IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 96
CRC 26/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SOUTH PACIFIC MEATS LIMITED Plaintiff
AND	SAHIZAD MOHAMMED Defendant

Hearing: 26 and 27 March 2012
(Heard at Invercargill)

Counsel: Graeme Malone, counsel for plaintiff
Peter Churchman, counsel for defendant

Judgment: 21 June 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

Background

[1] Mr Sahizad Mohammed was employed by South Pacific Meats Limited at its Invercargill plant in February 2006. He worked as an A-grade halal slaughterman on the day shift. An A-grade worker at the plant receives a higher rate of pay. The day shift comes with a longer season than the night shift. It is, accordingly, a more lucrative and sought after form of work. Mr Mohammed had previously worked in other meat processing plants, including as a halal slaughterman. Such plants operate on a seasonal basis. The plaintiff's Invercargill plant is no exception.

[2] There is no dispute that halal slaughtermen are in demand, not only in New Zealand but elsewhere. In recognition of this, the recruitment of people from overseas who are skilled in this area of work is co-ordinated by the Meat Industry Association of New Zealand (MIA) on behalf of industry members, including the

plaintiff company. The MIA co-ordinates work visas and takes a lead role in arranging flights at the start and the end of the season.

[3] Mr Mohammed is a Fijian national who has obtained work visas to work in New Zealand over the years. Those visas are restricted in terms of the type of work he can perform and where he can work. Mr Mohammed has previously worked to the end of the processing season and then travelled to Fiji, returning at the beginning of the following season.

[4] At the conclusion of the 2008/09 season Mr Mohammed received notice of his seasonal lay-off. He emailed the then plant manager (Mr Hampton) on 23 June 2009 indicating his intention to leave New Zealand and to return to Fiji on 26 June 2009. MIA made the necessary arrangements for this travel to take place, by way of a one-way ticket.

[5] The company subsequently sent a letter to Mr Mohammed's Invercargill address, advising that the 2009/10 season was due to commence on 3 August 2009 and that he was to commence his seasonal employment on that date. Mr Mohammed was in Fiji. His son (who lived at the family's Invercargill address) says that he rang his father after the letter arrived and told him of its contents. Mr Shanks (a supervisor with the company) visited the family home and spoke to Mr Mohammed's son (Mohammed Sheraan). The timing and nature of these discussions is in dispute.

[6] Mr Mohammed returned from Fiji and arrived at the plant at 11.45am on 3 August 2009. He attended an induction session after speaking to Mr Shanks. He returned to work the next day. Mr Mohammed says that he was advised by the Production Manager, Mr Hamilton, that because he had been late back to work he had lost his position on the day shift. Mr Hamilton says that this discussion took place the previous day. The company had employed another halal slaughterman in Mr Mohammed's place (Mr Eifiel). Mr Mohammed was offered general slaughtering work. He declined that offer. He was subsequently offered halal night shift work in November 2009, which he accepted. The night shift season finished on 27 May 2010, earlier than the day shift finished.

Employment Relations Authority determination

[7] During the 2009/10 season, the defendant says that he was employed for a shorter duration and on less favourable terms than those to which he was entitled, and that this constituted a breach of contract. He also says that he was unjustifiably dismissed at the end of the 2009/10 season. He successfully pursued a grievance in the Employment Relations Authority. The Authority found that the plaintiff had breached the collective agreement by failing to offer him employment as a halal slaughterman on the day shift at the commencement of the 2009/10 season, by failing to facilitate his return to New Zealand prior to 3 August 2009, and by employing another person as a halal slaughterman prior to 3 August 2009.

[8] The Authority further found that offers of employment made by the plaintiff for roles other than as a halal slaughterman were of no force or effect in terms of its obligations under the collective agreement. The defendant was awarded $31,000 damages based on the earnings he would have received had he been employed as a halal slaughterman on 3 August 2009.

[9] The plaintiff challenges the whole of the Authority's determination by way of a hearing de novo.[1]

The facts

[10] The 2008/09 season came to an end on 25 June 2009. On 23 June 2009 Mr Mohammed emailed Mr Hampton advising that he was willing to travel to Fiji on 26 June and asking that Mr Hampton contact Mr Pran of MIA to arrange his travel documents. This was consistent with past practice. MIA booked and paid for the flights of halal slaughtermen brought in from overseas and subsequently sought reimbursement from the employing company. Before any travel arrangements were booked, MIA required the employing company to confirm the dates on which the worker was required.

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[1] [2011] NZERA Christchurch 164.

[11] On 24 June 2009 Mr Mohammed contacted Mr Pran, at MIA, via email and asked that a one way ticket to Nadi be booked. He noted that he had "talked to Malcolm [Hampton]". Mr Hampton emailed Mr Pran on 25 June 2009 advising that the plant had closed for the season that day and that he understood that Mr Mohammed and another halal slaughterman (Mr Manzoor Khan) had contacted MIA in relation to flights. He went on to say: "I confirm our start up will be 3rd August 2009."

[12] MIA subsequently provided Mr Mohammed with a flight itinerary for one way travel and he left New Zealand. As it transpired, Mr Khan was furnished with an itinerary for return travel to and from Fiji, arriving back in New Zealand in advance of the start of the new season.

[13] On 29 July 2009 Mr Hampton sent out a standard form letter to the company's seasonal workers, including Mr Mohammed. The letter that was sent to Mr Mohammed was not before the Court, but it was accepted that it was in the following terms:[2]

> SPM will resume processing on Monday 3rd August 2009.
>
> This letter is notification for you to commence your seasonal employment on 3 August 2009. You will be required at the plant for an induction presentation at 7.30am in the lunchroom. *You will need to have attended this induction for you to commence your employment for the 2009/2010 season.*
>
> If there is any reason you are unable to accept this offer of employment and to be present at the induction, then please phone reception immediately, *otherwise I look forward to speaking with you at the Induction on Monday.*

[14] While the letter invited employees to immediately contact the company if they were unable to accept the offer of employment, Mr Shanks gave evidence that his practice was to follow up the letter with a telephone call. He said that he follows this practice as the company needs to know who is and who is not interested in working during the forthcoming season. He said that he made "several" attempts to contact Mr Mohammed by telephone prior to 30 July 2009 to ascertain whether he would be available for work on 3 August 2009.

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[2] Emphasis added.

[15] The existence or otherwise of telephone calls to Mr Mohammed's Invercargill home was in dispute. Mr Mohammed was not aware of any telephone calls to his house. That is perhaps not surprising, given he was in Fiji at the time. However, his son gave evidence that he had been living in the house with family members during this period and that he had not received a call and that no messages were left. He also said that as far as he was aware his female cousin (who, for cultural reasons, remained in the home during the day) had not received any calls.

[16] Mr Shanks and Mr Hamilton both emphasised that it was very important to the company to make contact with its seasonal workers via telephone (in addition to the letter that is sent out). It was, Mr Hamilton said, extremely important to the company to have the two halal positions filled in advance of the 2009/10 season because they were having a halal audit on the day of the reopening. However, the evidence relating to the company's professed desire to make contact with Mr Mohammed must be viewed in light of what in fact occurred.

[17] While the company's telephone records were before the Court there was no record of any calls having been made to Mr Mohammed's home telephone. Mr Shanks could not explain this when cross-examined, other than to suggest that he may have tried ringing Mr Mohammed on his cell phone. Mr Mohammed refuted any suggestions that he had received any calls on his cell phone and nor were there any telephone records of such calls having been made. And while Mr Shanks's evidence in chief was that he had made "several" attempts to call Mr Mohammed, notes of a meeting on 4 August 2009 record that he tried to ring him twice – once on 29 July 2009 (the day on which the letter was sent) and once on 30 July 2009 (the day before he says he visited the Mohammed home). Mr Shanks accepted that even if he had rung Mr Mohammed on his home telephone number he had not left a message, and was unsure (when the question was put to him in cross-examination) why he would not have done so.

[18] Mr Shanks says that he visited Mr Mohammed's home on 31 July 2009 because he had been unable to contact him by telephone, and he wanted to confirm Mr Mohammed's availability for start up on 3 August 2009. The difficulty with this explanation is that Mr Eifiel, another halal slaughterman, had already been rung and

asked to start on 3 August 2009.[3] Telephone records for the company reflect that three calls were made to Mr Eifiel on 30 July 2009, at 11.46am, 11.47am, and 1.41pm. In cross-examination, Mr Shanks accepted that he had called Mr Eifiel in relation to the halal position and that this had occurred before his visit to Mr Mohammed's house. Correspondence from Mr Eifiel is also consistent with his earlier re-engagement, recording that he was rung by Mr Mohammed on the morning of 31 July 2009 and that he (Mr Eifiel) told Mr Mohammed that he had "been called earlier by the company to start work."[4] That correspondence is consistent with Mr Mohammed's evidence in relation to telephone conversations he says he had with Mr Eifiel and Mr Shanks on 31 July, which I accept and which I refer to later.

[19] I find that Mr Eifiel was engaged as a halal slaughterman for the season start up on 30 July 2009. This was before the defendant could have been expected to respond to the letter of 29 July 2009 (even if a response was required to it) and well before 3 August 2009 (which was the date on which the letter advised him to arrive at work). I do not accept Mr Shanks's evidence that his telephone calls to Mr Eifiel were simply for the purpose of ascertaining Mr Eifiel's availability. That is at odds with Mr Eifiel's letter and with Mr Mohammed's evidence of the telephone conversation he says he had with Mr Shanks on 31 July (which prompted his call to Mr Eifiel).

[20] Mr Shanks says that when he visited the Mohammed home on 31 July Mr Mohammed Sheraan (Mr Mohammed's 17 year old son) was there and that he spoke to him. Mr Shanks's evidence was that Mr Mohammed Sheraan told him that his parents were in Fiji. Mr Shanks said that Mr Mohammed Sheraan made it clear that his father would be returning around 4 or 5 August, although he (Mr Mohammed Sheraan) was not sure.

[21] Mr Mohammed Sheraan's version of events differed significantly. He gave evidence that around 3.30pm on 30 July 2009 a man came by the house asking after

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[3] Two halal slaughtermen were required for the day shift. It appears that Mr Khan, a halal slaughterman with the earliest start date with the company, had been engaged for the 2009/10 season on the day shift.

[4] The letter refers to 3 July 2009, which appears to be in error. The start date was 3 August 2009.

his mother (who also worked at the plant). Mr Mohammed Sheraan's evidence was that the man appeared reluctant to give his name, but identified himself (after prompting) as "Paul" (later identified as Mr Shanks). Mr Mohammed Sheraan says that the principal focus of Mr Shanks's inquiries related to his mother's whereabouts and when she was returning to New Zealand, and that a rushed inquiry about his father followed. Mr Mohammed Sheraan says that he told Mr Shanks that his father would be back on 3 August, to which Mr Shanks responded "ok" and then left.

[22] Mr Mohammed Sheraan says that he spoke to Mr Shanks after receipt of the letter of 29 July 2009, and after he had telephoned his father to tell him that the letter had arrived. His evidence was that he told his father that his start back date was 3 August 2009 and that his father confirmed that he would be back by then. He was adamant that he had told Mr Shanks that his father was returning on 3 August 2009.

[23] Mr Mohammed Sheraan was cross-examined about telephone records from the home land line. A significant number were to Fiji, but none were recorded for the date on which he said he had telephoned his father. Mr Mohammed Sheraan's response to questions along this line was that he must have made the call using a calling card, which is a less expensive mode of communication and which does not appear as a land line call. Mr Mohammed Sheraan's evidence in this regard was supported by what Mr Small had to say. Mr Small gave evidence that he had visited the Mohammed family home, discussed the letter with Mr Mohammed Sheraan, and had told him that it was imperative that he ring his father.

[24] Mr Mohammed's evidence was that he received a call from his son saying that a letter had arrived advising that his start back date was 3 August. He says that he told his son that he would be back by that date. Mr Mohammed says that he subsequently spoke to his son and was told that a man called Paul had been to the house asking whether Mr Mohammed's wife was available. Mr Mohammed says that his son told him that he had told "Paul" that she was in Fiji and due back on 15 August and that he would be back on 3 August for start-up. He says he then tried repeatedly to get in touch with Mr Hampton and Mr Hamilton by telephone to arrange his return travel through MIA but was essentially fobbed off by the receptionist, who advised that neither man was available.

[25] Mr Mohammed said that he finally managed to speak to Mr Shanks and asked him to contact MIA to arrange his travel back to New Zealand for the start up of the season. He said that he was put on hold and that Mr Shanks returned and told him that someone else was starting on 3 August 2009, that he was not needed, and that this followed an instruction from Mr Hampton and Mr Hamilton. Mr Mohammed said that he was shocked and upset by this revelation and told Mr Shanks that he would be returning on 3 August 2009 regardless. When questioned, Mr Shanks said that he could not recall such a conversation.

[26] Mr Mohammed sought assistance from his friend and previous Human Resources Manager at another plant, Mr Small. Mr Mohammed and his son's evidence is broadly consistent with what Mr Small had to say. His evidence was that he rang the company on 31 July 2009 and spoke to the receptionist, asking to speak to Mr Hamilton. He was told that Mr Hamilton was unavailable. Mr Small left his contact details, asking that Mr Hamilton ring him and outlined the reasons for his call. He was told that Mr Hamilton would be free after lunch. Mr Small rang again at 2pm but was again told that Mr Hamilton was not available. His call was never returned. He was left with the impression that Mr Hamilton was reluctant to talk to him. Mr Small's evidence is consistent with a letter he sent to Mr Davis in 2010 outlining his recollection of events.

[27] While there is a degree of confusion as to dates, I accept Mr Mohammed Sheraan's evidence that he had spoken to his father about the letter and his return date before he spoke to Mr Shanks. I also accept Mr Mohammed Sheraan's evidence as to what occurred during Mr Shanks's visit to the Mohammed family home. His recollection of events was clear and consistent, and he remained unshaken in cross-examination. Mr Shanks's recollection was patchy.

[28] Even on the company's evidence, it sent a letter to Mr Mohammed on 29 July 2009 and received advice from Mr Mohammed's 17 year old son on 31 July that Mr Mohammed was returning on 4 or 5 August but that he (Mr Mohammed Sheraan) was "unsure" of the dates. Mr Shanks accepted in cross-examination that a reasonable person would not interpret the 29 July letter as requiring a response and accepted that it was usual practice for seasonal workers to simply turn up on the date

advised to them. Despite the equivocal response Mr Shanks says he received from Mr Mohammed's teenage son, no further steps were taken to clarify the position with Mr Mohammed himself. I conclude that that was because the company had already engaged Mr Eifiel for the halal day shift position and did not wish to re-engage Mr Mohammed.

[29] Mr Mohammed attended work on 3 August 2009, the day of the induction and the day specified in the letter of 29 July 2009. Despite Mr Mohammed's best endeavours to arrive in time for the morning induction session he arrived a few hours late (because of his flight arrival time). Mr Mohammed said that Mr Shanks told him that it was "ok" and that he directed Mr Mohammed to the induction, which he attended. Mr Shanks accepted that this was so.

[30] Mr Hamilton's evidence was that he talked to Mr Mohammed on 3 August 2009 and told him that the company had already engaged two employees for the two available halal positions and that he would have to do another job. Mr Mohammed's evidence was that he was told no such thing, and that it was not until the following day that Mr Hamilton told him that Mr Eifiel had been engaged ahead of him. Mr Mohammed's evidence tends to be corroborated by Mr Mohammed Sheraan's evidence that his father arrived home from work on 3 August in a "happy mood" that things had worked out. It is unlikely that he would have been in such a good mood if he had been told that he did not have a halal position on the day shift. It is also corroborated by Mr Shanks's admission that Mr Mohammed completed the induction course on 3 August, was instructed by him to return the next day, but that this instruction was later countermanded by Mr Hampton and Mr Hamilton.

[31] I find that while Mr Mohammed arrived at 11.45am on 3 August 2009 no issues were raised in relation to that by Mr Shanks, his supervisor, and that he was told to attend the afternoon induction session, which he did. Mr Mohammed considered, reasonably, that he was to start work the next day as a halal slaughterman on the day shift. However, when he arrived at work the next day (on 4 August) he was told that the position had been given to Mr Eifiel. He was told by Mr Hamilton that that was because he had not contacted the company. Mr Mohammed was then

offered general labouring work until the night shift started, at which time the situation would be reassessed. He declined that offer.

[32] Mr Hamilton's evidence was that Mr Eifiel was employed because of uncertainties about whether the defendant would attend the induction. This was the position that he adopted at a meeting on 4 August, convened to discuss why Mr Mohammed was not starting back on the day shift. I do not accept Mr Hamilton's explanation. The company, through Mr Shanks, had already approached Mr Eifiel about the day shift halal role on 30 July. Mr Mohammed's son had advised the company, through Mr Shanks, that Mr Mohammed would be returning for the start of the season and Mr Mohammed had himself advised Mr Shanks of this during their telephone conversation on 31 July 2009.

[33] Mr Hamilton also raised unsubstantiated concerns relating to Mr Mohammed's performance at the meeting on 4 August. I return to this issue later.

[34] A further meeting was held on 6 August between Mr Hamilton and Mr Mohammed. Mr Shanks, Mr Davis (union representative), Ms Katrina Murray (representative), and Mr Mohammed's son were also present. Mr Mohammed Sheraan identified Mr Shanks as the man who had called at his house. Mr Mohammed Sheraan says that they were told that the purpose of the meeting was to sort out what Mr Shanks had said to him and what Mr Mohammed Sheraan had said to Mr Shanks. Mr Mohammed Sheraan says that he was happy to be able to assist and told them exactly what had happened. He says that Mr Shanks challenged his narrative of events, and that he had told him that his father would be back on 4 or 5 August, rather than 3 August. Mr Mohammed Sheraan says that he disputed this at the meeting, and this is reflected in the meeting notes.

[35] Mr Hamilton says that he reiterated that the company was not in a position to offer Mr Mohammed a halal position because they had already been filled, but that he could start on the slaughter board and be paid the going rate for that task. Mr Hamilton told Mr Mohammed that he would reassess the situation when the night shift started. Mr Mohammed responded by saying that he was entitled to be employed in a halal position as he was more senior than Mr Eifiel. Mr Hamilton did

not find this persuasive, expressing the view that seniority was irrelevant to re-engagement. No resolution was reached at the 6 August meeting. Mr Davis advised that Mr Mohammed would talk to his family before making a decision about a return to work.

[36] A meeting was subsequently arranged at Mr Mohammed's request for 18 August. The meeting did not go well. Mr Hamilton advised Mr Mohammed that as nothing had been heard from him since the last meeting (some 12 days earlier) the general position that had been offered to him had been filled. However, he again offered to review the situation at the start of the night shift. Mr Hamilton said that he considered that Mr Mohammed had effectively abandoned his employment. However, this stands in contrast with the advice given at the conclusion of the 6 August meeting that Mr Mohammed would take time to reflect on matters before making a decision. Mr Hamilton did not make any attempt to contact Mr Mohammed and/or his representative to ascertain Mr Mohammed's position on the offer that had been made to him, despite being aware that Mr Mohammed was taking time to consider it.

[37] Mr Davis wrote to Mr Hamilton on 26 August 2009, advising that the union disagreed with the company's position of not starting Mr Mohammed on 3 August 2009, and pointing out that Mr Mohammed had gone to extreme lengths to make arrangements to return for the new season.

[38] A further meeting took place on 28 October 2009. Mr Hampton attended the meeting with Mr Hamilton. Mr Hamilton told Mr Mohammed that he was not employed by the company but that he would consider matters and would meet again with Mr Mohammed's representatives and then make a decision.

[39] While it is unclear whether a further meeting occurred, Mr Mohammed was subsequently offered, and accepted, a night shift position as a halal slaughterman. He undertook this role from November 2009. Mr Mohammed says that he reluctantly accepted this position, because he was concerned and stressed about not having any income. I accept that this was so.

[40] Mr Mohammed was subsequently laid off in May 2010, re-engaged on the night shift in November 2010, laid off in June 2011 and re-engaged in 2011. Because Mr Mohammed was working the night shift he was laid off earlier (in May 2010) than he would have been had he been on the day shift. It is this date that is said, by the defendant, to be the date on which he was unjustifiably dismissed by the plaintiff. Preceding events constituted, it is argued, breaches of contract.

[41] Mr Mohammed says that difficulties with the company continued. He says that he was advised by Mr Hamilton that he would be called up in August 2010 for the next season, and that he took this to mean that he would be returned to the day shift. He says that he arranged travel to ensure that he came back to New Zealand on 29 July 2010, ready for the August start-up date, and that Mr Hamilton knew that he was in Invercargill waiting for his call-up. Despite this, Mr Mohammed was not called up until the night shift began in November 2010. Mr Mohammed surmises that this was because his lawyer had, in the meantime, written to the company outlining a number of concerns about the way in which Mr Mohammed had been dealt with.

[42] The day shift began in August 2010. A halal slaughterman (Mr Mohammed Mohammed) was engaged on the day shift. Mr Hamilton accepted that Mr Mohammed Mohammed had less seniority than the defendant but said that he carried out general work. The defendant's evidence was that Mr Mohammed Mohammed undertook halal duties. Mr Hamilton accepted in cross-examination that Mr Mohammed Mohammed may have undertaken halal work, but made the point that he (unlike the defendant) was prepared to do, and did do, non-halal work. While there was a suggestion that Mr Mohammed Mohammed may have held the position of supervisor, I accept that this appointment came some time after his engagement to the day shift. I also accept that he undertook halal, along with non-halal, work on the day shift.

[43] Mr Mohammed asked Mr Hamilton what was going on, and was told that because Mr Mohammed had chosen not to come back for the previous season he had assumed that he would not be coming back for this season. This was a startling position for Mr Hamilton to adopt given the considerable lengths Mr Mohammed

had gone to in order to arrive at work at the start of the 2009/10 season and the discussions that had taken place between the parties in the intervening period. Further, Mr Hamilton had been involved in an email exchange with Mr Pran (of MIA) on 3 and 4 June 2010, in which reference was made to Mr Mohammed and others finishing on 27 May, and confirming that the new season would start on 3 August 2010 and that "*they* will commence as required".[5]

Discussion

[44] The defendant contends that the plaintiff breached its contractual obligations to Mr Mohammed in two ways. First, by engaging Mr Eifiel ahead of him at the commencement of the 2009/10 season. Second, by failing to facilitate Mr Mohammed's return to New Zealand for start-up on 3 August 2009. It is submitted that these alleged actions also amounted to breaches of good faith.

[45] The defendant was not in an employee/employer relationship with the company between seasons.[6] However, as Mr Malone, counsel for the plaintiff, accepted, the core collective agreement remained in effect and imposed continuing obligations on the company in terms of offering re-employment to seasonal workers when they returned to work.[7]

[46] A submission was advanced that in offering re-employment, the plaintiff had the right to offer different terms of employment, and re-engagement to alternative positions, provided this was not inconsistent with the collective agreement. *New Zealand Meat Workers etc Union Inc v Richmond Ltd*[8] was cited in support. In that

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[5] Emphasis added.
[6] *NZ Meat Processors, Packers, etc IUOW v Alliance Freezing Co (Southland) Ltd* [1987] NZILR 537 (AC), *New Zealand Meat Workers' Union Inc v Alliance Group Ltd* [2006] ERNZ 664 at [104].
[7] See *New Zealand Meat Workers Union v AFFCO New Zealand Ltd* [2011] NZEmpC 106 at [10]. The plaintiff had initially pleaded that the Authority had failed to have proper regard to s 113 (which provides that if an employee who has been dismissed wishes to challenge that dismissal or any aspect of it in any Court, the challenge may be brought only in the Authority as a personal grievance). However, Mr Malone expressly disavowed any reliance on s 113 at the hearing, submitting that events on 3 August 2009 did not amount to a dismissal and could be challenged by way of a claim of disadvantage or by way of breach of contract (noting that a disadvantage grievance would be out of time).
[8] [1992] 3 ERNZ 643.

case, the majority of the full Court of this Court held that when employees are laid-off at the end of each season their employment terminates and employees may then choose whether to accept or reject an offer of re-employment at the beginning of the new season. Importantly, however, Judge Palmer (writing the lead judgment for the majority) also observed that:[9]

> The termination of the individual employment contracts [based on an expired award], when the meatworkers were laid off …, did not and could not in law, I conclude, terminate the pending obligation of re-employment [according to the terms of the award]. …. Furthermore, this obligation … was not to be observed/performed until individual employers engaged in seasonal re-employment of meatworkers for the season immediately following the layoffs.

[47] While the Court found that the defendant company was entitled to offer returning employees different terms and conditions this was, as Mr Churchman pointed out, in the context of negotiations for a new collective agreement. That is not the situation in the present case. The plaintiff did not, as Mr Malone acknowledged, have a completely free hand.

[48] When Mr Mohammed returned to work on 3 August and Mr Shanks approved his return to work and instructed him to attend the induction, the plaintiff was bound to re-employ him on terms consistent with the collective agreement then in force and the re-engagement procedure specified in that agreement. For the following reasons, I find that the plaintiff failed in its duty to do so.

[49] The collective employment agreements for 2008 and 2010 are in materially the same terms. Clause 3 provides that:

> …
>
> 3.2 Where demand drops off before the close down for the season such that not all employees are required the employer may terminate employment of staff on a progressive basis. In selecting employees to be terminated, the employer shall take into consideration the skills required to operate a balanced workforce. All things being equal the Company will observe the principle of first on last off.
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> …

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[9] At 702.

3.5 Upon termination at the end of the season you are responsible for keeping the company advised of your current address and phone number for contact purposes for advice of the commencement of the next season.

3.6 After being notified of a return to work you have five working days to return, failure to do so within that time, will result in employment no longer being offered.

3.7 It is agreed that ...the plant operates in a seasonal industry. As a result staffing levels need to change during the season to match the required production levels. In selecting employees to be seasonally laid off or reengaged the following criteria will be considered

1. The original starting date of the employee provided they have been continuously employed during the season.
2. Competency to perform the work required, including skill levels, physical ability, reliability and adaptability in being able to work in a variety of positions.

Selection on this basis shall be made by the Plant Manager in consultation with the departmental supervisor and plant representatives.

Position

3.8 Your primary position is described in the schedule that forms part of this agreement and you will work in the company's meat processing plant located at Awarua, Invercargill.

3.9 You may be required from time to time to perform other duties within your capabilities.

[50] A variation was entered into on 23 December 2009. It relates to shifts, and states that:

> For the avoidance of doubt cls. 3.2 & 3.7 apply after end of a shift i.e. a person on the night shift or day shift may be laid off or moved down to allow a longer serving person to return to that shift from the swing shift and a person from the day shift may be laid off or moved down to allow a longer serving person to take up the day shift on end of night shift.

[51] Under the collective agreement, the defendant was responsible for advising the company of his contact details to enable it to give him notice of the commencement of the next season (cl 3.5). The defendant was obliged to return to work within five working days of notification (cl 3.6). A failure to return within that time would result in employment no longer being offered (cl 3.6).

[52] The company's letter notifying the return date was dated 29 July 2009. It advised the defendant that he was required for work on 3 August 2009. 29 July 2009 was a Wednesday. Assuming that working days include Saturdays and Sundays, five working days from 29 July was Monday 3 August 2009. As it transpired, the defendant returned to work within the five day period specified within cl 3.6 – attending work at 11.45am on Monday 3 August. However, by this time the plaintiff had engaged Mr Eifiel.

[53] Mr Hamilton said that the company took the step of offering the role to Mr Eifiel because Mr Mohammed had failed to contact the company. However, there was no contractual obligation on Mr Mohammed to contact the company. The company could withdraw the offer of employment, but only five working days after notification. He returned within the five day timeframe. I do not accept Mr Hamilton's explanation for engaging Mr Eifiel ahead of Mr Mohammed. The explanation lacks force given the date and terms of the company's letter to Mr Mohammed and the timing and circumstances surrounding Mr Eifiel's engagement.

[54] Nor did the letter from the company advising Mr Mohammed of his return date purport to require him to contact it in advance. Rather it contained a request that Mr Mohammed contact reception immediately if he was *not* able to accept employment. And I accept that it was common practice for workers to simply turn up to work at the start of the new season, following receipt of a letter advising them of their applicable start date.

[55] The letter to Mr Mohammed stated that he was required to attend an induction presentation and that he had to have attended that presentation before he could commence employment for the 2009/10 season. Mr Mohammed did attend an induction presentation on 3 August 2009, albeit in the afternoon rather than the morning. He attended the afternoon session with his supervisor's agreement. He had accordingly completed what he was required to complete, and had done what he was required to do.

[56] Clause 3.7 contains an express requirement that two criteria be considered in "selecting employees to be ... re-engaged" on a seasonal basis. The first is the

original start date of the employee, provided they have been continuously employed during the season. In other words, consideration must be given to the respective seniority of seasonal workers in selecting those for re-engagement. The recognition given to those with longer service is also reflected in the provisions relating to termination before the close down for the season, where (all things being equal in terms of skill) the company is to observe the "first on last off" principle (cl 3.2) and the wording of the variation, which makes it clear that long serving workers may be given priority in terms of allocation of more desirable shifts to those with less length of service during the course of a season.

[57] There is no evidence that the company complied with its obligations to consider Mr Mohammed's original start date in considering his re-engagement vis-à-vis Mr Eifiel's re-engagement. Indeed Mr Shanks, who Mr Hamilton described as bearing responsibility for the re-engagement process, gave evidence that he was unaware of the relevant contractual requirements relating to re-engagement. Notably, Mr Hamilton accepted in evidence that the collective agreement required the company to consider length of service in determining which seasonal workers to re-engage. This did not occur in the context of decisions about Mr Mohammed's re-engagement.

[58] The plaintiff submitted that the company was under no obligation to re-engage the defendant on the day shift doing halal slaughter work and rather was entitled to re-engage him in any capacity, discharging any contractual obligations it had by offering him work as a general slaughterman.

[59] This submission overlooks the restricted nature of Mr Mohammed's visa. He was legally constrained as to the work he could undertake, being permitted to work specifically as a halal slaughterman. While it may have been permissible for Mr Mohammed to undertake miscellaneous non-halal related work while employed as a halal slaughterman, the terms of his work visa were unequivocal – he was permitted to work in New Zealand provided he was employed as a halal slaughterman at the plaintiff's Invercargill plant.

[60] It is clear from the evidence that there were instances of halal slaughtermen undertaking non-halal work as an adjunct to their primary role, and that Mr Mohammed had previously been involved in bobby calf work for a brief period in the lead up to a season. However, there is (as Mr Churchman pointed out) a distinction between miscellaneous work incidental to the primary role of halal slaughterman, and engagement as a general slaughterman or labourer for an extended period of time.

[61] Mr Malone submitted that there was no evidence that Immigration New Zealand had ever complained about a halal worker undertaking general work. I do not consider that that materially alters the position. Accepting the offer of a non-halal position within the plaintiff company would have put Mr Mohammed at risk of breaching his work visa, and rendering him liable to deportation. It would be contrary to public policy to conclude that the company could meet its contractual obligations in terms of re-engagement by offering the defendant a role that would put him in breach of the conditions of his visa, issued by Immigration New Zealand.

[62] Nor do I consider that cl 3.9 of the collective agreement alters the position. Clause 3.9 provides that employees may be required to undertake other duties from time to time. That provision could not have overridden the restrictions contained within Mr Mohammed's visa.

[63] The second criteria in cl 3.7 relates to competency. Mr Hamilton suggested that there had been some concerns about Mr Mohammed's reliability and actions within the workplace. He said that Mr Mohammed had previously arrived back for start up late and had begun to "stir up trouble" and complain about issues such as prayer time, and other halal workers.

[64] Mr Hamilton's evidence in relation to Mr Mohammed's reliability and competency was underwhelming. While he asserted that there had been concerns about Mr Mohammed's competency he accepted that no formal or informal steps had been taken to address any such issues, and was unable (when asked) to identify the precise nature of the concerns that he suggested the company had with Mr Mohammed. He said that Mr Mohammed had returned late for previous seasons but

it soon became evident that Mr Mohammed had been granted leave without pay in relation to his start back in January 2008 and had been delayed by a day in August 2008 because of travel arrangements made by MIA.

[65] Clause 3.7 also requires that selection for re-engagement be made by the plant manager in consultation with the departmental supervisor and plant representative. Mr Hampton was the plant manager at the relevant time. He did not give evidence. There is nothing to suggest what, if any, criteria he considered. It is apparent from Mr Hamilton's evidence that Mr Shanks was given responsibility for the re-engagement process. As I have said, Mr Shanks was unaware of the applicable re-engagement criteria, and he accepted that he had not discussed re-engagement with the plant representative before decisions were made in relation to Mr Eifiel and Mr Mohammed.

[66] Mr Malone observed that there is no express provision relating to seniority in the agreement. That is correct in the sense that the collective agreement does not contain the word "seniority". Mr Malone pointed out that the provisions in the parties' collective agreement are in somewhat different terms to those in other meat processing agreements (such those relating to AFFCO and Silver Fern Farms). However what is clear is that the collective agreement provides for re-engagement on a seasonal basis having regard to a worker's original start date, and confers preferential status on seasonal workers with length of service. That is reflected in cl 3.7 and the sequencing of factors to be considered, and the wording of the variation to the collective agreement. It is also consistent with the way in which the parties have previously approached the re-engagement process.

[67] While the plaintiff's witnesses did not accept that a seniority list existed, Mr Hamilton did concede that the company has a contractual obligation to consider length of service in making re-engagement decisions. It remained unclear how the company meets this obligation in the absence of a list recording relevant start dates for its seasonal workers.

[68] And while Mr Shanks gave evidence that he did not consider that he needed to have regard to seniority in terms of re-engagement decisions (which he was

responsible for), it became tolerably clear in cross-examination that he did in fact do so. In this regard he conceded in cross-examination that he knew that he should call back Mr Khan (the most senior halal slaughterman) before someone like Mr Eifiel, accepting that that was because Mr Khan had "been there from day 1." I found Mr Shanks's evidence that no seniority system operated in the company in terms of re-engagement unpersuasive. I preferred the evidence of Mr Mohammed, Mr Davis and Mr Carran as to the practice that had been followed over the years.

[69] In *Vector Gas Ltd v Bay of Plenty Energy Ltd*[10] the Supreme Court highlighted the significance of an awareness of context as a necessary ingredient in ascertaining the meaning of contractual words, emphasising commercial substance and purpose over semantics and the syntactical analysis of words.[11] Justice Tipping observed that:[12]

> The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what the negotiating stance was at any particular time.

[70] In considering the use of extrinsic evidence, Tipping J went on to state that:[13]

> The key point is that *extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear*. Extrinsic evidence is also admissible if it tends to establish an estoppel or an agreement as to meaning.

[71] Seniority provisions are not uncommon in collective agreements within the meat processing industry. I accept Mr Carran's evidence that such provisions reflect

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[10] [2010] NZSC 5, [2010] 2 NZLR 444.
[11] See *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Amcor Packaging (New Zealand) Ltd* [2011] NZEmpC 135 at [12].
[12] At [19].
[13] At [31]. Emphasis added.

the seasonal nature of the work and are aimed at maintaining stability in the workforce, ensuring that experienced workers are re-engaged first at the commencement of each season. This, in turn, encourages workers to remain in the industry from year to year, thereby benefiting the employing company.

[72] Both Mr Carran and Mr Davis gave evidence that there has been a long standing practice within the plaintiff company of re-engaging seasonal workers on the basis of seniority. Mr Hamilton did not accept that this was so, but did accept that the collective agreement required the company to have regard to length of service. He said that this was one of several factors that the company took into account, along with other factors such as skill, physical ability, reliability and adaptability, and that the company's practice of "taking such factors into account has always occurred and is not new."

[73] Mr Carran's evidence, which was not contested on this point, was that over the years the company has consistently re-engaged seasonal workers into the roles and shifts that they had worked during the previous seasons, subject to minor changes (where, for example, there had been a promotion or if there were not enough people on day shift some night shift employees were given that opportunity). This evidence was consistent with the way in which Mr Mohammed had been dealt with during previous seasons, having been re-engaged to the more lucrative day shift doing halal work over and above other halal workers (such as Mr Eifiel) with less time with the company.

[74] It would be at odds with the evident underlying purpose of cl 3 to interpret it as enabling the re-engagement of a long standing day worker to a less lucrative night shift position over a worker with no employment history with the company, absent any countervailing factors relating to competency. Nor would such an interpretation be consistent with the parties' past practice.

[75] I find that the plaintiff breached the terms of the collective agreement. It failed to comply with its obligations in terms of the re-engagement process specified in the collective agreement. Had it complied with those obligations, and in the

absence of any substantive concerns as to competency, Mr Mohammed would have been re-engaged ahead of Mr Eifiel at the start of the 2009/10 season.

Obligation to facilitate travel?

[76] Counsel for the plaintiff submitted that the company had no obligation to facilitate Mr Mohammed's return travel and, even if it did, it met that obligation by sending MIA its email of 25 June 2009 advising that the plant start-up date would be 3 August 2009.

[77] There is no provision in the collective agreement expressly requiring the company to facilitate travel for halal slaughtermen brought in from overseas to work at its plant each season. However, the defendant pleaded that the failure of the plaintiff to facilitate the defendant's travel to New Zealand through MIA was both a breach of the plaintiff's contractual obligations under cl 3.6 and the statutory duty of good faith.

[78] With regard to the alleged breach of good faith, section 4(1) of the Act provides that the duty of good faith applies to those in employment relationships. An employment relationship is defined in s 4(2) to include "an employer and an employee employed by the employer". In this case, the alleged breach of good faith occurred before the defendant had accepted employment, which he did when he reported to work on 3 August. As was confirmed in *Richmond*, before that date the plaintiff and defendant were not in an employment relationship and as such neither party owed the other a duty of good faith.[14]

[79] Turning to the breach of contract claim, the evidence established the long-standing practice that the travel arrangements for halal slaughtermen coming to New Zealand on work visas is organised through MIA in conjunction with the employing company.

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[14] See also *Hayden v Wellington Free Ambulance Service* [2002] 1 ERNZ 399 at [27], *Balfour v Chief Executive, Department of Corrections* [2007] ERNZ 808 at [31].

[80] Mr Mohammed was clear that the plaintiff company had previously liaised directly with MIA to confirm his start date and that his travel had been arranged through MIA. This was consistent with his emails to the company in June 2009 and his subsequent attempts to contact Mr Hamilton to prompt him to confirm his start date with MIA. Mr Small's evidence was also consistent with Mr Mohammed's understanding of the way in which the travel arrangements for halal workers brought in from overseas on work visas was dealt with. The practice was for the company to confirm the start date for individual slaughtermen directly with MIA. If the company did not engage with MIA no travel could be arranged.

[81] I accept that there was an implied term of Mr Mohammed's employment agreement that, with respect to his return to work under cl 3.6, the plaintiff would facilitate this travel through MIA. This was a long standing and well accepted practice of which the parties were aware and which had been the basis of their arrangements in the past. The plaintiff knew that Mr Mohammed was overseas as it had facilitated his travel to Fiji at the end of the previous season. And when the plaintiff offered Mr Mohammed employment, it well understood that it had an ensuing obligation to arrange his travel to New Zealand. In these circumstances, the plaintiff was under an obligation to facilitate the defendant's travel to enable him to comply with cl 3.6, in accordance with past practice.

[82] The plaintiff submitted that, even if there was an obligation to facilitate travel for Mr Mohammed, it had complied with that obligation. I am unable to accept that submission. Mr Malone submitted that the 25 June 2009 email had been sufficient for MIA to organise Mr Khan's travel arrangements and ought to have been enough to satisfy any requirements relating to Mr Mohammed. The details of Mr Khan's arrangements with MIA were not before the Court and it is a matter of speculation as to whether MIA proceeded on the basis of the 25 June email alone. What was however clear from the evidence was that Mr Khan's personal circumstances were very different from the defendant's. This might explain any difference in approach. Further, the 25 June email simply referred to the plant's start up date. It was established that that is not the same as confirmation as to the required start dates for individuals which may, or may not, be the same as the day on which the plant commences operations. Mr Davis gave evidence (which I accept) that he spoke to

Mr Pran and was told that MIA could not book flights in the absence of confirmation from the company.

[83] What would have become obvious to the company when it started to receive panicked telephone messages from Mr Mohammed asking that the company liaise with MIA over arrangements to fly back to Invercargill for the 2009/10 season, was that the 25 June email had not been sufficient to enable MIA to book the flight and that MIA was requiring confirmation from the company. While I accept Mr Hamilton's evidence that the lead up to the start of the season was a busy one, he did not suggest that he was unaware at the time that both Mr Mohammed and Mr Small had been urgently trying to contact him to organise Mr Mohammed's travel to ensure that he could return for start up on 3 August. It is more probable than not that the lack of response stemmed directly from Mr Eifiel's earlier engagement.

[84] I find that the plaintiff breached its contractual duties to the defendant. No specific relief was sought in relation to such a breach.

Unjustified dismissal on 27 May 2010?

[85] I accept that Mr Mohammed took on the 2009/10 night shift halal role reluctantly, and because of concerns about his financial position. He was laid off when the night shift came to an end on 27 May 2010, earlier than the day shift. He argues that this constituted an unjustified dismissal. Conceptually that cannot be correct. The position he held as at 27 May 2010 was the night shift halal slaughterman position. His engagement in this position came to an end when the night shift came to an end.

2010/11 season start-up

[86] Difficulties were compounded at the start of the 2010/11 season. While Mr Mohammed returned to New Zealand early to ensure that he was ready and waiting in Invercargill for his call-up well in advance, and to avoid any repetition of the difficulties that had arisen the previous season, the company engaged another halal

worker on the day shift ahead of him. He did not have an earlier start date than Mr Mohammed in terms of cl 3.7.

[87] There was no evidence that the company approached the re-engagement process for the 2010/11 season on the correct footing, in terms of the requirements under the collective agreement. Mr Mohammed was not re-engaged on the halal day shift. Rather he was obliged to wait until the night shift started.

[88] Mr Hamilton's explanation that he thought Mr Mohammed was not interested in working, given his previous non-attendance, is not one that I accept for the reasons already expressed.

Remedies

[89] Mr Churchman submitted that the damages sustained by the defendant by virtue of the plaintiff's breaches amounted to the additional sum the defendant would have earned from 2009 if he had been working on the day shift (which gave him a longer season and therefore increased earnings).

[90] I accept that Mr Mohammed suffered a loss of earnings directly attributable to the plaintiff's breach of contract, in failing (since 3 August 2009) to engage him on the halal day shift. This breach resulted in Mr Mohammed working shorter seasons and receiving lower earnings than he would have had the plaintiff's breach not occurred. This loss was within the reasonable contemplation of the parties. The plaintiff was well aware that season length affects the earning potential of its workers, and would have been under no doubt that placing the defendant on the night shift would result in him earning less. It is this pay differential that underlies the provisions in the collective which, as I have found, "reward" longer serving workers with better hours and, accordingly, better pay.

[91] The Authority awarded the defendant the sum of $31,000 by way of damages. This sum was reached by adding the payments made to Mr Eifiel during the relevant

period and rounding the figure down.[15] The Authority did not, however, take holiday pay into account in reaching its final figure.

[92] Mr Hamilton gave evidence in relation to Mr Eifiel's earnings, including in respect of the appropriate figure for holiday pay during the relevant period. Based on those (accepted) figures I conclude that Mr Mohammed is entitled (subject to any issues relating to mitigation) to damages, by way of lost wages, in the sum of $63,349.86 gross.

[93] The focus of submissions for the plaintiff in relation to damages was squarely on an alleged failure by the defendant to mitigate his losses. It was submitted that the Authority had erred in its approach to this issue.

Mitigation

[94] There is a general requirement to take reasonable steps to mitigate loss.[16] The plaintiff submits that Mr Mohammed failed to do so. It is said that he ought to have accepted the general non-halal slaughterman role that was offered to him in 2009. I have already dealt with, and rejected, this submission.

[95] Mr Mohammed was subject to strict restrictions as to where he could work and what sort of work he could undertake – namely he was only entitled to undertake halal slaughterman work at the plaintiff's Invercargill plant. It was submitted that Mr Mohammed did not refer to these restrictions at the time he was offered the general role. I do not consider that this materially affects an assessment of whether or not the defendant met his obligation to mitigate his loss. His ability to do so was severely constrained, given the restrictive nature of his visa.

[96] Accepting the offer of a non-halal position within the plaintiff company would have put Mr Mohammed at risk of breaching his work visa, rendering him liable to deportation. It would be perverse and contrary to the interests of justice to

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[15] At [53].
[16] *Allen v Transpacific Industries Group Ltd (trading as "Medismart Limited")* (2009) 6 NZELR 530 at [78] .

conclude that the defendant was under an obligation to breach the conditions of his visa in order to mitigate losses caused by the company in declining to re-engage him as a halal slaughterman.

[97] Mr Mohammed took appropriate steps to mitigate his loss by taking up the offer of employment with the plaintiff company as halal slaughterman on the night shift in November 2009. Given the restrictions on his visa there was little else he could do.

[98] There was some suggestion that Mr Mohammed had worked in Fiji in the lead-up to the start of the night shift for the 2010/11 season. If that was so it would be relevant to determining the extent of any damage said to have been suffered by him as a result of the plaintiff's breach. This suggestion arose in the course of Mr Mohammed Sheraan's evidence. Mr Mohammed Sheraan clarified, in re-examination, that his father had been in Invercargill waiting for his call-up by the plaintiff. No questions were put to Mr Mohammed in relation to this. Mr Mohammed's evidence was that he returned to New Zealand in advance of the 2010/11 season thinking that he would be called up for the day shift, in light of previous conversations with Mr Hamilton. In the event, he was not called up until the night shift began, some months later. I do not consider that it was unreasonable for Mr Mohammed to remain in Invercargill waiting for his call-up in the circumstances, and having regard to previous events.

[99] Mr Mohammed gave evidence that he took steps to approach other plants in relation to halal work, but it appears this came to nothing. Working for any company other than the plaintiff would have necessitated changes to the conditions of his visa in any event.

[100] I am satisfied that Mr Mohammed took reasonable steps, in the circumstances, to mitigate his losses.

Compliance order?

[101] The defendant seeks a compliance order under s 137, requiring the company to re-instate him to the position of halal slaughterman on the day shift. The power to order compliance is discretionary. Such an order may be made where there has been non-compliance or observance with an employment agreement: s 137(1).

[102] It is submitted that a compliance order is necessary to prevent further breaches of cl 3.7 of the collective agreement, ensuring that the defendant's employment is safeguarded. It is submitted that in the absence of such an order, he will continue to be employed on the night shift and will suffer ongoing wage losses as a result.

[103] I do not propose to exercise the discretionary power under s 137 in the circumstances of this case. The Court is generally reluctant to order compliance in the absence of an opportunity given to comply.[17] That is especially so where, as here, there is a genuine dispute about the interpretation of employment rights and obligations. The plaintiff will be aware, from the terms of this judgment, of its contractual obligations in terms of the re-engagement process involving Mr Mohammed.

Reinstatement

[104] In the alternative to an order for compliance, the defendant seeks reinstatement to the role of halal slaughterman on the day shift.

[105] Section 123 provides that the Court may, in settling a personal grievance, provide for a range of remedies, including reinstatement. The defendant has not, however, established a personal grievance against the plaintiff. Rather, the company breached its contractual obligations. Reinstatement is, accordingly, not an available remedy in this case.

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[17] *Canterbury Hotel etc IUOW v Hancock & Co Ltd* [1989] 1 NZILR 358 (LC) at 376-377.

Costs

[106] The defendant is entitled to costs. If costs cannot otherwise be agreed the defendant is to file submissions within 60 days of the date of this judgment, with the plaintiff having a further 30 days.

Christina Inglis
Judge

Judgment signed at 3pm on 21 June 2012