**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2013] NZERA Christchurch 60
5407248

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| | BETWEEN | PAUL ROUGHTON<br>Applicant |
| | A N D | LEEFIELD FARMING LIMITED<br>Respondent |

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| Member of Authority: | Helen Doyle |
| Representatives: | Applicant in person<br>Allan McRae, Counsel for Respondent |
| Investigation meeting: | On the papers |
| Submissions Received: | 8 and 13 March 2013 from Applicant<br>1, 12 and 13 March 2013 from Respondent |
| Date of Determination: | 21 March 2013 |

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**DETERMINATION OF THE AUTHORITY**

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**A** **By agreement Paul Roughton is owed holiday pay by Leefield Farming Limited in the sum of $13,153.83 gross. The Authority has awarded interest on that sum from the date after the final payment on 29 November 2012 to the date of payment at 5% being the prescribed rate under s 87(3) of the Judicature Act 1908.**

**B** **I have ordered Leefield Farming Limited to pay Paul Roughton the sum of $5000 gross being notice and interest is to be awarded on that sum from that date of this determination until the date of payment.**

**C** **I have ordered Leefield Farming Limited to pay to Paul Roughton the sum of $16,153.83 being redundancy compensation and interest is to be awarded on that sum from the date of this determination until the date of payment.**

**D I have ordered Leefield Farming limited to pay to Paul Roughton the sum of $1071.56 being expenses.**

**Employment relationship problem**

[1] Paul Roughton was employed by Leefield Farming Limited (LFL) in Blenheim as a stock manager. Mr Roughton says that when his employment was terminated on 21 November 2012 he was not paid holiday pay and he did not receive notice or redundancy payments as required under his individual employment agreement.

[2] Mr Roughton claims that he is owed the sum of $34,307.66. This is made up of holiday pay in the sum of $13,153.83, one month's notice in the sum of $5,000 and a redundancy payment in the sum of $16,153.83. Calculations are based on a fortnightly gross salary of $2307.69. Mr Roughton also claims expenses incurred prior to his statement of problem being lodged with the Authority in the sum of $5,000 for attendances with his solicitor who corresponded with LFL and Mr McRae about the money owing to him.

[3] LFL in its statement in reply, denies that it terminated Mr Roughton's employment and says that his employment was effectively terminated with the sale of the farming property through the receivers of another company, Leefield Vineyards Limited and that Mr Roughton then accepted employment with the purchaser of the farm Leefield Station Limited. In those circumstances LFL says that the third sentence of clause 17.1 of Mr Roughton's individual employment agreement applies and there is no payment due and owing for notice and/or that no notice is required because Mr Roughton commenced work immediately for Leefield Station Limited. LFL says that the employee protection provision in clause 19 applies with the result that no redundancy is payable. It further does not accept that it should be liable for any expenses incurred.

[4] Mr McRae, on behalf of the respondent, confirmed that holiday pay claimed of $13,153.83 is accepted by LFL as due and owing to Mr Roughton.

**Investigation process**

[5] The Authority held three telephone conferences with the parties following which a number of relevant documents and submissions were provided. With the agreement of both parties, the Authority also wrote to the directors of Leefield Station Limited to understand the nature of Mr Roughton's current employment with that company and how it had come about. A written response was received from one of the directors, Steven Lock, and this was provided to Mr Roughton and Mr McRae for their comments.

[6] It was agreed by both parties that the Authority could deal with the remaining issues about the claim for redundancy and notice payment on the submissions, pleadings and documents provided.

**Issues**

[7] The issues for the Authority to determine are as follows:

(a) Is Mr Roughton entitled to a payment in lieu of notice;

(b) Is Mr Roughton entitled to a redundancy payment under clause 18 of his employment agreement or are the circumstances such that under clause 19 there is no redundancy payable;

(c) Is Mr Roughton entitled to reimbursement of expenses?

**The background against which the issues are to be assessed**

***Date of commencement***

[8] The date Mr Roughton commenced his employment assumes some importance if the Authority finds that he is entitled to redundancy payments under his employment agreement.

[9] Mr Roughton says that he commenced employment with LFL on 13 November 2006 and it is from that date that he has calculated his redundancy payment. The individual employment agreement at the time of termination was signed by Mr Roughton on 21 March 2007. That agreement provided the commencement date of employment with LFL as 1 April 2007. In addition however, to that individual employment agreement, Mr Roughton provided to the Authority and

Mr McRae an earlier letter of offer of employment from LFL dated 10 November 2006. That letter of offer was signed on 20 November 2006 and provided a start date for Mr Roughton on the farm of 13 November 2006 with employment to continue in force until 31 March 2007.

[10] The letter of offer does support a basis for an earlier start date for Mr Roughton with LFL of 13 November 2006 to that set out in the individual employment agreement that applied at the time of termination.

***Relevant terms of the individual employment agreement***

[11] The relevant clauses of the individual employment agreement concern notice, redundancy and the employee protection provisions. There was reference to clause 17.1 by LFL in its statement in reply but it was only to one sentence that provided; *If you do not given the contractual written notice period then you will not be paid for the unworked period of notice.*

[12] Clause 18 provides:

> *Redundancy*
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> *18.1 In the event that your employment is terminated as a result of your position being declared surplus to Leefield's requirements, you will be given the period of written notice specified in your Letter of Offer. Leefield may, at its discretion, make a payment in lieu of notice and not require you to work out the unexpired notice period. Leefield will also give you reasonable time off work for you to attend interviews during the notice period.*
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> *18.2 In those circumstances, redundancy compensation will be payable according to the following scale:*
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> - *First 12 months of completed service: 4 weeks base pay (or pro rata for service shorter than 12 months)*
> - *Each completed 12 month service thereafter: 2 weeks base pay*
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> *Up to a maximum total payment of 26 weeks base pay.*

[13] The letter of offer which accompanied the individual employment agreement provided the notice period was four weeks.

[14] Clause 19 provides:

> *Employee Protection Provision*

> *19.1 For the purposes of this clause a "Restructure" is where the business or assets of Leefield (or part of it) is to be undertaken by another person or business, or where Leefield's business (or part of it) is to be restructured, sold, contracted out or transferred to another person or business ("the other party") (other than in the circumstances excluded by section 69L of the Employment Relations Act 2000).*
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> *19.2 There will be no redundancy, whether technical or otherwise, by reason of a Restructure if you are offered reasonable alternative employment by either Leefield or the other party on terms and conditions that are generally no less favourable to those held by you (or terms and conditions you are willing to accept).*
>
> *19.3 In the event of such a Restructure affecting your position, Leefield will:*
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> > *(a) Meet with the other party to discuss how the restructure, sale, transfer or contracting out relates to your employment; and*
> >
> > *(b) Negotiate with the other party as to whether you would transfer to the other party and if so whether this would be on the same terms and conditions of employment.*

***Events that led to the termination of employment***

[15] There is no significant dispute about the events that led to the termination but there was a difference in the views of each party about the effect of various actions on obligations under the employment agreement.

[16] The sole director of LFL is Gregory Olliver. Mr Olliver is also the sole director of Leefield Vineyards Limited (in receivership) hereafter referred to as LVL (in receivership). LVL (in receivership) owned the farm land and leased this to LFL who operated the farming business.

[17] The information provided to the Authority supports that throughout his employment, Mr Roughton primarily dealt with Sarah Sparks, Mr Olliver's now estranged wife, with respect to wages, administrative matters and the farm. Mr Roughton understood that Mr Olliver was involved in making joint decisions and planning about the farm with Ms Sparks. Mr Roughton was aware that the land was owned by LVL (in receivership) and that the farming business operated under LFL.

[18] Receivers were appointed to LVL (in receivership) on 11 August 2009 some time before the material events in this matter took place. LFL is not in receivership. Mr Roughton attached to his statement of problem a final pay calculation including notice and redundancy faxed to him on behalf of LFL as at 30 April 2010 in the event of a sale or restructure. His employment continued after that time but the provision of that supported there was consideration as early as April 2010 to the possibility of termination of his position.

[19] Although Mr Roughton knew that LVL was in receivership having been advised by the company accountant, Ann Dew, and by Mr Olliver he says that he thought, following reassurances from Ms Dew and Mr Olliver, that things would in all likelihood, carry on as normal with his employment. He did recall Mr Olliver bringing groups of people onto the farm at a time I have taken to be closer to the material time in this case, although he could not recall specifically Mr Olliver introducing him to the receivers.

[20] Mr McRae in his submissions says that Mr Olliver made it clear to the receivers that he considered Mr Roughton remained the person best suited to manage the land with a view to the property being sold to someone who would be prepared to engage Mr Roughton. Mr Roughton was somewhat sceptical about that conversation having taken place. For present purposes I accept something was said by Mr Olliver to the receivers about Mr Roughton although the reality is that the main concern for the receivers would not have been LFL and its employee but LVL (in receivership) and its assets and liabilities. It seems Mr Olliver did not take the step of insisting the receivers tell him of the date of any sale and/or that the receivers omitted to advise him of this because Mr McRae says that Mr Olliver was unaware the lease was terminated and the property had been sold until after the event.

[21] Mr McRae also put forward in his submission that LFL had tried to maximise Mr Roughton's period of employment referring to LFL making an arrangement with another company, CIT Holdings Limited, to enable the farming operation on the property to continue on the basis that CIT Holdings Limited received the income from that operation and from that paid the bills associated with the operation. It is common ground there was no variation to the identity of Mr Roughton's employer throughout this time and it remained as LFL.

[22] Mr McRae submits that a point was reached when the receivers of LVL (in receivership) terminated the lease to LFL and sold the property free of any lease to another company, Leefield Station Limited. Although Mr McRae was unable to advise when this occurred, Mr Roughton said he understood the lease was terminated a fortnight before the takeover date of the farm by Leefield Station Limited which was 22 November 2012. Mr Roughton said that he only found out the lease had been terminated the week of the takeover date. He made attempts to talk to Mr Olliver about the situation but says that they were unsuccessful and his calls were not returned. Mr McRae said that Mr Olliver was not advised of the sale by the receivers of LVL and only learnt of what had happened following the sale.

[23] I am satisfied that Mr Roughton tried unsuccessfully to contact Mr Olliver by telephone over the fortnight or so prior to the takeover of the farm by Leefield Station Limited. If Mr Olliver received those voice messages and text messages he did not return any of the calls or text messages. That Mr Roughton made these attempts to contact Mr Olliver is supported by a letter drafted by Ms Dew for Mr Roughton in his name to be sent to LFL and Mr Olliver dated 23 November 2012 requesting payment of holiday, notice and redundancy payment. The letter refers to attempts by Mr Roughton to contact Mr Olliver by phone over the previous weeks but there being no response to calls or text messages. It also provides that there had been no discussion directly with Mr Roughton about the redundancy provisions in the agreement and that he had not received any notice.

[24] It does appear from submissions and other documents that there was difficulty for Mr Olliver in accessing LFL records however Mr Roughton was asked by Ms Sparks to refer any requests for payment to LFL and she confirmed that she was not in a position to assist Mr Roughton.

[25] The only written notice that Mr Roughton received in writing about the termination of his employment came from Ms Sparks after payment of his final pay on 28 November (salary paid fortnightly in arrears) on 29 November 2012. Ms Sparks advised by email that that Mr Roughton's wages had been paid but that would be the final payment and that he would need to write a letter to LFL to state his claim for any moneys owing. Ms Sparks advised of High Court proceedings in relation to another company, CIT Administration Limited, which she said in her email was loaning funds to LFL to pay Mr Roughton's wages. In a subsequent email dated

30 November, Ms Sparks set out details of LFL's legal advisers so that Mr Roughton could make contact with them.

[26] Mr Roughton then went to see his solicitor when no money was forthcoming and there was no response received from Mr Olliver.

***New employment***

[27] As stated earlier in the determination Mr Lock, a director of Leefield Station Limited responded to the Authority and advised in his email that in October 2013 (I have taken that to be an error and a reference to October 2012), a related company (which had subsequently nominated Leefield Station Limited as part-purchaser) entered into a sale and purchase agreement with LVL (in receivership). Mr Lock set out that this agreement was conditional on several matters including the receivers terminating any commercial farming or grazing leases, licences or occupancy agreements so that vacant possession was available to the purchaser on the possession date. Possession of the property took place on 22 November 2012.

[28] Mr Lock states that his introduction to Mr Roughton was on 24 October 2012 during a site visit. He said this was not arranged but a courtesy call to inform Mr Roughton that they would be on the property during the day.

[29] Mr Lock said that at no time in the purchasing process had there been any contact from LFL regarding the then current or future employment of Mr Roughton. LFL do not suggest in any of the documents or submissions that there was any contact with Leefield Station Limited about Mr Roughton.

[30] Mr Lock said that in addition the receivers made no attempt to promote the employment of Mr Roughton although he did have conversations with Duncan Ross from KordaMentha regarding Mr Roughton's employment status. Mr Lock says that he understood from Mr Ross that Mr Roughton was an employee of the Olliver's and not related to the receivership.

[31] On 29 or 30 November 2012 Mr Lock confirms that advice was received from Mr Roughton that his phone was to be disconnected and Mr Roughton was advised that Leefield Station Limited would be happy to take over the number. This change of ownership duly went through the following day.

[32] Mr Lock wrote that from the time they first met Mr Roughton, there were several verbal discussions regarding his intentions following the sale and potential future employment. Mr Lock set out that Mr Roughton made it clear that he was not in a position to commit to any employment offers until he had resolved his position with his current employer with whom Mr Lock believed he was having difficulties getting answers or responses.

[33] On 14 December 2012, Mr Lock met with Mr Roughton and agreed employment terms with him for the future. At that date it was agreed to backdate his employment commencement to 22 November 2012 being possession date. Mr Lock recorded that Mr Roughton was currently a permanent employee of Leefield Station Limited and although the basis of a written employment agreement has been agreed the paperwork had not yet been completed.

[34] Mr Roughton says that he worked for a month without payment due to the uncertainty of his situation until he received back-payment from Leefield Station Limited.

**Determination**

**Is Mr Roughton entitled to payment in lieu of notice?**

[35] Clause 18.1 of Mr Roughton's employment agreement provides that in the event his employment is terminated as a result of his position being declared surplus to LFL's requirement he will be given the period of written notice specified in his letter of offer which is four weeks.

[36] In the statement in reply there is a suggestion that it was Mr Roughton who did not give the required notice period and that he should forfeit any payment under clause 17.1 of the employment agreement. Mr McRae in submissions said no notice was payable in circumstances where Mr Roughton simply carried on employment on the farm with Leefield Station Limited.

[37] Mr Roughton's employment with LFL was terminated from 21 November 2012 without notice having been given under clause 18 .1 of the employment agreement. It was confirmed by Ms Sparks in her email of 29 November 2012 that Mr Roughton would not be paid beyond the pay period ending 25 November 2012.

[38] I find that under clause 18.1 of the individual employment agreement Mr Roughton was surplus to LFL's requirements because the lease LFL had with LVL (in receivership) was terminated and the property sold free of the lease and other encumbrances by LVL (in receivership) to Leefield Station Limited. LFL was not able in those circumstances to continue its business Clause 18.1 provides that where Mr Roughton's employment is surplus to LFL's requirement Mr Roughton will be entitled to the period of notice in his letter of offer or a payment in lieu of notice. Mr Roughton's subsequent employment with Leefield Station Limited I find does not change that obligation. I find that Mr Roughton is entitled to payment of one month's notice. On the basis of an annual salary of $60,000 that is a payment of $5000.

[39] I order Leefield Farming Limited to pay to Paul Roughton the sum of $5000 gross being four weeks notice payable under clause 18.1 of his employment agreement.

**Is Mr Roughton entitled to a redundancy payment under clause 18 of his employment agreement or are the circumstances such that under clause 19 there is no redundancy payable?**

[40] Mr McRae submits that there is no redundancy payable to Mr Roughton. He submits that what occurred was a restructuring where the business of LFL is being undertaken by another business Leefield Station Limited under clause 19.1 of the employee protection provision of the employment agreement. He submits that because under clause 19.2 Mr Roughton was employed on terms and conditions by Leefield Station Limited acceptable to him there is no liability to pay redundancy on the part of LFF. In terms of clause 19.3 Mr McRae submits that LFL did all that could reasonably be expected of it to secure employment for Mr Roughton.

[41] It is useful as well as considering clause 19 of the employment agreement to refer to subpart three of the Employment Relations Act 2000 (the Act) and the requirement there has been for an individual employment agreement to contain an employee protection provision since 2004. I do note that a new Part 6A to 690L was substituted as from 14 September 2006 by s 6 of the Employment Relations Amendment Act 2006.

[42] The object of subpart 3 of the Act is to provide protection to employees, to whom the explicit statutory protections in subpart 1 do not apply, if the employer's

business is to be restructured and the employees work to be performed for a new employer.

[43] Section 690J of the Act provides that every collective agreement and every individual employment agreement must contain an employee protection provision for those employees covered by subpart 3.

[44] Section 690I of the Act sets out what is required for an employee protection provision. There should be a process the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees as well as the matters relating to the affected employees' employment that the employer will negotiate with the new employer. It should also include whether the affected employees will transfer to the new employer on the same terms and conditions of employment and the process to be followed to determine what entitlements, if any, are available to employees who do not transfer to the new employer.

[45] Section 690I also provides a definition of restructuring. A restructuring is defined as a contracting out or selling or transferring the employer's business to another person. It does not include contracting in, subsequent contracting or in the case of a company the sale or transfer of shares; or any contract, sale or transfer made or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

[46] The learned authors of *Brooker's Employment Law*, Wellington, Brookers Ltd 2000 state: *Given the breadth of an EPP, it is likely that the majority of technical redundancy clauses, used by employers at the time that Part 6A was first introduced in 2004, will not be broad enough to satisfy the requirements of this definition* (ER690I.01), at p 768.

[47] Having set out the statutory requirement for an employee protection provision and the various relevant definitions I now return to the employee protection provision in Mr Roughton's individual employment agreement. I need to determine firstly whether there was a *restructure* as defined in clause 19.1 of the employment agreement. The conclusion reached will be relevant for any entitlement to redundancy compensation.

[48] Mr McRae submits under clause 19.1 of the employment agreement that Leefield Station Limited is undertaking and/or undertook the business of LFL in the nature of a restructure as defined under that clause.

[49] The context of the purchase by Leefield Station Limited needs to be carefully assessed. LFL operated the farming business on land it leased from LVL (in receivership). The receivers of LVL made a decision to sell the farm and the sale and purchase agreement was conditional amongst other matters on LVL (in receivership) terminating any leases. The lease with LFL was terminated as a condition of the sale of the farm and LFL could no longer carry on business.

[50] Leefield Station Limited had no dealings with LFL in acquiring the farm. It purchased the land from LVL (in receivership) free of any lease. This was not a situation where there was an assignment of the lease from LFL to Leefield Station Limited.

[51] Leefield Station Limited is owner or part owner of the farm and that is different to the business undertaken by LFL of managing/operating the farm by virtue of a lease from LVL (in receivership). Whilst Leefield Station Limited may undertake similar work on the farm that is different to it undertaking the business of LFL. LFL had no business for Leefield Station Limited to undertake because its lease to carry on operating the farm had been terminated as at the date of the sale by the receivers of LVL.

[52] I am strengthened in my view that the sale to Leefield Station Limited was not a restructure by what would have been, if there was a restructure, a clear breach by LFL of its obligations in clause 19.3. This illustrates the difficulty in concluding that what occurred was a restructure as defined in both clause 19.1 for reasons set out above and the Act. In terms of s 690I of the Act there was no contracting out or selling or transferring of LFL's business to Leefield Station Limited. LFL was never a party to the transaction with Leefield Station Limited and therefore the circumstances of sale and purchase did not naturally give rise as it would have in a restructure to an opportunity for LFL to meet with, discuss with or negotiate with Leefield Station Limited about Mr Roughton as clause 19.3 required.

[53] In conclusion I am not satisfied that there was a restructure under clause 19 of the employment agreement. If I had found there had been then I would have had to

consider clause 19.2 of the employment agreement and whether the circumstances were such that there should be no redundancy payable. I do not need to do that given my findings that there was no restructure.

[54] I find that M Roughton was redundant because his position was surplus to LFL's requirements and he is entitled to redundancy compensation under clause 18.2 of his employment agreement.

[55] Although issue was taken with the liability of LFL to pay any redundancy compensation no issue was taken with the calculations. I am satisfied on the information in front of me that the following amounts are due and owing to Mr Roughton for redundancy compensation under clause 18.2 of his employment agreement. For the first 12 months of service from 13 November 2006 to 13 November 2007 $4615.38 gross being four weeks base pay. For each completed 12 months service thereafter from 13 November 2007 to 13 November 2012 two weeks base pay. That is the fortnightly gross base pay of $2307.69 multiplied by five years of service which is $11,538.45 gross.

[56] I order Leefield Farming Limited to pay to Paul Roughton the sum of $16, 153.83 gross being redundancy compensation under clause 18.2 of his employment agreement.

**Interest**

[57] The Authority has power to award interest in a matter involving the recovery of money under clause 11 of the second schedule of the Employment Relations Act 2000. I find interest should be awarded on the holiday pay agreed owing to Mr Roughton in the sum of $13,153.83 from 29 November 2012 being the day after the final pay was paid until the date of payment at the rate prescribed under s 87(3) of the Judicature Act 1908 of 5%. I find that interest should be awarded on the notice and redundancy compensation from the date of this determination of 22 March 2013 until the date of payment at the rate prescribed under s 87 (3) of the Judicature Act 1908 of 5%.

**Expenses**

[58] Mr Roughton and his wife instructed Nelson solicitors from late November 2012 about the money owing. Mr Roughton provided the Authority with the invoice

issued by his solicitor C & F Legal Limited showing fees incurred of $4,977.20 (GST inclusive) and disbursements of $350.21. All of this work preceded the lodging of the statement of problem with the Authority. Mr Roughton was not represented in the matter before the Authority and therefore did not incur costs although is entitled to reimbursement of his filing fee of $71.56.

[59] Mr McRae submits that it would be inappropriate to make an award of costs against LFL because it has never sought to deny what it says was rightfully owed and that the correspondence was directed to the company structure having been a sham.

[60] The Authority has the power under clause 15(1) of the second schedule of the Employment Relations Act 2000 to order any party to a matter to pay the other party reasonable costs and expenses.

[61] I do not find that the expenses incurred of $4,977.20 are reasonable so that they should be met by LFL in their entirety. This is because much of the work invoiced was related to an unravelling of the company structure and claims against directors of different companies personally for the money owed which was not the mater in front of the Authority. I do accept that some of the expense incurred was related to the money owing by LFL, including no doubt initial attendances and had there been earlier communication or payment then there would not have been the need to involve the solicitor at all. It was only after the solicitor became involved that communication took place. There is no basis I find to make an award for the disbursements save as the filing fee.

[62] Costs in the Authority are normally quite modest. Costs are often for example awarded on a daily basis and for a full investigation meeting with briefs of evidence provided before hand that is $3500. This matter does not involve anywhere near as much work and any award has to sensibly reflect what expenses were incurred, were they relevant to the matter before the Authority and whether they were reasonably incurred.

[63] I find that reasonable expenses would be four hours work at $250 per hour being $1000 and reimbursement of the filing fee n the sum of $71.56.

[64] I order Leefield Farming Limited to pay to Paul Roughton the sum of $1071.56 being expenses.

[65] Finally I note that Mr Roughton has suggested that the Authority be involved in obtaining a full statement of account for the other companies in the structure. The matter before the Authority is that between Mr Roughton and his employer LFL and the Authority has determined what it owes Mr Roughton. Anything involving the other companies falls outside of the claim in front of the Authority and that suggested step will not be taken.

Helen Doyle
Member of the Employment Relations Authority