IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 112
ARC 6/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	IDEA SERVICES LIMITED (IN STATUTORY MANAGEMENT) Plaintiff
AND	VALERIE BARKER Defendant

Hearing: 14 May 2012
(Heard at Rotorua)

Appearances: Paul McBride, counsel for plaintiff
Kerry Single, advocate for defendant

Judgment: 16 July 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

Background

[1] Ms Barker was employed by Idea Services Limited (ISL) as a community service worker. Issues subsequently arose and an investigation was formally commenced. A number of meetings took place between Ms Barker and her manager, Ms Hudson, culminating in a meeting on 17 September 2010. At the meeting Ms Barker was advised that she was being dismissed with two weeks' pay in lieu of notice. Meeting notes record Ms Hurst (Ms Barker's union representative) as saying:

> Thank you Merepeka for this outcome, this is to let you know that we will be taking action for [Ms Barker] under s 103 of the CEA Personal Grievance and also the Health and Safety employment act.

[2] On 15 September 2010, Ms Barker had written a brief letter to Ms Hudson. She advised:

> I am taking this opportunity to inform you that I will be pursuing a Personal Grievance against yourself as the Lakeland Branch, Community Service Manager.

[3] Her letter was acknowledged by Ms Hudson on 23 September.

[4] On 10 October 2010, Ms Hurst wrote to ISL advising that the opportunity was being taken to "invoke, facilitate and submit a Personal Grievance", and that the verbal submitting of a personal grievance on 17 August[1] was confirmed.[2] Ms Hurst went on to refer to various sections of the Employment Relations Act 2000 (the Act) and the Health and Safety in Employment Act 1992 that she said the grievance related to. She advised that Ms Barker would be seeking remedies under s 123 of the Act and advised that "a hard copy of the communication will be posted."

[5] The following month, on 16 November 2010, a without prejudice letter was sent to ISL on Ms Barker's behalf. It refers to a personal grievance being raised on 10 October 2010, and sought an informal without prejudice meeting to discuss how matters might be resolved. In the letter, Mr Single, Ms Barker's advocate, said:

> Briefly the issues are around the manner in which your Community Service Manager, Linda Hudson has been treating both our clients in a way which can only best be described as bullying and harassment.

[6] ISL, now in statutory management, did not take up the offer of a meeting. A grievance was subsequently filed with the Employment Relations Authority.

[7] Mr McBride, on behalf of ISL, took issue with the plaintiff's reliance on the without prejudice letter of 16 November 2010. He advised the Court at hearing that Ms Robinson (the Authority member dealing with the grievance) referred the without prejudice letter to another Authority member for determination as to its admissibility, and that the parties were not given an opportunity to be heard prior to that issue being determined. Ms Oldfield, the Authority member dealing with the admissibility

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[1] Presumably this date was a slip and referred to the meeting on 17 September 2010.
[2] Personal grievances may be raised orally: *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

issue, set out her reasons for concluding that it could be placed before the Authority in a brief minute. She determined that:

> The author of a document headed "without prejudice" may waive privilege provided the contents of the document do not make express or implied reference to without prejudice representations by other parties to the proceedings.
>
> The letter makes no such references and on that basis I am satisfied that Mr Single as author of the letter is entitled to waive privilege.
>
> I therefore conclude that it may be submitted in evidence before the Authority.

The Authority's determination

[8] In the event, the Authority found[3] that Ms Barker could have raised a personal grievance verbally on 17 September 2010 because her dismissal was effective from that date but that she had failed to adequately particularise her grievance at the meeting. It found that the statement that Ms Barker would be bringing a grievance was insufficient, as it did not serve to make her employer sufficiently aware of the nature of the grievance or the remedies for resolving the grievance in terms of s 114(2).

[9] The Authority further considered that the letter of 10 October 2010 was not, of itself, sufficient to put the employer on notice as to the nature of Ms Barker's grievance or what relief she was seeking, referring to *Creedy v Commissioner of Police*[4] in support. The 10 October letter referred to a document which would follow, and that document contained "comprehensive ... details of the remedies..."[5] but it did not accompany the letter. The letter on its own was not, it was held, sufficient. If it had included the additional documentation, the Authority would have held otherwise. Nor was the Authority drawn to an argument that the without prejudice letter of 16 November 2010 was sufficiently particularised to raise a personal grievance.

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[3] [2011] NZERA Auckland 409.
[4] [2006] ERNZ 517.
[5] At [29].

[10] While finding that none of the steps taken by and on Ms Barker's behalf individually were sufficient to raise a personal grievance within the requisite timeframe, the Authority held that the verbal statement on 17 August (in fact September) 2010 and the letters of 10 October and 16 November 2010, taken in conjunction with each other and viewed objectively, formed a totality of communications and that: "Ms Barker had specified sufficiently the personal grievance to enable ISL to address it."[6]

[11] The Authority also found that ISL: "consistently with a duty of good faith [should have] responded to [the letters of 10 October and 16 November] by requesting specific details if it was unsure of the nature of the grievance."[7]

The challenge

[12] The plaintiff challenges the Authority's determination on a non de novo basis. There are four particular findings that the plaintiff takes issue with:

- First, the Authority's determination that the plaintiff was under an obligation of good faith following the expiration of the employment relationship;

- Second, the Authority's finding that reliance could be placed on the without prejudice letter;

- Third, that in advising that the defendant will be seeking remedies under s 123 of the Act the defendant had sufficiently detailed the remedies sought;

- Fourth, the finding that the totality of communications between the parties (being the verbal statement at the meeting on 17 September 2010, and the letters dated 10 October and 16 November 2010)

[6] At [48].
[7] At [44].

specified sufficiently the personal grievance to enable the plaintiff to address it.

[13] The plaintiff seeks a declaration that the defendant did not raise a personal grievance within the 90 days timeframe specified in s 114 of the Act.

[14] Because this is a non de novo challenge, the focus is on the Authority's determination rather than the entire matter that was before the Authority. The Court is limited to hearing the issues that were actually decided by the Authority, which are the subject of challenge.[8] No cross-challenge was filed. In so far as the defendant takes issue with various other findings of the Authority, that is outside the scope of the challenge before the Court and I put them to one side.

Ongoing obligation of good faith?

[15] Ms Barker's employment came to an end on 17 September 2010. At the meeting on that date Ms Barker was advised that she was being dismissed immediately with two weeks' pay in lieu of notice. Mr McBride submits that the Authority erred in finding that ISL had an obligation to engage with Ms Barker after her dismissal, pursuant to s 4.

[16] Section 4 of the Act provides:

> (1) The parties to an employment relationship specified in subsection (2)—
> (a) must deal with each other in good faith; …
>
> (2) The employment relationships are those between—
> (a) an employer and an employee employed by the employer: ...

[17] The simple point advanced by Mr McBride is that from 17 September 2010 Ms Barker was not an employee of ISL, ISL was not in an employment relationship with her, and accordingly owed her no ongoing obligations of good faith under s 4.

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[8] *Bourne v Real Journeys Ltd* [2011] NZEmpC 120 at [14]; *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 at [43].

[18] Mr Single took issue with this submission. He said that while there was no express provision relating to the ongoing obligation of good faith, it would be contrary to the underlying purposes of the Act for an ex-employer to do nothing and simply wait for the 90 day period to expire. While there is some force in that submission, the starting point for any analysis must be the wording of the section. It is clear – the mutual obligations of good faith imposed by s 4 apply to those in an employment relationship.

[19] I do not consider that there is scope for arguing that the statutory requirements imposed by s 4 continue to apply once the employment relationship has ended. To do so would be to read into the Act words that are not there. It is notable that s 4(1A)(c) specifically confers an obligation to act in good faith on an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of employment, but imposes no such obligation following termination.

[20] And, as Mr McBride pointed out, other provisions which apply following the expiration of the employment relationship specifically impose an obligation of good faith. By way of example, s 159(2) imposes an obligation to attend mediation in good faith, if directed by the Authority. There would be little need for such an express requirement if the obligation imposed under s 4 was an on-going one, surviving termination.

[21] Mr Single sought to rely on extra judicial remarks[9] of the Chief Judge which he said supported the existence of an ongoing obligation of good faith, extending beyond the employment relationship. It is, however, clear that the principal focus of his Honour's comments was on lessons that could be learnt from the circumstances arising in the case of *Creedy*, which involved, amongst other things, an unsuccessful claim to bring a disadvantage grievance outside the 90 day timeframe.

[9] Graeme Colgan, Chief Judge of the Employment Court "Some Stress Reduction Strategies" (speech to the Employment Law Institute, Auckland, 11 April 2011).

[22] In *Balfour v Chief Executive, Department of Corrections*[10] the Court accepted an argument advanced on behalf of the defendant that: "for good faith as defined in s 4 of the Act to apply, the employment concerned must be current. The statutory obligations of good faith end when the employment ends."[11] Mr Single sought to distinguish *Balfour* on the basis that it arose in the context of a mutual agreement to terminate the employment relationship. It is true that the facts of the present case differ, in that Ms Barker was dismissed by ISL. However, the key point remains the same. Section 4 expressly provides that the obligation of good faith attaches to an existing employment relationship. As s 4(1A) makes clear, the good faith obligations are directed at supporting productive employment relationships. Once the relationship is over, the underlying rationale for the imposition of the obligation of good faith falls away. In the absence of an employment relationship (as specified in s 4(2)) or any express statutory requirement,[12] no statutory obligation of good faith applies.

[23] The Authority erred in finding that ISL was under a statutory obligation of good faith following Ms Barker's dismissal, and that it had breached that obligation in failing to respond to communications from the defendant and her representatives.

Without prejudice correspondence

[24] The Authority determined that the defendant was entitled to unilaterally waive privilege over her advocate's without prejudice letter dated 16 November on the basis that the document itself did not make express or implied reference to without prejudice representations by other parties in the proceedings. No authority was cited for this proposition.

[25] Mr McBride submitted that the Authority erred in admitting the without prejudice letter. This submission was focussed on an argument that privilege is held by both parties and cannot be unilaterally waived.

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[10] [2007] ERNZ 808.
[11] At [30]-[31].
[12] Such as s 159(2).

[26] As I understood Mr Single's argument, privilege can only attach to a dispute and, because the recipient of the without prejudice letter (ISL) had not responded to the letter, no dispute existed and accordingly no issue of privilege arose.

[27] The Authority has a broad discretion to admit or to refuse to admit evidence. Section 160 provides that it may, in investigating any matter, call for evidence and information from the parties or from any other person, and may take into account: "such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not."[13] However, as has been made clear by the Supreme Court in *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal*,[14] a power to admit evidence not admissible in a court of law does not authorise a tribunal to override privilege.

[28] Documents marked without prejudice, and which form part of negotiations between parties, are prima facie privileged for omission from evidence, even if they merely initiate the negotiations and even if the document itself does not contain an offer to settle.[15] It is clear that the label attributed to a communication by a party is not determinative of its status. Simply entitling a letter "without prejudice" does not render it a privileged communication.[16]

[29] The consent of both parties is required to put the contents of statements made as part of an attempt to settle a dispute in evidence.[17] That is because a joint privilege is held by the parties.[18] The without prejudice rule is primarily based on the public policy of encouraging litigants to settle their differences rather than litigate them to a conclusion. In *Prudential Insurance Co Ltd v Fountain Page Ltd*[19] Hobhouse J observed:[20]

> It is the policy of the law to permit, and indeed encourage, confidential negotiations to take place to further the settlement of disputes and the law accordingly recognises that there shall be a restriction upon the use that can

[13] Employment Relations Act 2000, ss 160(1)(a) and (2).
[14] [2006] NZSC 48, [2006] 3 NZLR 577 at [18].
[15] *McGechan on Procedure* (online looseleaf ed, Brookers) at HX8.31.16(2)(a).
[16] *South Shropshire District Council v Amos* [1986] 1 WLR 1271, [1987] 1 All ER 340 (EWCA); *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [45].
[17] Absent a court order to the contrary.
[18] D L Mathieson (ed) *Cross on Evidence* (7th ed, Butterworths, Wellington, 2001) at 10.44.
[19] [1991] 1 WLR 756.
[20] At 771.

> be made by the recipient of any such communication. The recent decision of the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 establishes the wide ambit of the restriction that arises from communications being made without prejudice. The restriction affects not only the party who received the communication but also any other party and the principle "once privileged always privileged" will apply to subsequent litigation as well as the actual litigation in relation to which the without prejudice communication was made.

[30] Section 57(1) of the Evidence Act 2006 reflects this position. It provides that a person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was intended to be confidential and was made in connection with an attempt to settle the dispute. Section 65(5) of the Evidence Act reinforces the point, providing that: "[a] privilege conferred by section 57 (which relates to settlement negotiations or mediation) may be waived only by *all* the persons who have that privilege."[21]

[31] While the Employment Institutions are not bound by the Evidence Act, there is a recognised utility in having regard to how the courts of ordinary jurisdiction deal with issues relating to the admission of evidence and "what, if anything, the Evidence Act says about it."[22] And, as observed in *Miller v Fonterra Co-operative Group Ltd*, there is a broader public interest in a consistency of approach and of lawyers being in a position to advise their clients with a degree of certainty.[23]

[32] The 16 November 2010 letter was sent by the defendant's advocate to the plaintiff following Ms Barker's dismissal. The defendant sought a without prejudice meeting, with a view to discussing issues and determining whether a "way forward" could be found that was acceptable to Ms Barker, prior to "further action" being taken. The letter was expressed to be sent on a without prejudice basis, and it was clearly intended to initiate confidential settlement discussions aimed at resolving matters between the parties. I do not consider that the fact that no grievance had been formally filed at this stage undermines the privileged status of the communication. It is clear that the communication was directed at settling a dispute

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[21] Emphasis added.
[22] *Ravnjak v Wellington International Airport Ltd* [2011] NZEmpC 31 at [53]; *Mana Coach Services Ltd v NZ Tramways and Public Passenger Transport Union (Wellington Branch) Inc* WC13A/08, 30 June 2008 at [13]; *Auckland District Health Board v Bierre* [2011] NZEmpC 108 at [7].
[23] [2012] NZEmpC 49 at [15].

that the defendant had with the plaintiff. Nor do I consider that the absence of evidence that the plaintiff received the letter materially alters the position, as Mr Single suggested.

[33] I conclude that the Authority erred in finding that the defendant could unilaterally waive the privilege otherwise attaching to the 16 November letter.

Letter of 10 October 2010/Totality of communications

[34] Ms Baker's union representative wrote to the plaintiff on 10 October 2010, advising that:

> We take this opportunity to invoke, facilitate and submit a Personal Grievance. We confirm in writing our verbal submitting of a Personal Grievance on the 17 August 2010 at 11.45a.m.
>
> We invoke the Personal Grievance as follows;
>
> 1. Section 103(1)(a) of the Employment Relations Act and Amendments 2000 unjustifiable dismissal.
> 2. Section 103(1)(b) of the Employment Relations Act and Amendments 2000 disadvantage by the unjustifiable actions of the employer (Idea Services)
> 3. Clause 18 of the Collective Employment Agreement...
> 4. Section 2A of the Health and Safety in Employment Act 1992.
> 5. Section 6 of the Health and Safety in Employment Act 1992.
>
> Our union member Val Baker will be seeking remedies under Section 123 of the Employment Relations Act and Amendments 2000.
>
> Our union member, Val Baker confirms that she wishes to attend Mediation.
>
> Please respond within 14 days of your indication that you are prepared to attend mediation.
>
> ...
>
> A hard copy of the communication will be posted.

[35] The statement of problem filed with the Authority annexed the 10 October letter together with an attachment, which comprised a detailed set of submissions.

The Authority found that the plaintiff had not received the communication referred to at the conclusion of the 10 October letter and concluded that the 10 October letter did not sufficiently specify the personal grievance.[24] However, the Authority concluded that the letter of 10 October, taken with the without prejudice letter of 16 November and the verbal statement at the dismissal meeting did adequately specify the grievance for the purposes of s 114(2).

[36] Mr McBride submitted that the Authority fell into error in determining that the defendant's 10 October letter, referring to unspecified remedies under s 123, comprised a valid explanation of what the defendant sought. For the reasons that follow, I do not consider that s 114(2) imposes an obligation on an employee to particularise the relief he/she seeks in relation to an alleged grievance. Nor, in any event, do I accept Mr McBride's submission that the Authority had determined that the reference to remedies under s 123 of the Act in the letter "detailed what remedies were sought in the personal grievance" sufficiently. Paragraph [39] of the determination, which was the subject of challenge, merely summarises the contents of the letter rather than making any findings in relation to it. This is consistent with the Authority's later determination that the 10 October letter, on its own, was insufficient to raise a grievance.

[37] Section 114 relevantly provides that:

> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days ...
>
> (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[38] Some support for the proposition that an employee is obliged to particularise the remedies sought can be found in *Chief Executive of the Department of Corrections v Waitai.*[25] There Judge Travis observed, in finding that a grievance had

[24] At [32].
[25] [2010] NZEmpC 164 at [49].

not been raised within time, that the plaintiff employer was not made sufficiently aware of the grievances *and* the remedies sought to be able to respond.[26]

[39] As I have said, I do not consider that s 114(2) requires an employee to specify the nature of the relief sought in relation to the alleged grievance. The submission advanced on behalf of the plaintiff (and the approach adopted by the Authority) effectively reads two requirements into s 114(2). Firstly, that the employee specify the nature of the alleged grievance that he/she wants the employer to address. Secondly, that the employee specify the mode or manner in which he/she wants the employer to address the alleged grievance. The second requirement is not reflected in the wording of s 114(2). Rather, the focus of the provision is squarely on the alleged grievance, and the extent to which the employee has drawn (or reasonably attempted to draw) that grievance to the employer's attention.

[40] The underlying purpose of the personal grievance procedures is to identify and address employment relationship issues expeditiously and by direct communication between the parties to it.[27] It is evident too that the grievance process is designed to be informal and accessible.[28] Section 114 is to be read consistently with these purposes. While particularisation of the remedies sought may assist an employer in understanding what the employee wants addressed, and may accordingly bolster an argument that the threshold requirements of s 114(2) have been met, it will not always be necessary. And the informal, non-technical, nature of the personal grievance procedures relating to raising a grievance tells against an interpretation that requires an employee to specify the precise nature of the remedy or remedies they seek. The raising of a grievance is distinct from the more formal requirements attaching to the filing of a statement of problem, or a statement of claim. Both necessitate particularisation of the relief sought. That is not a requirement imposed under s 114(2).

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[26] See too *Dickson v Unilever New Zealand Ltd* (2009) 6 NZELR 463 at [28]. Compare *Abernethy v Dynea New Zealand (No 2)* [2007] ERNZ 462 at [63].
[27] Section 101(ab); *Creedy* at [39].
[28] Section 101(a), (b). See too, for example, *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139 at [40], [58].

[41] Ultimately, the issue of whether an employee has done enough to inform his/her employer of the nature of the alleged grievance that he/she wants addressed will be objectively determined having regard to the facts of each case. This may be reflected in a number of communications,[29] and there is no requirement that it be reduced to writing. Nor is there a requirement for the level of detail that might be expected in, for example, a statement of problem.[30]

[42] In the present case, the Authority found that the defendant had raised a grievance based on "a totality of communications,"[31] comprising what was said at the meeting, the contents of the 10 October letter, and the without prejudice letter of 16 November 2010. The plaintiff took issue with this finding.

[43] I have already found that the Authority approached the issue of waiver on an erroneous basis. I pause to note that even if the without prejudice communication had properly been before the Authority, it would not have advanced matters (as the Authority recognised). That effectively leaves the communication at the dismissal meeting (that unspecified "action" under s 103 would follow) and the letter of 10 October 2010.

[44] The Court has repeatedly emphasised the requirements for raising a personal grievance. In *Creedy*, the Chief Judge held that:[32]

> It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment …. For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address.... What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.
>
> …

[29] *Edmonds* at [45] citing *Liumaihetau v Altherm East Auckland Limited* [1994] 1 ERNZ 958 at 963 in support.
[30] *Creedy* at [37].
[31] Determination at [46].
[32] At [36]-[37].

> It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it soon and informally, at least in the first instance.

[45] In *Creedy* the Court rejected a submission that a brief letter from the employee's counsel advising that his client had a personal grievance based on an unjustified disadvantage met the requirements of s 114(2). The circumstances in *Creedy* can be contrasted with those that arose for consideration in *Coy v Commissioner of Police*.[33] There the plaintiff wrote to her employer stating that she intended to proceed with a grievance and referred to a number of broadly stated grounds, such as harassment and a denial of procedural fairness. The Court held that the letter met the requirements of s 114(2) by a narrow margin.[34]

[46] At the 17 September meeting, the plaintiff was simply advised that the defendant would be taking "action" under s 103. The subsequent letter of 10 October gave no indication of the factor or factors that the defendant contended made her dismissal unjustified, and it did not attach the material that might otherwise have provided the necessary detail. Simply setting out a number of sections of the Act which the defendant asserted had been breached does not amount to adequate particularisation of a grievance. The 16 November letter was privileged and ought not to have been admitted in evidence.

[47] Mr Single submitted that it was relevant that the communications referred to occurred shortly after the defendant's dismissal, and that the timeframes involved could be contrasted to the circumstances that arose in *Creedy*. I accept that the context in which a grievance is purportedly raised may be material in determining whether an employee has done enough to put the employer on notice. However, in the present case, while the plaintiff would have been aware that the defendant took issue with her dismissal, it had no way of knowing (based on the information communicated to it) why that was so, to enable the plaintiff to address the defendant's concerns.

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[33] CC 23/07, 19 November 2007.
[34] At [15].

[48] I do not consider that, either individually or when taken together, what was said at the dismissal meeting and in the subsequent letter of 10 October met the threshold requirements in s 114(2). The defendant did not adequately specify the nature of the alleged personal grievance which she wanted her employer to address. It follows that, on the evidence before the Authority, there was no basis for the finding that the grievance had been raised with the plaintiff within the timeframe specified in the Act.

Result

[49] The plaintiff's challenge succeeds. The defendant failed to raise a grievance within the 90 day timeframe specified in the Act.

[50] Those parts of the Authority's determination which were challenged, apart from paragraph [39], are set aside.

Costs

[51] The plaintiff is entitled to costs. If they cannot otherwise be agreed they may be the subject of an exchange of memoranda, with the plaintiff filing a memoranda and any supporting documentation within 30 days and the defendant within a further 30 days.

Christina Inglis
Judge

Judgment signed at 4.30pm on 16 July 2012