**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**[2016] NZEmpC 135**
**EMPC 6/2016**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | JASON NATHAN<br>Plaintiff |
| AND | BROADSPECTRUM (NEW ZEALAND) LIMITED (FORMERLY TRANSFIELD SERVICES (NEW ZEALAND) LIMITED)<br>Defendant |

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| Hearing: | 19 May 2016<br>(heard at Wellington) |
| Appearances: | T Cleary, counsel for the plaintiff<br>J Upton QC and R Upton, counsel for the defendant |
| Judgment: | 28 October 2016 |

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**JUDGMENT OF JUDGE K G SMITH**

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## Introduction

[1] This case is a non de novo challenge to a determination of the Employment Relations Authority (the Authority) dated 11 December 2015,[1] in which Mr Jason Nathan succeeded in his personal grievance against Broadspectrum (New Zealand) Limited (formerly Transfield Services (New Zealand) Limited) (Broadspectrum). Mr Nathan was reinstated by the Authority but challenges the decision that he be reinstated to a position no less advantageous to him rather than to his former position. He also challenges the decision to decline him costs.[2]

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1 *Nathan v Transfield Services (New Zealand) Ltd* [2015] NZERA Wellington 120

2 *Broadspectrum (New Zealand) Ltd (formerly Transfield Services (New Zealand) Ltd v Nathan* [2016] NZERA Wellington 32.

[2] Broadspectrum says there has been no error by the Authority and Mr Nathan was awarded all of the remedies he sought.

## Background

[3] Mr Nathan is a registered lines mechanic who started work for Broadspectrum on or about 25 July 2008. He was dismissed following an incident on 22 June 2013 when he responded to a call to repair a damaged span wire on the network used by Wellington Cable Car Limited (Wellington Cable) for its trolley buses.

[4] At the time of the incident Mr Nathan was an Acting Team Leader. He was called out shortly before 3.00 am to repair damage caused by a severe storm. He arrived on the scene first and was joined shortly afterwards by the remainder of the repair crew including Mr Jordan Smith. As Acting Team Leader he was responsible for safely managing the repair work. Before reaching the site Mr Nathan telephoned Wellington Electricity and requested the relevant circuit be switched off until he advised otherwise.

[5] By the time Mr Nathan arrived at the scene a police officer had moved the damaged span wire from the road. The span wire was also connected to an insulator, so Mr Nathan needed to treat it as potentially carrying an electrical current, in case the insulator had failed. He tested the span wire with a testing device and used the footpath as an earth. This testing showed the wire was not energised and could be worked on safely. While undertaking this testing and in carrying out the repair, Mr Nathan was wearing insulated gloves.

[6] A bucket-lift truck was used to gain enough elevation so that Mr Nathan could access the area where the span wire was to be repaired. A rope was lowered from the elevated bucket so that the span wire could be attached and pulled into place. While the span wire was being pulled into place it flashed or arced on a nearby traffic light pole indicating that it was still energised. It transpired that, while attaching the rope to the span wire, Mr Smith experienced a sensation he later

described as a tingle, indicating the span wire was carrying an electric current and he may have experienced an electric shock.

[7] This incident formed the basis of a disciplinary investigation that led to Mr Nathan's dismissal. On 26 June 2013, Mr Nathan was stood down pending an independent investigation. Throughout Broadspectrum's investigation, and in Court, Mr Nathan maintained that he had taken steps to ensure the circuit was not energised and the incident was not a flashover but arcing; the difference between them being their severity. Mr Nathan also maintained throughout that he complied with his training and workplace practices.

## Formal allegations and dismissal

[8] On 7 August 2013, Mr Proffitt, Mr Nathan's Manager, wrote to him inviting him to a meeting about this incident on 12 August 2013. Five allegations were put to Mr Nathan in Broadspectrum's letter as follows:

> In summary, it is alleged that:
>
> a) You failed to conduct a Hazard Identification (tailgate) session with the team prior to commencing the work;
>
> b) You failed to isolate the energy source including isolating the bridging of both DC poles and testing of the equipment to confirm it was de-energised as set out in procedure 9192-OP-0028;
>
> c) You allowed a member of your team, Jordan Smith, to undertake a task without the correct insulating gloves which are PPE,[3] which resulted in an electric shock to him;
>
> d) You failed to report that there was a serious incident in accordance with our health and safety procedures; and
>
> e) You submitted a falsified document as part of the incident, being the operating sequence.

[9] Mr Nathan was told that the meeting on 12 August 2013 was a disciplinary meeting. He was invited to bring a representative or support person with him and told that the allegations were serious and, if they were substantiated, they may amount to serious misconduct. A copy of Broadspectrum's report into the incident,

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[3] Personal protection equipment (footnote added).

prepared by two of its employees, Mr Hennie Nothnagel and Mr Pat Creagh, was enclosed with this letter. Mr Nathan had been interviewed by them on 28 June 2013 and had explained what happened. That report was called the Integrity Investigation Report.

[10] Mr Nathan attended the meeting with his wife who took notes. At this meeting he answered the allegations, explaining that he had conducted a hazard identification session (that is a tailgate meeting) and that the span wire had been de-energised by Wellington Electricity. He denied falsifying a document (the operating sequence referred to as (e) in Broadspectrum's letter).

[11] Mr Proffitt conducted the disciplinary meeting on 12 August 2013 and wrote to Mr Nathan on 15 August 2013. Mr Proffitt's letter reviewed each of the allegations. His letter culminated in a preliminary opinion that serious misconduct had occurred and, in accordance with Broadspectrum's House Rules, he was proposing summary dismissal. The stated basis for this preliminary opinion was that Broadspectrum required strict compliance with its health and safety policies and procedures. Mr Proffitt considered Mr Nathan did not appreciate the seriousness of his actions. Mr Proffitt also noted that as a Team Leader in a supervisory position Mr Nathan was expected to set an example, and Mr Proffitt said he was not able to trust Mr Nathan in the future because he had not been truthful in his responses and had falsified the operating sequence document.

[12] A further meeting was arranged to give Mr Nathan an opportunity to comment on Mr Proffitt's preliminary opinion before a final decision was made. The final meeting occurred on 27 August 2013 and was followed by a letter confirming Mr Proffitt's decision. Mr Proffitt decided that three of the five allegations had been substantiated. In his letter of 27 August 2013 he said:

> Following consideration of your responses to the allegations, I formed the view that three of the allegations were substantiated, specifically, that:
>
> - you failed to conduct hazard Identification (tailgate) session with the team prior to commencing the work;
>
> - you failed to report that there was a serious incident in accordance with our health and safety procedures; and

- you submitted a falsified document as part of the incident, being the [operating] sequence.

[13] Mr Proffitt summarised his decision in the following way:

> … In summary, I explained that you had shown a lack of responsibility for your actions throughout this investigation and have blamed others. At no time have you acknowledged the seriousness of your actions, or were remorseful. I advised that in these circumstances the appropriate disciplinary action was termination of your employment, effective from today.

[14] Mr Nathan instructed a lawyer to act for him in pursuing a personal grievance for unjustified dismissal.[4] Mr Nathan's lawyer wrote to Broadspectrum raising a grievance for him and asking for information. In that letter the Integrity Investigation Report was criticised as using incorrect information, drawing wrong conclusions and containing errors. The outcome of the final meeting between Mr Nathan and Mr Proffitt was challenged as predetermined and remedies were sought including reinstatement.

[15] Broadspectrum responded on 28 February 2014 saying that what was in issue was the procedure followed by Mr Nathan in planning and carrying out the repair work. It declined to grant the remedies claimed.

[16] Eventually Mr Nathan's personal grievance came before the Authority. Broadspectrum maintained its opposition to Mr Nathan's personal grievance, but the investigation meeting was only partly completed when the company made a proposal to the Authority to provide the remedies sought by Mr Nathan and, as a result, to end the employment relationship problem. It is this proposal, and how the Authority dealt with it, that is at the heart of Mr Nathan's proceeding before the Court.

## The determination

[17] The investigation meeting was scheduled for 1 and 2 December 2015. A lengthy investigation meeting had been anticipated because the Authority was scheduled to hear from 11 witnesses. However, when only three witnesses had given evidence for Broadspectrum, the company proposed to meet the remedies sought by

[4] Mr Cleary did not act for Mr Nathan prior to the challenge of the Authority's determination.

Mr Nathan in his statement of problem. The Authority recorded the proposal in this way:[5]

> … The offer was made publicly and on the record as follows:
>
> a. Transfield would reinstate Mr Nathan to a position no less advantageous to him than his former position. The reinstatement would take effect from 1 February 2016. Training would be provided to bring him up to speed.
>
> b. He would be reimbursed lost wages from his dismissal until reinstatement.
>
> c. He would be reimbursed the difference between what he was paid during the period of his suspension and what he claimed he should have been paid during that period. Transfield noted it did not agree with Mr Nathan's methodology but was prepared to reimburse this sum in order to resolve the matter.
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> d. Transfield would compensate Mr Nathan for the loss of retirement funds by paying the employer's contribution to his superannuation fund for the period from his dismissal to his reinstatement.
>
> e. Mr Nathan would receive compensation of $15,000 for distress as sought.

[18] Prior to making this proposal Broadspectrum had called two witnesses whose evidence was intended to show that, whatever the outcome of the investigation meeting, it was not practicable and reasonable to reinstate Mr Nathan to his former job as Acting Team Leader based at its Glover Street branch. The two witnesses were Wellington Cable's Chief Executive, Mr Simon Fleisher, and a senior manager from that company, Mr Andrew Cresswell.

[19] Mr Fleisher had not been employed by Wellington Cable when the incident with the span wire occurred, or when Mr Nathan was dismissed. Mr Fleisher was opposed to Mr Nathan working on his company's lines in future. He told the Authority that his company could not compromise on health and safety and would not have someone working on its network who did. Mr Fleisher told the Authority that Mr Nathan had worked on the network while it was still energised, had not undertaken a tailgate meeting, and did not report the electrical arcing (or flashover) when Mr Fleisher believed he should have done. Mr Fleisher also told the Authority

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55 *Nathan v Transfield Services Ltd*, above n 1, at [2].

that he understood Mr Nathan did not seriously dispute what was being said by him. In fact, Mr Nathan strongly disputed what Mr Fleisher had said and provided the Authority with a written brief of evidence in reply taking issue with those statements.

[20] Mr Cresswell agreed with what Mr Fleisher had said. In Mr Cresswell's opinion, Mr Nathan's electrical knowledge was minimal and he questioned his competency. Mr Cresswell also expressed concern about the safety implications and risks for Wellington Cable if Mr Nathan was reinstated to his job as Acting Team Leader and was to work on its network.

[21] Both Mr Fleisher and Mr Cresswell had read the Integrity Investigation Report, a copy of which was produced in a bundle of documents for the Authority. Mr Cresswell had also read Mr Nathan's evidence to the Authority so that what he said was partly based on the Integrity Investigation Report, Mr Fleisher's evidence, and Mr Nathan's evidence.

[22] The third witness for Broadspectrum to give evidence to the Authority was Mr Nothnagel who did so after Mr Fleisher and before Mr Cresswell. While giving evidence he expressed a doubt that the version of the Integrity Investigation Report provided in the bundle of documents was the final version of his report. He was given permission to leave the investigation meeting to check his copy. When he returned, after Mr Cresswell had given evidence, Mr Nothnagel identified several differences between the version of the Integrity Investigation Report in the bundle and his final version of it.

[23] The extent of those differences was not exhaustively explained in Mr Nathan's evidence to the Court. However, several were significant because they dealt with the seriousness of what had happened. Broadspectrum operated a policy called a Fair Play Policy, addressing potential responses by it where there had been a breach by an employee. In relation to that Fair Play Policy, Mr Nothnagel identified two significant differences between his version of the report and the one provided to the Authority. He told the Authority that the word "personal" had been inserted into one of his findings in the version of the report before the Authority so that it read as

if Mr Nathan had committed something called a personal optimising violation. The version of the report provided in the bundle to the Authority also had an addition to it about the tailgate meeting, so it read as if Mr Nathan had been responsible for a reckless violation.

[24] In his evidence to the Court Mr Nathan explained that an optimising violation under the Fair Play Policy leads to coaching for improvement but a personal optimising violation, or a reckless violation, can lead to disciplinary action including dismissal. The differences between these versions of the Integrity Investigation Report, therefore, were relevant to the potential outcome from the disciplinary action Mr Nathan had faced.

[25] After Mr Nothnagel's evidence, a further request was made on Mr Nathan's behalf for disclosure of copies of Broadspectrum's emails concerning the different versions of this report. Those emails were supplied and showed, among other things, that the draft report had received significant comment from Mr Proffitt, and others, while it was being prepared and before it was sent to Mr Nathan. For example, on 22 July 2013, Mr Proffitt sent an email to another Broadspectrum Manager, Mr Grant Martin, with his comments on the draft. On 29 July 2013, Mr Proffitt sent an email to other Broadspectrum managers which included the following sentence about the document provided by Mr Nathan called the operating sequence:

> … Times are wrong and it is falsified.

[26] Mr Proffitt had already decided one of the allegations against Mr Nathan was made out before speaking to him about it. On 23 July 2013, Mr Martin, sent an email to Mr Nothnagel, Mr Proffitt and others about the investigation report. Mr Martin had made a contribution to that report because he wrote in his email:

> Hennie and Pat [Mr Nothnagel and Mr Creagh], while my finger prints are all over it, your names are on this. Do you stand behind it /does this represent your view?

[27] It is not clear whether these emails were provided to the Authority as well as to Mr Nathan.

[28] The investigation meeting more or less stopped after Mr Nothnagel gave his evidence and no further witnesses were heard from. Instead, an opportunity was provided for the parties to attempt to negotiate a settlement, eventually with the assistance of another Authority Member as a facilitator. Settlement was not reached because of a sticking point over reinstatement. Mr Nathan wanted to be reinstated as Acting Team Leader at Glover Street in Wellington, which necessarily involved being able to work on lines for Wellington Cable in the future. Broadspectrum was prepared to reinstate Mr Nathan but was not prepared to agree to him returning to Glover Street.

[29] As Ms Manning, Broadspectrum's Regional Human Resources Manager, explained in her evidence to the Court, the company decided on a tactical response to overcome this impasse. On the resumption of the investigation meeting it made the proposal referred to earlier, subject to two qualifications. First, while Broadspectrum accepted it should reinstate Mr Nathan, the proposal was that it would be to a position no less advantageous to him but not to his former position. Second, it would not offer to pay him any costs because they were not claimed in his statement of problem.

[30] The Authority decided she had to consider whether this proposal resolved the employment relationship problem by providing for the remedies requested. The Authority noted that when the statement of problem was filed Mr Nathan had not stipulated that the reinstatement sought by him was to the exact linesman position he had occupied before his dismissal.[6] The determination states:[7]

> … That [reinstatement as Acting Team Leader] may have been his hope, but he could not have had a firm expectation that would occur. Reinstatement is a discretionary remedy available to the Authority where it determines an employee has a personal grievance. The Authority may provide for reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee.

[31] The Authority concluded no useful purpose would be served by reinstating Mr Nathan to his former job.[8]

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6 *Nathan v Transfield Services Ltd*, above n 1, at [7].
7 At [7] (footnotes omitted).
8 At [9].

[32] Before reaching this conclusion, the Authority did not recall Mr Fleisher or Mr Cresswell to ascertain if their evidence would have been any different in light of what Mr Nothnagel had said.

[33] Turning to the next aspect of Broadspectrum's proposal, the Authority declined Mr Nathan's claim for costs because he had not included them as a remedy in his statement of problem and Broadspectrum would be unfairly prejudiced by such a remedy being added part way through an investigation meeting.

[34] The Authority adopted Broadspectrum's proposal and orders were made accordingly. Broadspectrum was ordered to reinstate Mr Nathan to a position no less advantageous to him with effect from 1 February 2016. He was reimbursed for lost wages, the difference between what he had been paid while suspended and his normal pay, the employer's contribution to his superannuation fund and $15,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). The Authority declined to award him costs.[9]

[35] There was a sequel. On 1 February 2016, there was a further determination of the Authority by a different member.[10] Broadspectrum sought a declaration that it could lawfully instruct Mr Nathan to perform alternate duties it had identified for him, working as a transmission line mechanic on the national electricity transmission grid based in Upper Hutt. Broadspectrum sought an order that Mr Nathan not report to Glover Street as he had apparently indicated he would.[11] The Authority concluded the job offered to Mr Nathan in Upper Hutt was essentially similar to the one he had undertaken previously and that he would not lose income or conditions of employment.[12] The Authority found that the position in Upper Hutt complied with the 11 December 2015 determination by the Authority. However, Mr Nathan had a knee injury that meant the exertion of this work was beyond him. He was dismissed

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9 At [15].
10 *Broadspectrum (New Zealand) Ltd v Nathan* [2016] NZERA Wellington 15.
11 At [12].
12 At [18].

from this replacement job without taking up his duties. There is no separate challenge to that dismissal before the Court.

## The challenge

[36] Mr Nathan challenged the Authority's determination on a non de novo basis. The issues identified in his second amended statement of claim were whether he should have been reinstated to his former position as Acting Team Leader and been awarded indemnity costs or a lesser sum in costs. Two alleged errors of law were pleaded. The first alleged error was that the Authority erroneously relied on evidence from Mr Fleisher and Mr Cresswell that was tainted by the report in the bundle before the Authority. The second alleged error was that the Authority wrongly decided not to award costs, because they do not need to be pleaded in a statement of problem for the Authority and are not a remedy under s 123 of the Act.

[37] Broadspectrum's defence is that the reinstatement remedy sought in the Authority was not specific to Mr Nathan's former position, so that its proposal and the subsequent order by the Authority complied with s 123(1)(a) of the Act; it was a matter for the Authority's discretion which had been properly exercised. As to the claim for costs, Broadspectrum said a belated application to amend the statement of problem had been made and the Authority made a procedural decision to decline that late application. It followed that this procedural decision was not susceptible to a challenge because of s 179(5) of the Act. Broadspectrum applied to strike out Mr Nathan's challenge to the Authority's costs determination. By agreement that strike-out application was heard at the same time as the substantive challenge.

## Submissions relating to a non de novo challenge

[38] Mr Upton QC, counsel for the defendant, submitted that a non de novo challenge is conducted in the nature of an appeal and is necessarily limited. Relying on *Jerram v Franklin Veterinary Services (1977) Ltd*[13] for that principle and *Harvey Norman Stores (NZ) Pty Ltd v Boult,*[14] as an illustration of the principle in practice, he submitted that the approach required was a narrow one, and Mr Nathan's second

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13 *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] ERNZ 157 (EmpC)
14 *Harvey Norman Stores (NZ) Pty Ltd v Boult* [2014] NZEmpC 28.

amended statement of claim did not disclose an error of law capable of being remedied by the Court. He referred to *Jerram* where the Court said:[15]

> I find that the non de novo hearing in this case is in the nature of an appeal from a determination of the Authority so that the challenger/plaintiff is required to show that the Authority's determination was wrong.

[39] The passage from *Boult* relied on in support of this submission reads:[16]

> Had this been a de novo challenge it would be open for the Court to substitute its view of an appropriate award of costs for that of the Authority. As this is a non-de novo challenge and it is advanced solely on the basis of error of law, however, the plaintiff can only succeed on this point if I am satisfied that the manner in which the Authority exercised its discretion was so unreasonable as to amount to an error of law.

[40] The point of Mr Upton's submissions was to limit the extent of the Court's consideration of what happened before the Authority. This difference in approach to the challenge is apparent from the evidence each party relied on. Mr Nathan gave detailed evidence about what happened in the investigation meeting and produced briefs of evidence provided to the Authority and documents disclosed to him. In contrast, Broadspectrum confined its response to this challenge to submissions and evidence from Ms Manning, who explained the tactical decision taken by the company when making its proposal to the Authority.

[41] A non de novo challenge arises from an election made pursuant to s 179 of the Act. A party dissatisfied with the written determination of the Authority may elect to have the matter heard by the Court. Section 179(3) provides that the election must:

> **179 Challenges to determinations of Authority**
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> …
>
> (a) specify the determination, or the part of the determination, to which the election relates; and
>
> (b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a **hearing *de novo***).

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15 *Jerram v Franklin Veterinary Services (1977) Ltd*, above n 13 at [16].

16 *Harvey Norman Stores (NZ) Pty Ltd v Boult*, above n 14 at [28].

[42] Subsection 179(4) of the Act applies where that election does not seek a hearing de novo. That subsection reads:

> **179 Challenges to determinations of Authority**
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> …
>
> (4) If the party making the election is not seeking a hearing de novo, the election must specify, in addition to the matters specified in subsection (3),—
>
> (a) any error of law or fact alleged by that party; and
>
> (b) any question of law or fact to be resolved; and
>
> (c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and
>
> (d) the relief sought.

[43] While *Jerram* held a non de novo election is in the nature of an appeal that is not the end of the analysis. *Jerram* also held:[17]

> Although I accept that the requirements of s 183 apply equally to de novo hearings and non-de novo challenges, the Court can still make its own decision as much in cases where it starts with a completely clean slate (the de novo hearing) as in cases where the challenger should be required to satisfy the Court that the Authority's determination was wrong. So it follows that although in a de novo hearing the party that originally brought the problem to the Authority must re-establish that cause of action when challenged to do so in Court, in the case of a non-de novo hearing the Court will have regard to the Authority's determination and its reasoning and will have to be persuaded by the challenger that these were wrong.

[44] *Jerram* was endorsed in *Cliff v Air New Zealand Ltd*, where the Court said:[18]

> The election the challengers must make under s 179(3) refers not so much to the nature of the presentation of the case in court but, rather, to the extent to which the decision under appeal is challenged. An election by the challenger "… seeking a full hearing of the entire matter (… a hearing de novo)" indicates that all matters that were before the Authority will be at issue on the challenge. What has become known colloquially as a "non-de novo challenge" (because of the absence of reference to this in s 179) is a narrower form of appeal in the sense that it defines some but not all of the determination that is under appeal. That is exemplified by s 179(4) which requires a party not seeking a hearing de novo to specify what it says are errors of law or fact in the Authority's determination and other particulars as

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17 *Jerram v Franklyn Veterinary Services (1977) Ltd*, above n 15 at [15].

18 *Cliff v Air New Zealand Ltd* [2005] ERNZ 1 (EmpC) at [7].

> to the issues to enable the Court to conduct a restricted and more focused hearing of the appeal. But the election does not dictate the way in which the appeal will be heard. So, as here, there may be evidence or further evidence about the matters in issue in the non-de novo challenge and in such a case it is particularly appropriate, and indeed necessary, for the Court to make its own decision on a point or points as required by s 183.

[45] The plaintiff in a non de novo challenge still carries a burden as was described in *Robinson v Pacific Seals New Zealand Ltd* where Judge Inglis said:[19]

> The plaintiff carries that burden. In undertaking its task the Court is required to consider the Authority's determination together with any evidence, to the extent that it is relevant to the assessment process. If the Court is not satisfied that the Authority has erred in the way contended for by the plaintiff the challenge must fail. If it were otherwise the distinction drawn in the legislation between a de novo challenge and those that are not pursued on that basis would be otiose.

[46] It follows from these cases that the making of an election for a non de novo challenge does not dictate the way in which that challenge is to be heard. There may be evidence of matters placed in issue by the non de novo challenge and, as a result, it may become necessary for the Court to make its own decision as required by s 183 of the Act.[20] While it is necessary for the plaintiff to establish one or more of the alleged errors which have been pleaded, if the Court is satisfied that the Authority has made one of them, so that it is necessary to set aside some or all of the determination, then the issue may need to be reconsidered taking into account any evidence called at the hearing of the challenge.[21]

## The pleadings

[47] In his second amended statement of claim Mr Nathan elected to challenge paras [14](a) and [15] of the determination. Paragraph [14] contained orders made by the Authority relying on the proposal by Broadspectrum. In para [15], the Authority declined to award costs.

[48] Two issues were identified. The first issue was whether Mr Nathan should be reinstated to his former position. The second issue was whether he should have been

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19 *Robinson v Pacific Seals New Zealand Ltd* [2015] NZEmpC 84 at [22].
20 *Cliff v Air New Zealand Ltd*, above n 18, at [7].
21 *Robinson v Pacific Seals New Zealand Ltd*, above n 19 at [17] – [19] and *Lim v Meadow Mushrooms Ltd* [2015] NZEmpC 192, (2015) 10 N ZELC 79-060 at [23].

awarded indemnity costs or some lesser costs. Supporting both of those pleadings were assertions that an error of law had been made as follows:

> (c) The first error of law is that the Authority erroneously held (at para [8]) that third parties' views determined the matter and in any event the third parties' views relied on were tainted by the defendant and unjustified.

[49] As to the second error of law, about costs, the claim was that they do not need to be pleaded before the Authority and are not a remedy under s 123 of the Act. An error of fact was also pleaded, repeating the comments about third parties' views referred to earlier.

[50] Mr Nathan pleaded that not having misconducted himself, he ought not to be disadvantaged by losing his former position or be out of pocket for significant legal expenses given that Broadspectrum capitulated before the Authority.

[51] To be successful Mr Nathan needs to establish that the Authority was in error in the way he pleaded in his second amended statement of claim. On this non de novo challenge it was open to him to provide evidence and submissions to support his pleading that the determination was wrong. It follows that this case is not as narrowly confined as Mr Upton submitted.

## First alleged error: third party views

[52] Mr Nathan's case for reinstatement is that the Authority should have ordered that he be reinstated to his former position as Acting Team Leader at Glover Street. Mr Cleary, counsel for the plaintiff, submitted that Mr Nathan's case was always that he should have been reinstated to that position, which was apparent from his statement of problem before the Authority. However, the Authority was swayed in its decision by the evidence from Mr Fleisher and Mr Cresswell who are the third parties referred to in the pleading.

[53] Mr Upton's submission was that the alleged error of law pleaded is inaccurate because the Authority did not determine reinstatement on that basis. If Mr Upton's submission is correct there is no ability to challenge the orders by the Authority because, in fact, no determination was made. Mr Upton referred to paras [9] and

[10] of the Authority's determination to support his submission. In those passages comments were made by the Authority about what may have been decided had the investigation meeting been concluded. In both paragraphs the Authority used careful language to indicate that preliminary or tentative views were being stated. At para [9] the Authority said:

> In light of the position taken by those two witnesses, I am satisfied no useful purpose would be served by reinstating Mr Nathan to his former position. He could not undertake the work he formerly performed because of the prohibition placed on him by the external party. Although I had not heard all the evidence in this matter, it was already clear to me that, if I were to find Mr Nathan had been unjustifiably dismissed, and if I were to exercise my discretion in favour of reinstatement, I would not have reinstated him to his former position, but to one no less advantageous to him.

[54] The witnesses referred to were not named but were Mr Fleisher and Mr Cresswell. In para [10] the Authority Member referred to the remedy proposed by Broadspectrum saying:

> … Additionally, it accords with the remedy I am likely to have awarded if I had determined he had a personal grievance and if I had further determined the remedy of reinstatement to be reasonable and practicable.

[55] Despite using this careful language a determination about the reinstatement remedy claimed by Mr Nathan was made by the Authority. When the investigation meeting resumed on 2 December 2015 there was an impasse. Both parties accepted reinstatement should occur but they disagreed about the type of reinstatement. Mr Nathan wanted his former position back but Broadspectrum considered that option was not feasible. As is apparent from para [9] of the determination, the choice between the two was made by the Authority, drawing on Broadspectrum's preparedness to reinstate Mr Nathan and the evidence that had been heard. In saying Mr Nathan would be placed in a position no less advantageous to him, the Authority accepted Broadspectrum's case about reinstatement: that it was not practicable and reasonable to reinstate him to his former position as Acting Team Leader. The basis for that conclusion could only have been the evidence the Authority heard from Mr Fleisher and Mr Cresswell. The Authority adopted the remedies proposed by Broadspectrum as orders under the heading "Determination".[22] Broadspectrum complied and went to the extent of seeking a further determination to be satisfied

[22] At [13].

what it proposed as a replacement job for Mr Nathan satisfied the order. Had Broadspectrum not complied with the order by the Authority in the determination it would have been susceptible to a compliance order.[23]

[56] The next issue is whether in making that determination the Authority erred. Mr Upton submitted that if there was a determination it involved an exercise of discretion so that to be successful Mr Nathan needed to show that the discretion was wrongly exercised. He submitted there was no basis for reaching such a conclusion.

[57] Section 123(1)(a) of the Act gives the Authority a discretion about reinstatement. That section reads:

> **123 Remedies**
>
> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
>
> (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:
>
> …

[58] Mr Cleary sought to avoid any difficulty arising from challenging the exercise of a discretion by submitting s 123(1)(a) contains two remedies created by the conjunction "or". One remedy is reinstatement to the former position and the other is placement in a position no less advantageous to the employee. Mr Cleary submitted Mr Nathan sought only one of those remedies in his statement of problem in the Authority, reinstatement, so he was pursuing an all or nothing outcome: reinstatement to his former position and not placement in another position.

[59] Mr Cleary relied on several propositions for this submission starting with Form 1, Sch 1, of the Employment Authority Regulations 2000 (the regulations) specifying that reference has to be made to the specific remedy sought. He submitted the statement of problem gave notice that what was being sought was reinstatement to Mr Nathan's former position and he did not need to be more precise. Even if more specificity was required, Mr Nathan could not have sought as a remedy to be reinstated to an alternative position.

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[23] At [14].

[60] Mr Cleary also relied on International Labour Organisation Convention 158,[24] article 10 of which refers to reinstatement as an outcome of an appeal against termination of employment. He acknowledged that New Zealand has not ratified this Convention but submitted that it may still be taken into account in interpreting a question of law relying on *Wellington Road Transport IUOW v Fletcher Construction Co Ltd.*[25]

[61] As part of this submission, Mr Cleary outlined the legislative history of reinstatement as a remedy, starting with its inclusion in the Industrial Relations Act 1973 and, in that statute, the process of a successful grievant being put back into a former position or in a position no less advantageous. He also referred to the Labour Relations Act 1987 and three potential outcomes for reinstatement; reinstatement in the employee's former position, placement in a position that the employee would have been in if the personal grievance had not arisen, or in a position no less advantageous to the employee.

[62] He noted that under s 40 of the Employment Contracts Act 1991 the remedy of reinstatement was expressed to be reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee. The same words have been used in s 123(1)(a) of the Employment Relations Act 2000.

[63] The thrust of these submissions was that Mr Nathan had not sought as a remedy to be reinstated to a position no less advantageous to him and, where Broadspectrum had capitulated, it was inappropriate to consider a remedy providing for anything other than reinstatement to his former job. Mr Cleary captured this proposition in the succinct statement that the remedy was provided for the plaintiff's benefit, if he succeeded, and was not provided for the defendant's benefit where it had conceded.

[64] I do not accept the submission that s 123(1)(a) of the Act creates two separate remedies and that a plaintiff is able to elect one of them to the exclusion of the other.

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[24] Termination of Employment Convention, 1982 (adopted 22 June 1982, entered into force 23 November 1985).

[25] *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* [1983] ACJ 653 (AC).

The legislative history of reinstatement does not shed any light on this discussion, other than to recognise that it has been a remedy for a considerable time. My reason for reaching this conclusion is that s 125 of the Act applies where reinstatement is to be considered, so that the remedy is only available if it is practicable and reasonable. It is expressed in the following way:

> **125 Remedy of reinstatement**
>
> (1) This section applies if—
>
> (a) it is determined that the employee has a personal grievance; and
>
> (b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).
>
> (2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.

[65] Section 125 refers only to reinstatement and does so in an all encompassing way, by referring to s 123(1)(a). It does not separately refer to placement in a position no less advantageous to the reinstated employee. If Mr Cleary's submission was correct, and two separate remedies are available under s 123(1)(a), the test in s 125(2) of what is practicable and reasonable would apply only to one of them. By careful pleading a plaintiff could avoid being subjected to this test and circumvent an assessment being made based on the practicality and reasonableness of the remedy being ordered. It would be a discordant outcome if that test applied only to one of two remedies the purpose of which is to re-establish an employment relationship. That could not have been Parliament's intention when providing this remedy.

[66] It follows that even though Mr Nathan had only sought to be reinstated to his position as Acting Team Leader, the Authority was not precluded from considering reinstating him to that position, or reinstating him in a position no less advantageous to him.

[67] However, that leaves for consideration whether the Authority was wrong in exercising this discretion by deciding to order reinstatement in the manner proposed by Broadspectrum. I consider the Authority was wrong. The Authority decided to accept what Broadspectrum proposed and in doing so could only have been relying on the evidence from Mr Fleisher and Mr Cresswell. Ordinarily that evidence would

be very persuasive. However, that evidence had potentially been compromised by Mr Fleisher and Mr Cresswell relying, at least partly, on a report that differed in significant ways from what was intended by Mr Nothnagel. Unfortunately the Authority did not recall Mr Fleisher or Mr Cresswell to ascertain which version of the report they had read, or if the opinions they had expressed would alter on being advised that the version of the report provided to the Authority had been called into question by the differences between that version and Mr Nothnagel's final version.

[68] The proposal by Broadspectrum followed what the Authority knew was an attempt by the parties to settle. It must have been apparent, on the resumption of the investigation meeting, that agreement had not been reached and a decision was required. When that point was reached, the Authority needed to consider the evidence to decide if reinstatement was practicable and reasonable. While the Authority knew Broadspectrum would re-employ Mr Nathan, the only evidence about whether it was practicable and reasonable to reinstate him as Acting Team Leader came from him, Mr Fleisher and Mr Cresswell. The Authority was on notice that the evidence from Mr Fleisher and Mr Cresswell may have been influenced by a version of the report that was not the final one and that version may have misstated or overstated the incident.

[69] The weight placed on what was said by those witnesses determined the remedy even though their evidence was potentially flawed. In those circumstances, the Authority was wrong to rely on this evidence as the basis for exercising the discretion to order reinstatement as proposed by Broadspectrum, by placing Mr Nathan in a position no less advantageous to him.

## Second alleged error of costs

[70] The second alleged error was to decline Mr Nathan's application for costs. The Authority's reason for doing so was that costs were not pleaded as a remedy in the statement of problem and to allow them to be pleaded belatedly would prejudice Broadspectrum.

[71] Mr Cleary submitted that the Authority's error was to treat costs as a remedy when they are not. He submitted costs need not be pleaded in the Authority and the discretion to award them is not affected by reference to either the time when they are sought, or to them being included in the statement of problem.

[72] Broadspectrum's submission was that the decision to decline to award costs was procedural because it was about amending a pleading in a proceeding before the Authority and there is no right to challenge a procedural decision (s 179(5)(a) of the Act). Mr Upton submitted that the Court's jurisdiction is confined by s 179(5) and that matters of procedure are not susceptible to a challenge under that section. He relied on *H v A Ltd* for the proposition that a determination of the Authority is amenable to challenge where it has a substantive effect but otherwise cannot be remedied on a challenge or by way of review.[26]

[73] The statement of problem filed by Mr Nathan in the Authority on 20 May 2014 did not include costs as a remedy or otherwise claim them. Broadspectrum advised the Authority that it would provide Mr Nathan with the remedies being sought in the statement of problem. That advice was followed by an unsuccessful application for costs made by Mr Nathan's (then) lawyer and for leave to amend the statement of problem for that purpose. With that background, Mr Upton submitted that costs in this case were not a determination of the sort referred to in s 179(1) of the Act. The decision not to allow the application to amend the pleading did not have substantive effect and, for that reason alone, the Court has no jurisdiction to entertain the present claim for costs.

[74] As an alternative submission, Mr Upton said that if the Court does have jurisdiction the determination does not contain an error of law about costs. That is because the power to award costs in Sch 2 of the Act is discretionary and there is no obligation or requirement for the Authority to award them. It follows that there can be no error of law where the Authority has exercised its discretion on a proper basis. Mr Upton submitted that the Authority's decision could not be categorised as being so unreasonable as to come within the rare category of case where unreasonableness by itself constitutes an error of law.

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[26] *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [13] – [14].

[75] The starting point is that the Authority made a determination not to award costs because they were not sought as a remedy in the statement of problem and Broadspectrum would be taken by surprise.[27] It is that determination Mr Nathan challenges. In *White v Auckland District Health Board*, the Court of Appeal held that the remedies available under the Act were confined to what is provided for in ss 123 to 128 of the Act and did not include costs.[28] The outcome of that case was that, although the remedies provided to the successful plaintiff had been reduced because of his contributory conduct, it was not appropriate to reduce the costs award to which he was otherwise entitled. While that case concerned the approach to costs in the Court, the principle is applicable to the Authority. It follows that costs in the Authority are not a remedy and it was wrong for the Authority to approach them on the basis that they are. Furthermore, I do not accept that it was necessary for Mr Nathan to include a claim for costs in his statement of problem, given the low level and reasonably informal nature of the proceedings before the Authority.[29]

[76] Having reached the conclusion that the Authority was wrong to decline to award costs to Mr Nathan on the basis that it did, that raises an issue about whether the Court can now determine them. In *Eniata v AMCOR Packaging (New Zealand) Ltd t/a AMCOR Kiwi Packaging* the Court considered its ability to examine a costs determination in the Authority.[30] The Court held:[31]

> This Court cannot determine costs in the Employment Relations Authority at first instance. The statutory provision for doing so empowers the Authority alone to make orders for costs. Whilst the position is different where there is a challenge to the Authority's decision on costs, no decision has yet been made in this case in that forum. It is for the Employment Relations Authority itself to determine what costs, if any, Mr Eniata should be called upon to pay to AMCOR.

[77] It follows the Court can award costs in this case, because there was a determination about them and a challenge to that determination. Mr Nathan was left in the position where his employer had accepted it should meet all, or almost all of his claimed remedies, but he had to bear the expense of bringing a proceeding to

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27 *Nathan v Transfield Services (New Zealand) Ltd*, above n 1, at [5].
28 *White v Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635 at [32].
29 See for example cl 13 of sch 2 to the Act.
30 *Eniata v AMCOR Packaging (New Zealand) Ltd t/a AMCOR Kiwi Packaging* EmpC Auckland AC 19A/02, 24 May 2002.
31 At [2].

compel his former employer into that acknowledgment and bear the associated cost. Mr Cleary submitted that Mr Nathan should be reimbursed on an indemnity basis for the costs incurred before the Authority, because Broadspectrum's case had collapsed. However, the Court was also invited to consider whether that sum, or any other sum, might be appropriate. Mr Cleary did not make submissions about what costs would be appropriate if the Court decided not to grant indemnity costs. Mr Upton did not make submissions about the quantum of costs, placing Broadspectrum's submissions firmly on the platform that costs were not capable of being awarded.

[78] The Authority has power to award costs by virtue of cl 15 of Sch 2 to the Act. Under cl 15(1) that power is to award costs and expenses the Authority thinks reasonable. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the full Court considered the principle to apply to costs in the Authority, given its flexible and unique procedures.[32] Noting that the Authority is able to set its own procedure, the Court stated some basic tenets in the Authority when considering costs. The Court began by observing that there is a discretion as to whether costs should be awarded and the amount of them, but that discretion is to be exercised on a principled basis and not arbitrarily; costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account; the reasonableness of the costs; the costs generally follow the event; that awards will be modest and that frequently costs are judged against a notional daily rate.[33]

[79] In this case, Mr Nathan produced a copy of the invoice from his former lawyer. No other information was provided from which an assessment could be made as to whether costs payable on that basis would be reasonable in the circumstances; for example, it is not clear what hourly rate was used in those costs, or what steps taken on Mr Nathan's behalf it relates to.

[80] In the circumstances, I consider Mr Nathan was entitled to an award of costs because he had been successful and there are no circumstances that would deprive

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32 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].
33 At [44].

him of an award. The just outcome is to apply the daily tariff that was used in the Authority in 2014, which was $3,500 per day.[34]

## Outcome

[81] I have reached the conclusion that the Authority erred in both respects pleaded by Mr Nathan. It is therefore necessary to consider what remedies (if any) are appropriate to grant.

[82] Mr Nathan sought reinstatement and lost wages from the date of his dismissal on 24 March 2016 through to the date of judgment, interest and costs. There was no dispute about Mr Nathan's claim for wages if he succeeded. He did not seek, in substitution for an order for reinstatement, any other remedy.

[83] As to reinstatement, the full Court in *Angus v Ports of Auckland Ltd (No 2)* said:[35]

> In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate the opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[84] Broadspectrum's case was confined to submitting that no error by the Authority had been made, and it did not call any evidence to show that it is not practicable and reasonable within the meaning of s 125(2) of the Act to reinstate Mr Nathan to his former position as Acting Team Leader. Broadspectrum bore the onus of showing reinstatement was not practicable and reasonable. Its preparedness to propose reinstating Mr Nathan, but to a different position, is at least some evidence that it does not consider his skills or experience to be inadequate, and there is no evidence on which to conclude that the situation is any different now from what it was in 2015 when the proposal was made. Having made that observation, Mr Nathan is not in a position to resist any further training he is directed by

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[34] For example see *Beguman (Labour Inspector) v Effective Fencing NZ Ltd* [2012] NZERA Auckland 229; *Cooke v JKL Entertainment Ltd* [2013] NZERA Christchurch 5.

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

Broadspectrum to undertake, to address any need to refresh his skills given the time he has been absent from the workplace or to deal with any coaching that might be required arising from the incident on 22 June 2013.

[85] I have concluded that the appropriate remedy is to order Mr Nathan's reinstatement as Acting Team Leader at Glover Street, but in a staged manner to ensure his reintegration into the workforce is achieved as smoothly as possible. He is also entitled to the financial remedies claimed.

[86] Pursuant to s 183(2) of the Act the determination of the Authority is set aside and in its place I order that:

1. Mr Nathan is to be reinstated to his former position as Acting Team Leader for the defendant at Glover Street, subject to the following:

    (a) His wages are to be reinstated from the date of this judgment but;

    (b) His return to active duties at the defendant's Glover Street premises is deferred for 14 days from the date of this judgment to allow for an orderly resumption of duties and for any other necessary administrative steps to be taken by Broadspectrum; and

    (c) Further, Mr Nathan is to fully cooperate in undertaking any training required of him by Broadspectrum which, for the avoidance of doubt, may take place during the time period referred to in 1(b) or such other time as Broadspectrum may direct.

2. Broadspectrum is to pay Mr Nathan his lost wages from 24 March 2016 to the date of this judgment at the rate of $1,519.22 gross per week.

3. Interest is to accrue on the lost wages at five per cent per annum.

4. Mr Nathan is awarded costs in the Authority proceeding in the amount of $7,000.

[87] The application by Broadspectrum, seeking to strike out Mr Nathan's challenge relating to costs, is dismissed.

[88] The costs of this proceeding are reserved. In the absence of agreement between the parties the plaintiff may file a memorandum seeking costs within 20 working days and the defendant may have a further 20 working days to respond.

K G Smith
Judge

Judgment signed at 4.15 pm on 28 October 2016