IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 117
EMPC 336/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TYRONE WAYNE UNDERHILL First Plaintiff
AND	KANE JOSEPH UNDERHILL Second Plaintiff
AND	COCA-COLA AMATIL (NZ) LIMITED Defendant

Hearing: 12 June 2017
(Heard at Auckland)

Appearances: K and T Underhill, plaintiffs in person
B A Smith, counsel for defendant

Judgment reissue: 29 September 2017

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve interesting issues relating to the requirements of s 114(1) of the Employment Relations Act 2000 (the Act). A primary issue raised by the defendant, Coca-Cola Amatil (NZ) Ltd (Coca-Cola), is whether the plaintiffs, Tyrone and Kane Underhill (the Underhills), are estopped from proceeding with personal grievance proceedings for unjustified dismissal. Coca-Cola alleges that the plaintiffs did not raise their grievances within 90 days of the date of the alleged dismissal on 26 May 2016.

[2] In a determination dated 21 November 2016, the Employment Relations Authority (the Authority) held that the grievances were not raised within time and

therefore it did not have jurisdiction to proceed further.[1] In view of this finding, the Authority did not need to go on and consider another defence raised by Coca-Cola that the plaintiffs, in any event, were self-employed contractors and not employees. Costs were reserved and in a subsequent determination dated 12 January 2017 the plaintiffs were jointly ordered to pay Coca-Cola costs of $2,250.[2] No challenge has been made to that determination.

[3] The employer did not consent to the grievances being raised outside the time limit. The plaintiffs have made no application to extend the time despite having been given the opportunity to do so.

[4] The plaintiffs have filed a challenge to the determination, electing a hearing de novo. Coca-Cola defends the challenge but has filed an admission of cause of action for the purposes of the proceedings. It now admits that at all material times the plaintiffs were employees of Coca-Cola. That admission relates to the earlier assertion that the plaintiffs were independent contractors and now disposes of that issue.

[5] Coca-Cola sought to have the challenge proceed initially only on the basis that the Court would decide the issue as to whether the grievances were raised within time. In view of the fact that the plaintiffs are representing themselves, it was more appropriate for the challenge in its entirety to proceed to a hearing with the hearing of all evidence. In this way, the Court could make a decision on the grievances in the event that the plaintiffs established that the grievances were raised within time. The Authority had made a final determination on the time-limit point and, according to this Court's decision in *Abernethy v Dynea NZ Ltd*, the Court is required to proceed to hear the entire matter in the event that the challenges on the limitation point are upheld.[3] In addition, by hearing the entire matter, all of the facts which might relate to the preliminary point would emerge and be available.

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1 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2016] NZERA Auckland 381.
2 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZERA Auckland 8.
3 *Abernethy v Dynea New Zealand Ltd (No 2)* [2007] ERNZ 462 (EmpC).

Pleadings

[6] With the plaintiffs being self-represented litigants, the statement of claim which has been filed is not a detailed document. It was deemed as adequate for the purposes of the challenge. Coca-Cola has filed somewhat more elaborate pleadings. Initially, whether or not the plaintiffs were actually employees of the defendant was put in issue by the statement of defence, although that has now been resolved by the admission of cause of action. The primary issue now in dispute from the pleadings is the question of the time limit for raising a personal grievance. If the personal grievances were raised in time, the Court has to decide on the grievance claims and remedies.

[7] In pursuance of the overall grievance claims, the plaintiffs seek reinstatement, compensation in the sum of $100,000, reimbursement of lost earnings in the sum of $44,000, interest and costs.

[8] The defendant states in the statement of defence that it opposes the remedies sought. There is no further elaboration on its opposition to remedies, particularly the claim to reinstatement. However, in view of the fact that the primary focus of the defendant has been on the time-limitation issue and that the plaintiffs were independent contractors, that is understandable. In view of concessions made by witnesses for Coca-Cola in their evidence, the hearing proceeded on the basis that if the plaintiffs succeeded in their challenge, it is unlikely that Coca-Cola would have complied with procedural requirements in effecting the cancellation or termination of employment. This is because of the circumstances surrounding the termination of the employment (Coca-Cola believing at that time it was terminating the contracts of independent contractors).

[9] Certainly, the issues to be determined by the Court have been sufficiently raised by the pleadings, the evidence (or lack of it) and submissions which were made at the hearing.

Factual background and evidence

[10] Unfortunately, because the parties have concentrated on the circumstances arising at the time that the plaintiffs had their employment terminated, there is a paucity of oral evidence regarding the way in which the plaintiffs first came to be contracted and employed by Coca-Cola. Such information can be gleaned from the contemporary documents.

[11] The plaintiffs, who are brothers, were initially employed on a 12-month fixed-term contract with Coca-Cola as trainee vending fillers. Each of them signed a letter on 30 July 2015 containing the terms of employment. The reason for the fixed-term nature of the employment was expressed to be on the basis that each of them would be led into an independent contracting position. Tyrone Underhill entered into a vending filler services agreement with Coca-Cola dated 9 March 2016. The agreement produced in evidence is unsigned. It appears from the statement of defence that he commenced work under the agreement on 4 April 2016. Kane Underhill executed an agreement dated 28 April 2013. That date was clearly in error. The commencement date was stated to be 23 September 2015, although the statement of defence alleges he commenced work under the agreement on 21 September 2015. In the documents, the relationships between them and Coca-Cola were described as "that of principal and independent Filler". The agreements specifically stated that nothing contained in them was deemed to constitute the relationship of employee and employer. That position has now been overtaken by the admission that the plaintiffs were employees of Coca-Cola.

[12] Differences arose between Coca-Cola and the Underhills in March and April 2016. Coca-Cola claimed:

(a) During the days when Kane and Tyrone Underhill were performing their vending filling services, they could not be contacted. Telephone calls were not answered. Voicemail messages left were not answered. Emails were not replied to. Text messages were not answered.

(b) There were complaints from customers about the stocking of vending machines. The attempts to contact both Kane and Tyrone partly related to attempts to deal with the complaints while Kane and Tyrone were both on the road carrying out their deliveries.

(c) There were days where Kane or Tyrone did not turn up for work and failed to give notice that they would not be turning up. As a result, Coca-Cola alleges that productivity stopped and costs were incurred.

(d) There was a persistent failure to comply with security measures regarding collecting of cash and delivery to Coca-Cola of cash recovered from vending machines.

(e) Meetings were conducted with Kane and Tyrone to discuss the deficiencies in their performance. No improvement resulted from these meetings.

[13] Kane and Tyrone Underhill read briefs of evidence containing their evidence-in-chief. These were not particularly helpful in responding to the assertions previously made by Coca-Cola as to their performance while employed. However, in a reply brief, which Kane Underhill read on both his own and Tyrone's behalf, they did deal specifically with allegations against them by the witnesses for Coca-Cola in their pre-prepared briefs of evidence. They either denied the assertions or provided explanations relating to the customers' complaints. The explanations consisted of a combination of difficulties. Such difficulties were claimed to be with accessing sites, allegations that vending machines needed re-stocking when they had been and were full, defective machines not serviced, and mechanical difficulties with vehicles. They insisted that emails and messages were replied to. They asserted that the complaints about failure to communicate related to nothing more than a few missed telephone calls. They pointed out that the work involved a great deal of concentration from both of them in driving and carrying out their restocking duties and that it was not always possible to respond to calls in a timely fashion. In oral evidence under cross-examination, they complained about the actions of Coca-Cola

management towards them, describing it as abusive and as harassment. They did not appear to be happy remaining working there.

[14] There was clearly a misunderstanding between Tyrone Underhill and Coca-Cola relating to issues of delay in returning bags of cash retrieved from vending machines to Coca-Cola. Tyrone Underhill appeared to take this issue as an allegation of theft against him. However, the company witnesses clarified that the issue raised had nothing to do with an allegation of theft, but rather with a concern over security of large quantities of cash if they were kept in an unsecured situation and were not returned to Coca-Cola at the earliest opportunity. During the course of the hearing, it appeared that Tyrone Underhill may have accepted that a misunderstanding occurred on his part in relation to the evidence on the cash bags.

[15] In his evidence on behalf of Coca-Cola, Shane Martin, the regional sales and operations manager – vending, dealt with the circumstances leading to the termination of the vendor filling services agreements with Kane and Tyrone Underhill. Mr Martin stated that despite all the attempts in improving communications and their discussions and meetings which took place, Coca-Cola kept having issues with attendance by Kane and Tyrone Underhill and communication with them. Mr Martin stated that in the end he felt as if there was nothing that the company could do to change their performance issues. Mr Martin stated that after discussions with Nolan O'Sullivan, the route organisation analyst and Wayne Simeon, the general manager – vending, the decision was made that he would meet with Kane and Tyrone Underhill and end their contracts. Mr Martin stated that the primary reason was that Coca-Cola felt it could no longer rely on them to turn up for work and that when they did work on their jobs, communications could not be maintained. Apparently, in earlier discussions, it had been indicated to the Underhills that apart from these difficulties, when they did carry out work, their vendor machine servicing and filling were of a high quality.

[16] Mr Martin stated in his evidence that he considered the context to be one where the Underhills were independent contractors. Therefore, he did not follow the process he would normally follow in terminating the employment of an employee.

[17] Mr Martin invited both Kane and Tyrone Underhill to a meeting to discuss their performance. The meeting was set for 8 am on 26 May 2016. Neither Kane nor Tyrone Underhill attended the meeting or notified Mr Martin why they would not be attending. When they did not attend the meeting, Mr Martin visited them at their home address at approximately 10 am. Both Kane and Tyrone Underhill were at home and their vehicles were in the driveway. He asked Kane and Tyrone Underhill to pack everything up in their vans and to meet with him at the Albany office. Mr Martin stated that, at the meeting, he discussed with them the events leading up to the meeting and the processes that had been put in place to improve their performance. He stated that neither of them disagreed. He explained to them that due to consistent breaches of their contractual arrangements, Coca-Cola would be terminating their contracts effective immediately. When he asked them if they had anything to say, they both said that in the circumstances, they understood why it had come to this and why he was forced to make the decision to terminate. At that point, the contracts were terminated.

[18] If it had been accepted by Coca-Cola at that point that Kane and Tyrone Underhill were employees, then what transpired would have been a summary dismissal. No period of notice was given. Coca-Cola has appeared to concede that the procedures leading to the final meeting and the process adopted to terminate the contracts would not have complied with the procedural requirements in employment law. While Coca-Cola at that time believed that the Underhills were working for it as independent contractors, the actions of Mr Martin visiting them at their home address when they failed to turn up for the arranged meeting and then carrying out the summary termination of the agreements, give rise to substantial procedural difficulties for Coca-Cola when the actions are viewed in an employment context.

[19] Nothing in the termination of the contracts appears to have turned on the fact that Kane and Tyrone Underhill did not turn up at 8 am for the meeting. There was some conflict in the evidence as to whether the Underhills had been given leave for 26 May 2016 so that a family birthday could be celebrated. That was asserted by Kane Underhill. However, Mr Martin, under cross-examination, would not concede that the Underhills had been given leave that day.

[20] Mr Martin's actions on 26 May 2016 are set out in a chronology of events which was contained in an email sent by Mr Martin to both Bob Irvine, commercial manager – vending, and Mr Simeon. The sequence of events described by Mr Martin is as follows:

> Here is a detailed breakdown of how the day played out:
>
> Invitation was set for meeting 8am.
>
> None of the Underhills turned up.
>
> I visited the Underhill's home address at approximately 10am.
>
> Both Kane and Tyrone were home and Vehicles were in driveway.
>
> I asked the boys to pack up everything into the vans and meet me at the Albany office to have a meeting.
>
> Once at the Albany office, we proceeded to strip all stock off Kane's van and all cca property placed back in the bay. All banking was done and paperwork processed for both vans.
>
> I then took both Kane and Tyrone into the office and started the meeting.
>
> I discussed the lead up to this meeting and the process we had in place to improve performance in both fillers.
>
> I asked them if the[y] disagreed with anything I was saying, both were in agreeance to what was being said.
>
> I explained due to the consistent breaches to our contractual agreement we would be terminating our [contract] effective immediately.
>
> I also explained that any outstanding cashbags will be invoiced if not processed.
>
> I asked the boys if they had anything to say and they said under the circumstances they understood why it had come to this, and why I was forced to make this decision.
>
> Meeting ended and I returned to office.

Correspondence following meeting of 26 May 2016

[21] The sequence of events which followed the meeting on 26 May 2016 is set out in the ensuing correspondence between the Underhills and Coca-Cola. On 7 June 2016 both Kane and Tyrone Underhill wrote to Coca-Cola, inviting it to attend mediation with the "Department of Labour" with regard to termination of their "Employment Contract". On the same day they also requested Coca-Cola to

provide them with a statement in writing of the reasons for the termination of their "Employment Contract".

[22] On 14 June 2016 Mr Irvine responded by separate identical emails to the Underhills as follows:

> …
> I am writing to acknowledge receipt of your letters (both dated 7 June 2016) requesting (i) a written statement of reasons for termination and (ii) formally inviting us to mediation.
>
> Shane Martin is on annual leave. In his absence, I'm happy to help with your request but need some clarity on exactly what you're looking for. We can provide a written statement for reasons of termination, however by inviting us to mediation would infer that there is an employment dispute to resolve which, to the best of my knowledge, there is not.
>
> If you feel that there is a dispute that needs formally addressing, then you would need to raise a specific personal grievance claim against Coca-Cola Amatil NZ. From there we would then need an opportunity to respond before heading to mediation.
>
> I look forward to hearing from you.
> …

[23] Following the emails from Mr Irvine, an email response was sent by Kane and Tyrone's father, Waynne Underhill, who has apparently acted as adviser to his sons during this matter. His email of 26 June 2016 reads as follows:

> …
>
> I am Tyrone and Kane's father, Waynne Underhill. We would appreciate two individual written statements for the reasons of termination of Tyrone and Kane's Vending Filler Services Agreement, in accordance with section 120, ss (2) of the Employment Relations Act 2000. I would further remind your administration that, at 30 June 2016, the 14 day expiry date would be in effect.
>
> We have been in communication with Mediation services from MBIE for their assistance with these matters.
> …

[24] On 30 June 2016 Mr Simeon provided letters to both Kane and Tyrone Underhill. The letter addressed to Tyrone Underhill reads as follows:

…

Termination of your contract for services

We are writing to confirm the reasons for the termination of your services contract with Coca-Cola Amatil (N.Z.) Limited. You were engaged under a Vending Filler Services Agreement (dated 9 March 2016) (the **Agreement**) rather than a contract of employment.

However, as you are aware, we considered that your conduct remained unsatisfactory, despite numerous verbal and written warnings and corrective action requests, and our reasons for terminating your services pursuant to clause 12.2.1 of the [Agreement] were as follows:

- Persistent failure to perform your duties in accordance with instructions from us;
- Persistent failure to meet required service standards;
- Persistent failure to communicate with us or keep us informed as would be reasonably expected in order to fulfil your obligations;
- Persistent failure to comply with security measures regarding collecting and delivery of cash recovered from vending machines.

Despite the fact that you were not an employee at the time of termination of your services, we have confirmed with the Ministry of Business, Innovation and Employment of our willingness to attend a mediation session at their Queen Street, Auckland office on Wednesday 10 August 2016.

In the meantime, if you require further clarification, please do not hesitate to contact me.

…

[25] The letter addressed to Kane Underhill was identical except as to the date of commencement of the agreement.

[26] There then followed correspondence with the Mediation Service in an attempt to have the matter mediated. Eventually, on 12 July 2016 Coca-Cola indicated to the Mediation Service that it was not prepared to attend mediation. This prompted the plaintiffs to commence proceedings in the Authority. That resulted in the parties having to attend mediation, which was unsuccessful. In the period between the determination of the Authority and the hearing of the challenge, the Underhills maintained that correspondence they had written to Coca-Cola clearly raising a personal grievance was provided to the mediator. This was alleged to be in the form of emails. Coca-Cola denied ever having received such correspondence or

that such correspondence had been given to the mediator. The Underhills were not able to produce copies of these emails.

[27] The presentation of the statement of problem to the Authority would certainly have met the requirements of s 114(2) of the Act, which reads as follows:

> 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.

[28] The date of commencement of the proceedings before the Authority would have been outside the period of 90 days from the date of termination of employment on 26 May 2016. However, in view of all of the circumstances, and particularly the fact that the parties believed initially that the relationship between them was not one of employment, 26 May 2016 may not be the date on which the action that is alleged to amount to a personal grievance occurred or came to the notice of the employees.

Raising the grievance

[29] The position of Coca-Cola is that the action alleged to amount to a personal grievance occurred or came to the notice of the Underhills on the date of the oral termination of their contract or, as is now conceded, their employment agreement. This date was 26 May 2016. Coca-Cola claims that no actions amounting to the raising of the personal grievance occurred within 90 days of that date.

[30] The Underhills allege that they sent an email to Coca-Cola on 11 July 2016 and that this email specifically raised the grievance. This is denied by the witnesses of Coca-Cola, and the email was not able to be produced at the hearing. The onus is on the Underhills to prove conclusively that that document was sent as it would be crucial to the issue raised in these proceedings.

[31] Putting that aside, it has been established that the Underhills took two actions. First, they asked for mediation. Secondly, they asked about the reasons for their termination of employment. Both of these requests were made on 7 June 2016.

[32] Asking for reasons for dismissal does not constitute raising a personal grievance.[4]

[33] As for asking for mediation, Mrs Smith, counsel for the defendant, accurately pointed out in her closing submissions:

> Mediation may be sought for a variety of employment relationship problems that are not personal grievances, including wage arrears claims, disputes about the interpretation, application or operation of employment agreements, compliance orders or any other employment relationship problem.

It therefore must be correct that a request for mediation cannot constitute raising a personal grievance. It could mean a number of things.

[34] Individually, neither asking for mediation nor asking for reasons for dismissal counts as raising the grievance. The question then arising is whether they would count in combination or along with other factors.

[35] While it is true that mediation can deal with many matters that are not personal grievances, asking for reasons for dismissal at exactly the same time would narrow down those possibilities. It would be difficult to accept that the employer might have thought the mediation was about other matters such as, for example, interpretation of the employment agreement, when it was being asked to attend mediation on exactly the same day as a request for the reasons for dismissal. It could only be assumed that the mediation was in connection with the dismissal.

[36] The effect of these two actions being taken on the same day is equivalent to a statement along the lines of 'I am raising a personal grievance for unjustified dismissal'. While the Underhills did not explicitly say that, a reasonable employer could infer it.

[37] However, there is a further issue of lack of specificity. The starting point is the language of section 114(2), which has been set out earlier in paragraph [27]. The

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4 *Houston v Barker t/a Salon Gaynor* [1992] 3 ERNZ 469 (EmpC).

core principle for the statutory requirement to be met is stated in *Creedy v Commissioner of Police*:[5]

> [36] 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* … As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[38] The emphasis in the above quotation clearly indicates that a statement to the effect that 'I have a personal grievance for unjustified dismissal or disadvantage' is insufficient to raise a grievance.

[39] *Creedy* was applied in the context of unjustified dismissal in *Idea Services Ltd v Barker*.[6] In that case, the letter sent by the employee specified that a personal grievance would be raised, and it listed a number of statutory provisions.[7] The Court held that this was insufficient. This was because it:[8]

> … gave no indication of the factor or factors that the defendant contended made her dismissal unjustified, and it did not attach material that might otherwise have provided the necessary detail.

[40] In this case, as occurred in *Barker,* it is clear that Coca-Cola could not know what to address. It could know that it was a personal grievance for unjustified dismissal, but it had no way of responding to that without knowing the grounds on which the dismissal was claimed to be unjustified. It fails the basic test in s 114(2) as well as the principle outlined in *Creedy*. The personal grievance could not have been raised by these two actions.

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5 *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) (emphasis added). It should be noted that *Creedy* was overturned on appeal, but not on this point of law. See *Creedy v Commissioner of Police* [2007] NZCA 311; *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7.

6 *Idea Services Ltd v Barker* [2012] NZEmpC 112, [2012] ERNZ 454.

7 At [34].

8 At [46].

The commencement of the 90-day period

[41] As stated earlier, the one action taken by each of the Underhills that certainly would count as raising the grievance is their filing of the statement of problem in the Authority. That the filing of a statement of problem counts as raising a grievance has been confirmed in the previous decisions of *Premier Events Group Ltd v Beattie*[9] and *Pollard Contracting Ltd v Donald*.[10]

[42] The defendant's position is that this occurred out of time. It was raised by Mrs Smith in her submissions that the company terminated the Underhills' employment on 26 May 2016, and because the statements of problem were filed on 1 September 2016, that amounts to a delay of 9 days from the expiry of the 90-day period.

[43] The starting point for considering whether the defendant is correct is the wording of s 114(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 beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[44] This section creates two different starting points for the limitation period:

(a) when the cause of action actually accrues; or

(b) when the employee notices that the cause of action accrues.

The limitation period will start at whatever period is later.

[45] There are therefore two potential arguments for starting the limitation period on a date other than 26 May 2016. The first is that the cause of action did not actually accrue on that date, and the second is that, even if it had, the Underhills did not realise it until later. Both options will be considered below.

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9 *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79, [2012] ERNZ 257 at [11].
10 *Pollard Contracting Ltd v Donald* [2014] NZEmpC 137; [2014] ERNZ 318 at [10]-[15].

The date of accrual of the cause of action

[46] The contract between Coca-Cola and each Underhill brother is written as a contract for services, using language more appropriate for a commercial relationship than an employment relationship. As such, one unusual feature is its express termination clause, cl 12.

[47] Clause 12 contains two methods for the contract to be terminated.

(a) The first is sub-cl 12.1, which gives Coca-Cola an exclusive right to "terminate this Agreement at any time during the Term by giving not less than one calendar month's *written notice* to the Filler". (Emphasis added)

(b) The second method is outlined in sub-cl 12.2. This requires one party to default (then becoming the "Defaulting Party"), either by committing a breach (12.2.1) or by becoming insolvent (12.2.2). The "Non-defaulting Party" then has a right to send a notice in writing to remedy that default. If the default is not remedied after five business days, "the Non-defaulting Party may terminate this Agreement forthwith *by giving written notice of such termination to the Defaulting Party*". (Emphasis added)

[48] The clear effect of the above provisions is that this is a contract that can only be terminated by written notice.

[49] The rule for express termination clauses in contract law is that they must be followed strictly, or else the termination will have no effect. This is made clear in *Chitty on Contracts*:[11]

> The terms of the contract may… provide that notice can be given only… in a certain form (e.g. in writing) … Prima facie the validity of the notice depends upon the precise observance of the specified conditions.

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[11] HG Beale (ed) *Chitty on Contracts* (32nd ed, Thomson Reuters, London, 2015) vol 1 at [22-051].

Edwin Peel similarly writes:[12]

> The party seeking to terminate must act strictly in accordance with the terms of the clause. For example, a voyage charter party may provide that the charterer can cancel if the ship is not at the port of loading by September 30. The charterer would not be entitled to cancel on September 29, even though at that time the ship was so far away from the port that she could not possibly get there the next day.

[50] The High Court in New Zealand has also stated that express termination clauses in contracts need to be "strictly construed".[13] The effect of this is illustrated by *Elkington v Phoenix Assurance Company*.[14] That case concerned an insurance contract. The insurance company attempted to cancel the insurance orally. The Court held, however, that only a written termination could suffice in that case, as the insurance contract asked for "delivery of notice", and notice is only capable of "delivery" when it is in writing. The oral notice was therefore not sufficient. This meant that the insurance contract was not actually cancelled; the insurance company had to pay out for the insured's building burning down.

[51] The *Elkington* case was cited with approval in the employment context in *Chapman v Waitemata Stevedoring Services Ltd (No 2).*[15] It should be noted that the case did not concern a dismissal; rather, it was about a lockout and insufficient notice by the employer in putting one into effect.

[52] General principles of contract law are applicable in the employment context. This is clear from s 162 of the Act, which allows the Court to apply any rule of law relating to contracts. The principle was also stated recently by the Court of Appeal:[16]

> Contracts of employment are subject to the same rules of interpretation as apply to all contracts. The express terms are the central focus of an interpretative assessment.

[53] In *Money v Westpac Trust Banking Corporation* the Employment Court emphasised that:[17]

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12 Edwin Peel *The Law of Contract* (12th ed, Sweet & Maxwell, London, 2007) at 900.
13 See for example *Brown & Doherty Ltd v Whangarei County Council* [1988] 1 NZLR 33 (HC) at 36.
14 *Elkington v Phoenix Assurance Company* (1895) 14 NZLR 237 (SC).
15 *Chapman v Waitemata Stevedoring Services Ltd (No 2)* [1992] 3 ERNZ 756 (EmpC) at 771.
16 *AFFCO NZ Ltd v NZMW & Related Trades Union Inc* [2016] NZCA 482 at [31].
17 *Money v Westpac Trust Banking Corporation* [2003] 2 ERNZ 122 (EmpC) at [39].

> The contractual obligation must be taken to have been entered into deliberately by the respondent with the intention of honouring it if the occasion arose.

[54] Judge Inglis (as she then was) recently reiterated these principles in *Stormont v Peddle Thorp Aitken Ltd*.[18] In that case, the employment contract specified that if the employee's employment was terminated, the company must consider another position for her. The company's failure to do so was considered a breach of its contractual obligations and duty of good faith.[19]

[55] In relation to notice periods, the Court has applied a strict approach to both parties to an employment agreement. It was decided in *Poverty Bay Electrical Power Board v Atkinson* that the limitation period starts at the end of the notice period given to the employee.[20] In that case, the employee had a three-month notice period in his contract. He was dismissed and paid in lieu of working out his notice. He raised his grievance four months after that payment was made. This was held to be on time; the period started running at the end of the three-month notice period, which means it only took him one month to raise the grievance.

[56] A similar conclusion was reached in *New Zealand Automobile Association Inc v McKay*,[21] where Chief Judge Colgan applied *Atkinson*. In that case, the employee was given one month's notice upon dismissal. He tried to raise the grievance during that one-month period, but it was held not to be possible, as the dismissal only occurred at the end of that one-month period. It could only have been a disadvantage grievance raised during that notice period.

[57] While *Atkinson* and *McKay* involved dismissal upon notice, and the present case involves what was in effect a summary dismissal, the principle is the same. If it is accepted that the express termination clause must be strictly construed, in accordance with contract law principles, then it follows that termination of employment in this case was not perfected and did not occur on 26 May 2016. This is for the simple reason that notice was given orally in a face-to-face meeting on that

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18 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71.
19 At [74]-[81].
20 *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 (EmpC).
21 *New Zealand Automobile Association Inc v McKay* [1996] 2 ERNZ 622 (EmpC). See also *Charlton v Colonial Homes Ltd* [2001] ERNZ 759 (EmpC).

date – no written notice was provided. Since the Underhills were not technically dismissed on that date, the cause of action did not yet accrue. There cannot be a personal grievance for unjustified dismissal when the employee has not yet been dismissed.

[58] If the dismissal did not occur on 26 May 2016, then the question arises as to when dismissal actually occurred and, therefore, when the limitation period starts. Following the 26 May 2016 meeting, there was correspondence sent to the Underhills, all through email. One pair of emails was sent on 14 June 2016 (one to Kane Underhill and one to Tyrone Underhill), and another pair of letters was sent by email on 30 June 2016.

[59] The pair of emails of 14 June 2016 could not be considered written notice of termination. However, the letters sent by emails of 30 June 2016 regarding the reasons for termination are sufficient. The letters are titled "Termination of your contract for services". Each letter explicitly mentions cl 12.2.1 of the contract, which deals with reasons for termination. This is the written notice the Underhills should have expected under the contract.

[60] Dismissal was therefore perfected and occurred on 30 June 2016, as this is when written notice was provided. The period between 30 June and 1 September 2016 (when the Statements of Problem were filed) is 63 days, which is well within the 90-day limitation period. Even if the emails of 14 June 2016 were regarded as written notice, the Underhills would still be in time if the dismissal was held to have occurred on 14 June 2016. There are 79 days between 14 June and 1 September 2016. The dismissal could not have occurred any earlier than that, as there was no other written correspondence from Coca-Cola to the Underhills in evidence.

[61] In case this argument raises 'floodgate' concerns the implications of this case would not be far-reaching. There are already decisions of the Court that indicate dismissal only occurs at the end of the notice period. It is a fair principle, especially when one party is itself essentially relying on the other party's lack of legal representation and a strict construction of s 114 of the Act. It is not usual for employment contracts to have such express termination clauses as occurs in this

case. The only reason there was such an explicit clause here is that this was intended to be a commercial contract for services.

[62] Further, if an employment agreement in a future case did have such an express termination clause, there is no reason for it not to be applied. For the Court to ignore it would defeat the parties' contractual intention, and there is no legislative provision that would justify that.

Section 114(1) – when did the action alleged to amount to a grievance come to the notice of the employee?

[63] This is the alternative argument under s 114(1) of the Act. If termination of employment did occur on 26 May 2016, it is still possible that the limitation period had not commenced if the Underhills did not realise that their cause of action accrued at that point. The Underhills adverted to this argument in both their oral evidence and submissions and it therefore warrants consideration.

[64] The way it was somewhat vaguely argued by the Underhills was that they initially believed themselves to be independent contractors and therefore incapable of filing a personal grievance. This belief would then have been undone by the letter expressing the reasons for termination on 30 June 2016, so the limitation period, they argued by inference, would begin there.

[65] It is a difficult argument to make, as the letter with reasons for termination actually states exactly the opposite. It is titled "Termination of your contract for services". The second sentence states "You were engaged under a Vending Filler Services Agreement… rather than a contract of employment". And near the end, it states "you were not an employee at the time of termination of your services". It would be very hard, therefore, for the Underhills to claim they first realised they were employees from that letter.

[66] In addition, certain excerpts from the oral evidence and specifically the cross-examination suggest the Underhills accept that they realised they were dismissed unjustifiably as early as 26 May 2016. In Tyrone Underhill's cross-examination, counsel for the defendant asked if both Underhills only realised they were

unjustifiably dismissed upon receiving the letter on 30 June. In response, Tyrone Underhill stated:

> I always knew. It's a feeling that comes over you. You're working under – that's the grievance there, it's the emotion that takes over you. You know when it's there.

[67] The same question was asked of Kane Underhill. His response was:

> … we felt the personal grievance long before the 30th of June.

[68] In expressing it this way, the Underhills may have been confusing the lay term of 'being aggrieved' with the technical legal term of 'having a personal grievance'. Nothing Tyrone Underhill said necessarily implies this, but Kane Underhill did say:

> … we discussed it with my father and he explained to us what we need to do then and there when we emailed… Wayne and Bob, about the termination and everything we knew what we were asking for that, where there was a personal grievance before asking it, *but until we actually seen what we were initially sacked for then we realised it was real.*
>
> (emphasis added)

[69] The emphasised portion is the relevant part. Looking past the difficult syntax, Kane Underhill appears to be making the distinction between earlier feeling aggrieved and then realising that he had a "real personal grievance".

[70] There could, then, be an argument that the Underhills knew they were dismissed on 26 May 2016 but that they did not realise they were *unjustifiably* dismissed until they saw the reasons for dismissal. An Authority determination containing this type of argument is *MacDonald v The Optimum Clothing Ltd*,[22] although the facts are not similar. In that case, the employee was made redundant on 29 April 2011. She did not raise the personal grievance within 90 days of that redundancy. However, on 3 June 2011, she saw that her "former position" was advertised. The Authority held that the limitation period started on 3 June 2011, as this was when she realised that her redundancy was not genuine, and that she

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22 *MacDonald v The Optimum Clothing Company Ltd* [2012] NZERA Auckland 161.

therefore has a personal grievance. She therefore managed to raise the grievance in time.

[71] While *MacDonald* is not binding on this Court, the Authority did cite the Court's decision in *Drayton v Foodstuffs (South Island) Ltd*, a case involving allegations of discrimination by reason of involvement in union activities.[23] The Court accepted that the dismissal and the reasons for dismissal can be separated in time, meaning that it is possible the personal grievance does not come to the attention of the employee until a date later than the date of dismissal.

[72] A similar decision, also of the Court, is *Robertson v IHC New Zealand Inc*.[24] There, the Court stated that:[25]

> … if circumstances later came to the notice of the affected employee which arguably rendered his/her earlier termination of employment a personal grievance comprising an unjustified dismissal, then the 90-day period will commence from the date the affected employee reasonably concludes he/she has been unjustifiably dismissed because of the further information he/she has derived concerning the contended basis of his/her dismissal.

[73] *Robertson* also concerned a redundancy rather than a dismissal for cause. However, the same principles apply for such a dismissal. If it is the case that the Underhills only found out the reasons for their dismissal on 30 June 2016, and only at that point realised that dismissal was unjustified, this could be the date when the limitation period starts to run.

Were reasons provided on 26 May 2016?

[74] This comes down to a question of fact. Coca-Cola insists that it was clear about the reasons for termination of employment during the 26 May 2016 meeting. The Underhills appeared to deny this. When asked in cross-examination whether Mr Martin explained the reasons during the meeting, Kane Underhill stated:

> No he didn't. He didn't say that. What he really said was, "You know why yous are fired, eh?" And to be honest, no we didn't. We didn't. It was an emotionally (sic) thing.

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23 *Drayton v Foodstuffs (South Island) Ltd* [1995] 2 ERNZ 523 (EmpC).
24 *Robertson v IHC New Zealand Inc* [1999] 1 ERNZ 367 (EmpC).
25 At 387.

[75] Similarly, Tyrone Underhill was asked whether he said that he understood the reasons why his employment was terminated during the meeting. He said:

> Yeah, I did say that just to make it not awkward, 'cos we liked Shane, you know, it was an awkward meeting, you know…

[76] The characterisation by the Underhills is that the meeting involved Mr Martin just asking if they understood why they were dismissed, and the Underhills saying they did just to avoid any further awkwardness.

[77] Coca-Cola's evidence is that the reasons were stated explicitly during the meeting. Mr Martin stated from his brief of evidence:

> … I discussed with them the lead up to the meeting, and the processes we had in place to improve their performance. Neither of them disagreed. I explained that due to consistent breaches of their contractual arrangements, we would be terminating their contracts effective immediately.

[78] The issue is not whether or not the Underhills said they understood why they were being dismissed, but rather whether the reasons were actually outlined during the meeting. The Underhills claim they were not, while Coca-Cola claims they were. Had Coca-Cola complied with the contract by providing written notice at that point, the issue would have been clarified. Nevertheless, the Underhills' vagueness in their evidence on this and other matters leads me to prefer Mr Martin's evidence. Mr Martin's chronology, sent to his colleagues at the time, confirms his account of what transpired. It is more likely than not that the conversation and the provision of reasons were more extensive than the Underhills' claim.

Constructive knowledge

[79] Even if it was the case that reasons were not properly communicated during the 26 May 2016 meeting, such that the Underhills could clearly know the position, it is strongly arguable that they should have understood the reasons, putting aside whether they actually did. This is because of the numerous emails in evidence, preceding the meeting and outlining the issues with the Underhills' performance.

[80] The Underhills must have been aware of Coca-Cola's concerns at their performance issues, as there was no shortage of written communications outlining

those issues. Even if Mr Martin did not specifically point these reasons out during the 26 May 2016 meeting, the Underhills should have been able to glean that those were the reasons.

[81] Looking at the quote from *Robertson* again, it is clear that constructive knowledge will suffice. The employees could "reasonably conclude" that the dismissal was unjustified. This was the result in *Drayton v Foodstuffs*.[26] The Court there concluded that the employees should have known that the reasons for their failure to receive a bonus may be discriminatory before the reasons were officially sent through, as the circumstances pointed to that conclusion.

[82] In the present case, the reasons for dismissal of the Underhills sent on 30 June 2016 related to communication problems, failing to complete certain tasks and unsatisfactory attendance. This is exactly what the written communications prior to the 26 May meeting mention. The Underhills should have realised the reasons for termination of employment at the 26 May meeting, even if they were not explicitly spelt out.

[83] For these reasons, this argument by the Underhills that the limitation period may have started later fails. However, as I have found on the alternative point that the cause of action actually accrued on 30 June 2016 when the requirement for written notice was perfected and the 90-day period commenced then, their grievances were raised within time. I now continue to consider their grievance claims.

The personal grievances

[84] As indicated earlier, Mr Martin conceded that if Coca-Cola had been aware that the relationship between it and the Underhills had been that of employment, the termination of the agreements would have been dealt with differently. Coca-Cola therefore conceded that in the dismissals of the Underhills, procedural requirements in employment law, and specifically those set out in s 103A(2) and (3) of the Act, were not complied with. While it is clear from the contemporary documents that

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[26] *Drayton v Foodstuffs (South Island) Ltd*, above n 23.

there had been discussions with the Underhills over a reasonable period of time as to the deficiencies in their performance, the decision to cancel what were thought to be contracts for services was sudden and peremptory. No opportunity was given to the employees to have legal representation or accompanying persons present when disciplinary action was being taken. As matters progressed, the point should have been reached where Coca-Cola knew that termination of what has now been agreed as employment, was in contemplation. This would have required more formal warnings to have been given, legal or other representation recommended and the potential outcomes, if improvement was not effected, being clearly set out. There does not appear to be any occasion when the deficiencies alleged were spelled out in advance of meetings and in written form. No written warnings were given that the discussions on performance might lead to further disciplinary action. In particular, no indication was given that failure to improve might lead to dismissal. The dismissal was summary and in breach of Coca-Cola's own written contract requiring written notice. No reasons were given as to why the conduct justified summary dismissal as opposed to dismissal with a period of notice or payment in lieu. There has been no suggestion that the Underhill's behaviour amounted to serious misconduct which might ordinarily be required to justify a peremptory summary dismissal such as occurred in this case.

[85] Regardless of the company's belief about the Underhills' employment status, there was sufficient evidence given orally and by way of contemporary documents to show that the Underhills were clearly in default in the performance of their duties. The documents show that efforts were made to contact the Underhills while they were on the road; and justifiable reasons were clearly set out as to why Coca-Cola would want to be in contact with them urgently and in the interests of maintaining its relationship with its customers. The reasons given by the Underhills in their defence for not making contact were not persuasive.

[86] In this case, the primary reason for finding the dismissals to be unjustifiable is the procedural defects. Subject to the reservations in s 103A(5) of the Act, even where the employee's conduct is such that dismissal or other disciplinary action could be justifiable, failure to comply with the procedural requirements should not be downgraded as having lesser importance in the Court's assessment of a grievance.

The required procedures confirmed in employment law cases and prescribed in the Act have been established to ensure that in the interests of maintaining continuity of employment and good employment relations every opportunity is provided to give the parties to the relationship the chance to resolve their differences. Explanations may be given which may provide a different perspective. Last chances to improve in the knowledge that serious consequences may otherwise result can lead to a change in attitude and behaviour. Proper counselling can be provided along with proper and expert representation and submissions for employees who may be too unsophisticated to adequately perceive and present their position. There are many other varied reasons why adequate and proper procedures are imposed upon employers contemplating disciplinary action. In this case, Coca-Cola fell short of those standards and opportunity for differences being reconciled were lost. The defects were not minor and resulted in this case in unfair treatment of the Underhills. On an objective basis, Coca-Cola's actions and methods of terminating the employment of Kane and Tyrone Underhill were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. They were unjustifiably dismissed. This is particularly so when more than one witness indicated that when the Underhills were present at work and carrying out their duties as vending machine fillers, they did so to a high standard. It was just their other deficiencies, involving lack of attendance and failure to communicate, that made it intolerable for Coca-Cola to continue their employment.

Remedies

[87] There was very little evidence from the plaintiffs to support the remedies they claimed. Certainly, there was no evidence from them to support their claim to reinstatement. Nor, however, was there evidence from Coca-Cola that reinstatement would not be practicable or reasonable, which is the threshold as to when reinstatement may be ordered pursuant to s 125(2) of the Act.

[88] There is no specific onus applying either way on the issue. The Employment Court, sitting as a full Court in *Angus v Ports of Auckland (No 2)*,[27] stated that if reinstatement is claimed and the employer opposes it, the employee "will need to

[27] *Angus v Ports of Auckland (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [66].

provide the Court with evidence to support that claim". The Court also discussed that the reasonable requirement "invokes a broad enquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned".

[89] It added:[28]

> … the reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some case, others, for example health care patients in institutions.

[90] As to whether reinstatement is reasonable and practicable, there was oral evidence during cross-examination from both Underhills which was unsupportive. The allegations they made against Coca-Cola made it plain that the relationship had deteriorated to such an extent that they may not have been willing to continue in employment in any event. From both parties' points of view in this case, reinstatement, without further evidence, could be assessed as likely to have a negative effect on both of them. The Underhills were clearly unhappy with what they perceived to be unreasonable demands being made, and it is clear that Coca-Cola had reached the end of the road in trying to have the Underhills improve their performance. Mr Martin, in his evidence, expressed his frustration that no matter how often the deficiencies were raised with the Underhills, no improvement resulted. From the evidence of the Underhills I gained the impression that they had no insight into the difficulties they created by their unsatisfactory attendance and their refusal to properly communicate with their supervisors.

[91] In this case, the Underhills do not reach the standard set in *Angus* in that no evidence has been provided which would support an assertion that a claim for reinstatement would be reasonable and practicable. Unfortunately, in the absence of evidence from Coca-Cola, it is impossible to assess conclusively the effects on it or its other employees. Nevertheless, in view of the deterioration in the relationship from both parties' points of view, reinstatement in this case would not be practicable and reasonable.

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[28] At [68].

[92] Insofar as compensation for humiliation, loss of dignity and injury to feelings and reimbursement for lost earnings are concerned, there was again very little evidence from the Underhills to support these remedies. Quite often in cases such as this and particularly where lay litigants are involved, the parties concentrate in their evidence on the substantive issue of the alleged grievance and totally overlook that evidence is also required to enable the Court to consider remedies. Neither the Underhills nor Coca-Cola in their evidence in this case properly covered the issue of remedies. However, some evidence emerges from the oral evidence and the contemporary documents, which assists the Court to some extent in dealing with these remaining issues.

[93] Regarding compensation, the Underhills provided a few statements during cross-examination which might go towards justifying some award. Kane Underhill, when he was being questioned about the email, which he alleged amounted to a raising of a grievance but which he could not produce, responded:

> We'd have to go search digging for them, cos we've – when we lost our job we lost our house, we lost our power, we lost our Internet. It's hard to get those documents. They're emails on Internet. Those are hard to get.

The Court could infer that losing their house, power and internet would certainly add to the stress and loss of dignity in losing their jobs quite significantly. This evidence was also not disputed by the defendant.

[94] Later during cross-examination, Kane Underhill said:

> … what had happened was when we had lost our jobs my father just asked us what happened and we explained to him the whole situation. … essentially our spirits were defeated, and he saw this. …

The statement "spirits were defeated" is evidence of hurt and humiliation.

[95] Also during cross-examination Tyrone Underhill stated:

> … We all felt that it was over. We knew, me and Kane, Shane knew; so to tell us to come to that meeting, you know, it's embarrassing to show up and face it like that. You know, maybe the problem is we're just little kids and at the end of the day we can't face that stuff.

This shows that the Underhills would have felt humiliated by the peremptory request to attend the meeting and then being summarily dismissed. Some inferences could be made here in a situation where the employer came to their own home, asked to meet him at the office for a meeting and then carried out a dismissal. Certainly, this would have been humiliating.

[96] Insofar as the claim for reimbursement of lost earnings is concerned, there is very little evidence which can be relied upon. During the trial period when they were on fixed term employment agreements, the Underhills each earned $18 per hour. Under the Vending Filler Services Agreement, a formula for calculation of charges was provided.

[97] In relation to mitigation, there is some evidence that once termination was effected they made efforts to obtain alternative employment. During cross-examination, Kane Underhill stated:

> … when we had lost our jobs … We had tried to get jobs after that and it just wasn't working …

Contributing behaviour

[98] Where the Court determines that an employee has a personal grievance, s 124 of the Act requires, in deciding both the nature and extent of the remedies to be provided in respect of that personal grievance, consideration of the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance. If those actions so require, the Court may then reduce the remedies that would otherwise have been awarded. While in this case the importance of the procedural requirements to be followed has been stressed, the Court has accepted that there were substantial difficulties with the Underhills' performance of their duties. Balanced against that are the substantial procedural deficiencies of Coca-Cola in carrying out the termination of employment. While that is understandable in this case because Coca-Cola believed that it was in effect terminating a contract for services, some aggravation of the position has occurred because a different result may have been in prospect if proper procedures had been followed. Balancing the matter as best I can in the circumstances, I have concluded that the contributory

conduct of the Underhills should result in a reduction in the remedies to be awarded by 25 per cent.

Summary and disposition

[99] In summary, the claim made by the Underhills that their grievances were made within time is upheld. This is on the basis that the written agreement between the parties required written notice to be given. On the basis of strict contractual obligations, until that was perfected, a cause of action did not accrue. The 90-day limitation period for raising a grievance did not commence until the position was corrected.

[100] The secondary argument by the Underhills, that they did not realise they had a personal grievance until a later date, fails.

[101] The Underhills were unjustifiably dismissed.

[102] Insofar as remedies are concerned, it is not appropriate to order reinstatement in this case. Making the best that the Court can from the paucity of evidence on other remedies, compensation pursuant to s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings is awarded to each of the Underhills in the sum of $1,200 but to be reduced by 25 per cent to take account of their contributing behaviour.

[103] Insofar as reimbursement for lost wages is concerned, there is some evidence of attempts at mitigation. Even without such evidence, in a situation where the Underhills were summarily dismissed in somewhat difficult circumstances, it would be unreasonable to expect them to immediately obtain alternative employment. In all of the circumstances I award them reimbursement of what were, in effect, wages. The total period of reimbursement is to be four weeks. This is to be calculated on the basis of the average weekly amount paid to them in the four months preceding 26 May 2016 and then reduced by 25 per cent. That should be paid to each of the Underhills on a gross basis, without deduction for PAYE. They will then become personally responsible for accounting to the Inland Revenue Department for any tax

which may be payable. The reason for this is that if they were previously dealing with the Inland Revenue Department on the basis of being self-employed, reassessment of tax payable by them may be required.

Costs

[104] Insofar as costs are concerned, the Underhills represented themselves. Costs would normally follow the event, but they are not entitled to costs. Nevertheless, it is ordered that they be reimbursed by the defendant for filing fees of $204.44 they have paid to the Court. In view of the fact that the substantive determination of the Authority is set aside by this judgment, any costs determination by the Authority is set aside and the Underhills are to be reimbursed by the defendant for any filing fees they paid to the Authority.

M E Perkins

Judge

Judgment re-signed at 10 am on 29 September 2017