in Mr Peters in terms of his personal attributes and his other roles. They lost trust and confidence in him to run the Queenstown operation, but nevertheless he was held in high regard by LSG and they wanted to retain him if they could. Mr Dear referred to Mr Peters in evidence as the most solid and faithful person he had ever met but that he had difficulty with the staff management aspect of the role. Mr Dear said that prior to making his decision to offer Mr Peters a lesser role, he concluded he did not get the comfort he needed that Mr Peters could properly undertake the managerial responsibilities of the role. He said that the responses were not adequate. I accept from the meetings held with Mr Peters that a fair and reasonable employer would not have been reassured in terms of Mr Peters continued management responsibilities. In those circumstances where the safety of food was an important factor a fair and reasonable employer would not have considered a warning.

[54] A unilateral change in an employee's employment agreement amounts to a breach of contract that would entitle an employee to conclude the employment is repudiated in these circumstances. Mr Peters did not actually accept the permanent offer of the position at a lower rate and instead resigned. There was no discussion with LSG to see if any concerns were capable of resolution before Mr Peters resigned.

I accept Mr Pollak's submission that there was no evidence of any ulterior motive for LSG offering a lesser role except for the concerns in the audit report and the concern in light of that report about Mr Peters ability to carry out his managerial function.

[55] LSG were entitled to conclude that Mr Peters had made a careful decision in terms of his resignation and that there was nothing further they could do in all the circumstances to persuade him otherwise.

[56] I am satisfied that the process undertaken by LSG leading to and the decision to offer a position at a lower level to Mr Peters was what a fair and reasonable employer would have done in all the circumstances as at 14 April 2008. I am not satisfied that there was unfairness in terms of the process so that it can be seen as a breach. In terms of the offer of demotion itself, Mr Peters chose not to accept that offer which I am satisfied was one that a fair and reasonable employer would have offered in circumstances where it concluded it did not have trust and confidence in Mr Peters to manage and run its business in the Queenstown operation but did have trust and confidence in terms of his personal attributes and other roles performed.

[57] In all the circumstances I do not find that Mr Peters has a personal grievance that he was unjustifiably constructively dismissed and there is nothing further I can do to assist him in this matter.

### **Costs**

[58] Mr Pollak advises that in the event the Authority determines in LSG's favour the company does not seek costs against Mr Peters, so there is no issue arising in that regard.

Helen Doyle  
Member of the Employment Relations Authority