IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2021] NZEmpC 155
EMPC 398/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BEST HEALTH FOODS LIMITED Plaintiff
AND	ROXANNE BEREA Defendant

Hearing:	29 June 2021 (Heard at Christchurch)
Appearances:	J Gu, agent for Best Health Foods Ltd R Berea in person
Judgment:	20 September 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Best Health Foods Limited (BHFL) has challenged a determination of the Employment Relations Authority which dealt with issues arising from a termination of Ms Roxanne Berea's employment with that entity, after a very short period of employment under a trial provision.[1]

[2] The challenge is brought on a non-de novo basis. The issues raised by the challenge are that the Authority erred in fact or in law in one or more of the following respects:

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1 *Berea v Best Health Foods Ltd* [2020] NZERA 474 (Member Beck).

a) Having found there was a valid 90-day trial provision in Ms Berea's individual employment agreement (IEA), it erred when it found no notice was given under that provision.

b) It also erred by concluding that no fair and reasonable employer could have concluded that summary dismissal on performance grounds was warranted.

c) Finally, it erred at the remedies stage, in particular by not reaching a correct conclusion as to contribution, when it determined Ms Berea's conduct did not contribute to her personal grievance.

The Authority's determination

[3] Since the challenge raises issues as to whether or not the Authority erred, it is necessary to set out its findings.

[4] The Authority began by summarising the evidence as to how Ms Berea came to be employed by BHFL for a short period only.

[5] After referring to email exchanges, the Authority found that on Monday, 13 January 2020, Ms Berea accepted an offer to work for BHFL as a Marketing, Sales and Production Coordinator.[2] Although she indicated she would commence on Thursday, 16 January, it was subsequently agreed that she would start Friday, 17 January 2020.[3]

[6] The Authority noted that Ms Berea recalled on her first day being asked to assist with a presentation for a visiting Chinese delegation who were being shown around the factory the next day, a Saturday. She worked until 4.00 pm, when Mr James Gu, the General Manager, Director and shareholder of BHFL, advised her that the visit had been postponed.[4]

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2 At [9].
3 At [10].
4 At [16].

[7] On Monday, 20 January 2020, Ms Berea worked a full day. She recalled being frustrated with IT/email connection issues. She was also asked to write content for BHFL's website. She said she asked for a briefing as to the materials that would be available to assist on that task, but Mr Gu told her simply to check online what other companies were doing, and to adapt that content.[5]

[8] On Tuesday, 21 January 2021, Ms Berea said she had a meeting at 9.00 am with Mr Gu and his co-director, Ms Yali Li. She was told her work was "basic" and that she had until the end of the day to produce more acceptable content. Mr Gu had been concerned that Ms Berea had provided copy with a basic error that misdescribed the benefits of BHFL's productions, and that the copy was not solely focused on infant formula as it should have been.[6]

[9] At the end of that day, Ms Berea was asked to meet Mr Gu at 4.30 pm. The Authority found that at this short meeting, Mr Gu told Ms Berea he was unhappy with her work, and that she was not needed any further. Ms Berea collected her belongings and left the workplace. She said she was in tears and recalled ringing her husband.[7]

[10] Mr Gu had said that given the small size of his company (14 to 15 employees), he needed someone to "hit the ground running" and he was unimpressed by Ms Berea's expectation of IT support and her writing skills, and that he made an early decision to end the employment relationship based on a belief that a valid 90-day trial period was in place.[8]

[11] The Authority went on to find that Mr Gu then forwarded a letter by email to Ms Berea at 5.44 pm that purported to give her notice of her employment being terminated on Saturday, 25 January 2020. It indicated "[W]e are paying for the next three working days, but you don't need to come to work for us".[9]

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5 At [17].
6 At [18].
7 At [19].
8 At [20].
9 At [21].

[12] Ms Berea was then paid 47 and a half hours described as being inclusive of three days' pay in lieu of notice.[10]

[13] After discussing the law with regard to trial provisions, the Authority found that an employment agreement was concluded between the parties prior to the commencement of actual employment. Accordingly, the trial period in her IEA was valid.[11] This finding is not in issue in the present challenge.

[14] The Authority went on to consider whether Ms Berea was given valid notice. It recorded a relevant clause in the IEA which stated:[12]

> During the trial period, your employment may be terminated with three days' notice by either party, or payment in lieu of such notice.

[15] The Authority found that no notice, written or otherwise, was given to Ms Berea until after she had been dismissed at the brief meeting on 21 January 2020, and she had been "sent away" from the workplace.[13]

[16] The Authority found that s 67B(1) of the Employment Relations Act 2000 (the Act) envisaged the giving of notice prior to the ending of an employment relationship. It also concluded that giving notice after the point of dismissal was defective notice. The Authority said the dictionary definition of "notice" means to provide an indication of a future event or "advance notification or warning".[14]

[17] Reference was also made to dicta from the Court of Appeal in *Ioan v Scott Technology NZ Ltd,* in which it was held that the mere fact of a payment in lieu of notice does not itself prevent a termination from being a summary dismissal.[15]

[18] On the strength of its findings as to fact, the Authority determined that payment in lieu of notice, although permitted by the employment agreement, could not and did not, cure a defective notice.

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10 At [22].
11 At [29].
12 At [36].
13 At [39].
14 At [40]. Reference was made to Catherine Soanes and Angus Stevenson *Concise Oxford English Dictionary* (11th ed, Oxford University Press Inc, New York 2004).
15 *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386, [2019] ERNZ 331 at [28]–[29].

[19] I interpolate to record that the Authority initially issued its determination without referring to the email sent by BHFL to Ms Berea at 5.44 pm. After this omission was pointed out by Mr Gu, the Authority recalled its original determination, and reissued it with a reference to the email, as summarised above.[16]

[20] In the final version of its determination, the Authority said the notice given at the meeting with Ms Berea was not ambiguous or short; rather, it was non-existent. The Authority went on to say that even if it was to accept that the notice communicated by Mr Gu's emailed letter of 21 January 2020 constituted the dismissal, he would have concluded this was insufficiently short notice to meet the requirements of s 67B of the Act.[17]

[21] The Authority accordingly determined that Ms Berea was summarily dismissed, going on to conclude that this dismissal was unjustified because such a dismissal was not substantively or procedurally justified.[18]

[22] Remedies were assessed on the basis of there having been no contribution.

[23] BHFL was ordered to pay to Ms Berea:

a) $3,774.58 gross lost wages; and

b) $12,000 compensation for humiliation, loss of dignity and injury to feelings.

The hearing

[24] Mr Gu and Ms Li gave evidence for BHFL. The thrust of their testimony was that Ms Berea was not sent away at the meeting held on the afternoon of the third day of her employment. Rather, there was a discussion as to her work performance. They said that later that day, she was given notice of termination in the email sent by Mr Gu.

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16 Above at [11]. This issue was discussed in this Court's judgment: *Best Health Foods Ltd v Berea* [2021] NZEmpC 63.

17 At [42].

18 At [45]–[55].

[25] Mr Gu also asserted that written work carried out by Ms Berea in the course of her final day of employment, Tuesday, 21 January 2020, included language that had been plagiarised from a website of another organisation. He said this was dishonest and unethical which would have justified summary dismissal, and/or was a factor to be taken into account when assessing remedies if the Court were to get to that point.

[26] Ms Berea strongly contested both of these assertions. She said in summary that she was told in no uncertain terms at the afternoon meeting on 21 January 2020 that she was not needed any longer. She was very upset by this statement, and departed the workplace soon after, then telephoning her husband in a distressed state from her parked car to describe what had happened. Ms Berea's husband, Mr Raul Berea, confirmed this account.

[27] Ms Berea said that she had been employed to impress the delegation of overseas visitors to the BHFL factory. When they cancelled their visit, her services were no longer required and BHFL set about ending her employment as quickly as possible.

[28] One of the performance issues raised by Mr Gu was that when Ms Berea was asked to focus on activities which required the use of a desktop computer, she was wholly unable to install the necessary office applications.

[29] On this topic, Ms Berea called Mr Robin Zhou, another former employee of BHFL, who she had worked with in the short time she was an employee. He gave evidence about the difficulties Ms Berea had in carrying out any computer-based work. He said this was because the company was wholly unprepared for her to do so. He considered BHFL was slow to provide her with the necessary assistance. He also confirmed Ms Berea left the work premises soon after a meeting she attended with Mr Gu and Ms Li.

First issue: was notice of termination properly given?

[30] Although much of the evidence related to what occurred at the meeting which took place late on Tuesday, 21 January 2020, the preceding events are also relevant.

[31] Mr Gu put the employer's case on the basis that Ms Berea was seriously incompetent in relation to the tasks she was asked to undertake as Marketing, Sales and Production Coordinator.

[32] If correct, this point could be relevant to all three issues I identified earlier both in light of the Authority's findings, and the evidence placed before the Court.

[33] It is therefore necessary to review all the dealings between the parties.

Ms Berea's engagement

[34] Prior to her employment, Ms Berea was interviewed at some length by Mr Gu and Ms Li. It emerged Ms Berea had not been in employment for some six months. From this Mr Gu appears to have inferred that she had experienced difficulty in obtaining work, and that she may have over-sold herself when interviewed. This was reinforced, he believed, by the fact she was unable to properly carry out the tasks she was asked to perform over the first few days of her employment.

[35] I am satisfied from Ms Berea's evidence that approximately six months before she was interviewed, she decided to quit her job and take an extended holiday with her family in Romania. No adverse inference is to be drawn from this. Before doing so, she had worked in a variety of middle management roles in New Zealand, Romania, the United States of America and on cruise ships. She was undoubtedly experienced. No adverse inference should be drawn from these circumstances.

[36] During her interview, she was informed there was a delegation from China coming over to New Zealand a week after the interview, and that BHFL would wish to employ her to act as a guide for a factory tour. I find that an aspect of the company's interest in engaging Ms Berea arose from the fact that she was not Chinese. As she concluded, by employing her the organisation would not be seen as being a company operated solely by Chinese owners and workers.

Commencement of work

[37] As the Authority found, it is apparent the company was wholly unprepared for Ms Berea's arrival at the workplace for her first day of work. When she attended the

BHFL premises at 8.30 am on 17 January 2020, the gate was closed. She had to phone the company office number to obtain entry. She spoke to an employee who then unlocked the gate to admit her. He did not know who Ms Berea was, or that she had been engaged to be employed by the company. Mr Gu accepted that nobody other than he and Ms Li knew she would be attending that day.

[38] Ms Berea spent the day preparing her presentation for the anticipated factory tour for the Chinese delegation that was to take place the following day. However, she was advised at 4.00 pm that the delegation would no longer be attending.

Monday, 20 January 2020

[39] The findings made by the Authority as to what occurred on Monday, 20 January 2020 are not in issue. It is obvious from the evidence produced to the Court, and as found by the Authority, there were IT and email connection issues.

[40] Although a computer had been provided to her by about the middle of the day, there was no suitable mouse for it, nor essential software. Without access to Microsoft services, she was told she should use a Notepad application, for the purposes of recording content for the company's new website. These problems took a good part of the day to resolve.

[41] In the meantime, Ms Berea had been instructed to develop a new website for the company. With no computer access she handwrote ideas for this task. She says, and I accept, that from time to time Mr Gu walked past her desk and wanted to know what she had achieved.

Tuesday, 21 January 2020

[42] Again, the evidence given to the Court confirms what the Authority was told.

[43] Ms Berea arrived at work at 8.30 am. Mr Gu arrived some time later, and then asked her to attend a meeting with him and Ms Li. At the meeting, she was told that her work was "basic", and that she had until the end of the day to produce "better content".

[44] Ms Berea said that later she wished to discuss how the website she was to develop should be structured, and where to obtain information about the company, namely its history, current structure, products, suppliers, market orientation and so on. She was told there was no need for a meeting about these issues. Mr Gu said that the source material she needed would be available on the Internet. He said there was another entity with a similar profile, and that she should check what other such entities were doing and copy and adapt that material.

[45] Ms Berea said she was confused and astonished by these perfunctory instructions. Rather than offering information about the company so that she could undertake her task, she found she was being told to copy content developed by another entity.

[46] Nonetheless, she attempted to assemble ideas in a draft format, which she forwarded by email to Mr Gu.

The final meeting

[47] Mr Gu said a meeting was arranged to discuss Ms Berea's performance at 4.30 pm. He said he was concerned about Ms Berea's computer abilities. Mr Gu also said that she had used words from another website. He said he was very concerned she had plagiarised third-party material.

[48] He said the meeting lasted for 10 minutes, but he was unable to say what occupied that length of time. He accepted he could not recall elements of the meeting, particularly when pressed as to what each of the participants said.

[49] Similarly, Ms Li who attended the meeting, and then gave evidence about it, was unable to describe the event in any detail. At one stage, she suggested the meeting was at 2.30 pm, rather than 4.30 pm which was the time identified by Mr Gu; and that it lasted some 40-plus minutes, not 10 minutes.

[50] Both Mr Gu and Ms Li denied strongly that Ms Berea was sent away in the course of this meeting.

[51] Turning to Ms Berea's account, she agreed there was a meeting at 4.30 pm. She gave a plausible account as to what was discussed. She said that initially, problems were raised as to the adequacy of her written work. She was told that the work she had done was "very basic", and that it was not what the company was looking for.

[52] After discussing the problems with her written work, Ms Berea said Mr Gu told her she would not be needed further. She became upset. She sought clarification, stating that there were elements of her job description which had not been provided to her when interviewed. She emphasised that she had been asking for a meeting to discuss how the website work should be structured. She had received no training.

[53] Mr Gu said he could not afford to wait for her to "get up to speed" and the company had employed her so that she would "hit the ground running".

[54] Ms Berea then realised Mr Gu was terminating her employment. She was shocked that this was happening and asked him to clarify whether that was what he was in fact doing. She said that he confirmed this was the case.

[55] Ms Berea asked Mr Gu about the other things she was hired to do which was set out in her job description, such as proof reading, sales, planning and so on. Mr Gu said that these were "for later" and that the company did not "need those skills now".

[56] Then Mr Gu told Ms Berea to sign out and that he would pay her until 5.00 pm as it was nearly that time anyway.

[57] Ms Berea gathered her personal effects, signed out and left the workplace. Because she understood she was being paid to 5.00 pm, she recorded her sign out time as being 5.00 pm.

[58] Her time of departure from the workplace was confirmed by Mr Zhou, who noticed she came from the meeting with Mr Gu and Ms Li and then left. He confirmed that she was not present at 5.00 pm. I accept his evidence.

[59] Upon leaving the work premises, and when she was seated in her vehicle outside those premises, she rang her husband in a very distressed state. There was debate between the parties as to whether the phone call was in fact made where Ms Berea said it was made, from her vehicle outside the work premises, or as Mr Gu suggested in his cross-examination of Ms Berea, somewhere on the work premises.

[60] Mr Berea gave evidence. He said he realised the phone call from his wife was relayed via Bluetooth from within her vehicle. He also produced reliable evidence from Spark New Zealand Trading Ltd that the call took place at 4.52 pm. I accept Mr Berea's evidence.

[61] In summary, the evidence clearly establishes Ms Berea left the workplace before 5.00 pm. She signed out at 5.00 pm as she understood she had been authorised to do so. I accept her account as to timing.

[62] There are other factors that point to the accuracy of her evidence.

[63] First, it is more likely than not that Mr Gu on behalf of BHFL decided he did not wish to employ Ms Berea after he learned that the Chinese delegation was not attending. The instruction to Ms Berea that she "rewrite the website" was a spur-of-the-moment decision, because no forethought had been given to her ongoing role.

[64] The company was unprepared for her to undertake this type of work, hence the problems with the provision of a computer and the inadequate instructions that were given to her as to the source of information she should use as to BHFL's activities.

[65] Various performance issues were then raised because Mr Gu and Ms Li wished to terminate Ms Berea's employment.

[66] I accordingly accept the accuracy of Ms Berea's evidence as to what occurred at the meeting with Mr Gu and Ms Li. Her account that she was dismissed because BHFL no longer wished to employ her is entirely plausible. I reject the evidence of Mr Gu and Ms Li to the contrary.

[67] At the meeting, nothing was said as to notice. It is reasonably clear that after the meeting, which had not gone well, Mr Gu checked Ms Berea's employment agreement. It provided that three days' notice of termination of the trial period needed to be given. The email he sent at 5.44 pm was plainly sent to reflect that obligation.

[68] Accordingly, I find that the termination of Ms Berea's employment occurred during the 4.30 pm meeting.

[69] BHFL did not submit that the Authority's legal analysis was wrong as to the consequences of BHFL not giving the appropriate notice at the meeting held with Ms Berea

[70] The Authority found that Ms Berea was, in effect, summarily dismissed.

[71] The Court of Appeal held in *Ioan v Scott Technology NZ Ltd* that a strict approach to the construction of s 67B of the Act is required.[19] The section requires termination to be on notice. Summary dismissal therefore falls outside the section.[20] The Court concluded that Parliament did not intend that terminations of employment agreements that would at general law constitute terminations on notice could be classified as summary dismissals for the purposes of s 67B and fall outside its scope.[21]

[72] In the result, I find the Authority did not err when it found that notice was not given at the meeting Ms Berea attended, and that she was summarily dismissed when she was sent away. Since the provisions of the trial provision were not complied with, the company cannot rely on them.

[73] I dismiss this aspect of the company's challenge.

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19 *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386.
20 At [27].
21 At [28].

Second issue: was summary dismissal justified?

[74] The gist of BHFL's case as to summary dismissal was that Ms Berea's work performance over the three days of her engagement was so inadequate that summary dismissal was a step which a fair and reasonable employer could have taken.

[75] The termination of the employment provision of Ms Berea's employment agreement stated:

> The Employer may terminate your employment without notice or without a payment in lieu of notice for any of the following reasons, if you:
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> (a) commit any serious or persistent breach of any of the terms of the Agreement;
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> (b) are guilty of dishonesty, misconduct or neglect in the performance of your obligations under the Agreement;
>
> (c) become insolvent or bankrupt or make any assignment or arrangement with your creditors;
>
> (d) are convicted of any criminal offence relevant to the performance of your obligations under the Agreement;
>
> (e) refuse to comply with any reasonable instruction or direction including any failure to comply with your obligations under any of the Employer's rules, policies and/or procedures and any directions given by management of the Employer;
>
> (f) fail to perform to the standard reasonably expected by the Employer, including persistent failure to achieve targets;
>
> (g) obtain a medical assessment result that is not satisfactory to the Employer and which it objectively results in you being unable to perform your duties set out in the Agreement;
>
> (h) abuse alcohol or drugs whilst on the Employer's premises, or just prior to commencing work on the premises, which adversely affects your ability to carry out your duties; or
>
> (i) engage in physical abuse or display unreasonable verbal aggression.

[76] It is clear that these provisions are intended to describe serious misconduct of a kind which a fair and reasonable employer could conclude justifies immediate dismissal.

[77] In applying the test of justification as described in s 103A of the Act, the Court must objectively assess substantive and procedural fairness.[22]

[78] Although I was not directed to any particular paragraphs in the clause set out above, I am satisfied that a fair and reasonable employer could not have concluded that any of them applied, given what occurred.

[79] Ms Berea did what was asked of her. Initially, she prepared for a visit of a delegation which was then cancelled.

[80] Then, she endeavoured to meet the employer's instructions in respect of a complex task she was expected to undertake on a desktop computer. The facilities for doing so were not properly prepared for her. It was not unreasonable for an employee in her circumstances to expect this would have occurred. There is nothing in her reaction to these circumstances which could possibly constitute serious misconduct.

[81] As to the use of language Ms Berea located on a website, as directed, the company's concerns are seriously overstated. This material was draft only. It was not published, and could not constitute plagiarism, as Mr Gu suggested. Again, Ms Berea simply did what was asked of her. The opinion that this constituted serious misconduct is wholly misconceived.

[82] The Authority, in its discussion of these matters found that Ms Berea had been given an insufficient orientation and time to demonstrate her skill level.

[83] In light of the evidence that has been placed before the Court, I conclude the Authority did not err in making these findings.

[84] Turning to issues of procedural fairness, even if there were performance issues, these were not discussed adequately with Ms Berea so as to give her any opportunity to remedy perceived problems.

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[22] *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466; *Cowan v Idea Services Ltd* [2020] NZCA 239, [2020] ERNZ 252.

[85] The Authority found that the manner of dismissal was abrupt with no practical opportunity for her to obtain representation or having any input into the company's decision. It held that procedural fairness under s 103A did not occur, and good faith was absent in the decision to dismiss. Further, that the procedural defects were not minor and did result in Ms Berea being treated unfairly.[23] Again, I find the Authority did not err.

[86] In summary, the Authority concluded that no fair and reasonable employer could have concluded that summary dismissal on performance grounds was warranted in these circumstances.

[87] I am satisfied that the Authority did not err in this assessment. I dismiss this aspect of the challenge.

Third issue: remedies

[88] As noted earlier, BHFL was ordered to pay Ms Berea $3,774.58 gross, which was three weeks' and two days' lost wages, reduced by the three days' of wages which were paid in lieu of notice. The Authority also awarded Ms Berea $12,000 compensation for humiliation, loss of dignity and injury to feelings.

[89] The company's challenge is not directed to the quantum of these sums, but rather to the subject of contributory conduct.

[90] The Authority considered this topic, noting that it was a requirement of s 124 of the Act that the Authority must consider the extent to what, if any, Ms Berea's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced.

[91] The Authority noted that the relevant factors were recently summarised in *Maddigan v Director-General of Conservation*.[24]

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23 At [52].
24 At [62]; *Maddigan v Director-General of Conservation* [2019] NZEmpC 19, [2019] ERNZ 550.

[92] There, Chief Judge Inglis noted that the approach to contribution which emerges from recent judgments of the Court could be summarised as follows:[25]

(a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?

(b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?

(c) Third, what is a fair assessment of the extent of the contribution?

(d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[93] In this case, the Authority concluded, in light of those factors, that the dismissal was ostensibly for unidentified performance issues, so that there was no contributory conduct on the part of Ms Berea. She had attempted to obtain clarity as to her role. The suggestion that she receive more guidance was entirely reasonable.[26]

[94] The Authority went on to find that the hasty decision to dismiss in context was a wholly disproportionate response. Any reasonable employer could easily have perceived they had overreacted. Ms Berea's conduct could not therefore be considered "culpable". No reduction in remedies was therefore justified.[27]

[95] For BHFL, Mr Gu submitted that there should be a 100 per cent reduction of remedies in light of the performance issues to which he had referred.

[96] Because I have found, as did the Authority, that the beliefs held by Mr Gu as to performance issues were wholly misconceived, I must reject the submission now made to the Court.

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25 At [73].
26 At [63].
27 At [64].

[97] I am satisfied the Authority was correct in its assessment that this was a case where no reduction of remedies was warranted.

[98] I dismiss the third aspect of the company's challenge.

Result

[99] The company has failed on each of the three issues it raised for consideration in its challenge.

[100] Having regard to the effect of s 183 of the Act, the effect of which is that this decision replaces the Authority's determination, I confirm the remedies that were awarded by the Authority, as set out at [23] above.

[101] I reserve costs. Normally these follow the event. That would mean that any costs which the Court is able to recognise for the purposes of an application for costs under the Guideline Scale as to Costs could be sought by Ms Berea as the successful party.[28]

[102] Ms Berea was unrepresented at the hearing; and I have no evidence that she incurred legal costs or any relevant disbursements in dealing with the challenge. However, if she has, she may make an application for an order of costs against BHFL, supported by documentary evidence, within 21 days. BHFL will then have a further 21 days within which to respond.

B A Corkill
Judge

Judgment signed 10.20 am on 20 September 2021

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[28] "Employment Court of New Zealand Practice Directions" <https://www.employmentcourt.govt.nz/assets/Documents/Publications/Employment-Court-Practice-Directions.pdf> at No 16.