**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2017] NZEmpC 66**
**EMPC 81/2016**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | MEENA LAL<br>Plaintiff |
| AND | THE WAREHOUSE LIMITED<br>Defendant |

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| Hearing: | 3, 4 and 5 April 2017<br>(Heard at Auckland) |
| Appearances: | G Bennett and C Bowdler, advocates for plaintiff<br>M McGoldrick, counsel for defendant |
| Judgment: | 1 June 2017 |

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**JUDGMENT OF JUDGE CHRISTINA INGLIS**

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## Introduction

[1] Ms Lal was employed at the Newmarket store of The Warehouse Ltd (The Warehouse) for a number of years. She suffered an injury while at work in August 2012. She was assessed as being able to resume light duties, for five hours per day, in July 2013 but did not return to work in any capacity from October 2013. Her employment was terminated on medical grounds a year later.

[2] Ms Lal claims that she was unjustifiably dismissed. The essence of her claim is that while she could not return to full duties as at the date of her dismissal, she could have returned on a reduced basis. She contends that The Warehouse should have facilitated her return to work at a different store. While Ms Lal does not seek to

pursue a claim of unjustified disadvantage, she submits that the way in which The Warehouse dealt with issues relating to a managed return to work reinforces her claim of unjustified dismissal.

[3] Ms Lal unsuccessfully pursued a grievance in the Employment Relations Authority.[1] She challenges the Authority's determination on a de novo basis.

## Background

[4] Ms Lal was employed as a shop floor team member. She sustained an injury to her ankle while at work on 31 August 2012. She later developed problems with her foot. These problems were linked to the prior ankle injury. As a consequence Ms Lal was certified as medically unfit for work.

[5] Gallagher Bassett Care Advantage (GB) is contracted to facilitate employee access to entitlements and rehabilitation on behalf of the Accident Compensation Corporation (ACC) under an employer accredited partnership programme with The Warehouse. GB engaged with Ms Lal in respect of her injury and a managed return to work. A rehabilitation plan was developed following discussions and having regard to medical information provided in respect of Ms Lal's condition. Ms Lal signed off on the rehabilitation plan on 17 June 2013. The agreed plan included reference to the need for her to actively engage in her rehabilitation, and to attend all meetings and assessments. It also made it clear that Ms Lal was entitled to apply for a review of the plan. She never took this step.

[6] In the event, Ms Lal was assessed as "fit for some work" from 16 July 2013, subject to a number of action points in the rehabilitation plan, namely that she was to undertake light duties (which were described), for five hours per day five days per week. From 14 August 2013 Ms Lal was assessed as being fit to undertake six hours of work per day, though not to lift more than 10 kg or climb ladders. From 27 August 2013 to 9 September 2013, she was assessed as being fit for some work subject to some physical restrictions (relating to prolonged sitting, standing and walking).

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1 *Lal v The Warehouse Ltd* [2016] NZERA Auckland 78.

[7] Ms Lal requested a meeting with Ms Wooding (Human Resources) in late September 2013. At the meeting Ms Lal expressed a desire to transfer to a different store to undertake her rehabilitation. She said that her manager was not providing her with light duties. Ms Wooding explained the difficulties that a transfer would throw up and undertook to speak to Ms Lal's manager about the nature of the duties she was being assigned. She also undertook to speak to Ms Bassi, Ms Lal's case manager at GB. She attended to these tasks the following day, the outcome of which was recorded in an email to Ms Lal dated 3 October 2013 (although Ms Lal's evidence was that she had not seen that email). In summary, Ms Wooding obtained Ms Bassi's support for further physiotherapy and arranged for the store manager to meet with Ms Lal to discuss her duties.

[8] On 14 October 2013, Ms Lal visited an orthopaedic surgeon. He sent a report to Ms Lal's doctor, detailing her condition and noting, amongst other things, that "She would certainly benefit from a job where she is not on her feet and is more sedentary and sitting in nature. She tells me she spends most of her day on her feet with custom [sic] relations walking which will certainly aggravate her symptoms." This letter was followed up with another one the following month, in which it was said that:

> [Ms Lal] continues to struggle with her ankle. This is exacerbated by spending prolonged time on her feet with work. She would be better suited in a work environment that is less busy and she is able to rest and spend less time on her feet. I would appreciate it if you would consider appropriate transfer for her for this to occur.

[9] A medical report was prepared for GB by an assessor (dated 8 November 2013). The medical assessor concluded that Ms Lal would not be able to return to pre-accident employment as a shop floor assistant with the work tasks required in such a role. Clerical and office support work and security services were identified as medically sustainable work types.

[10] The assessment report was discussed with Ms Lal during a meeting the following month, including the conclusions expressed in the report. Ms Lal expressed the view that she could return to light duties (notwithstanding the medical

assessment) but not at the Newmarket store. She referred to her orthopaedic surgeon's most recent letter in support of this request. By this stage Ms Lal was undertaking some computer training, with a view to retraining for a different role.

[11] The Warehouse wrote to Ms Lal on 16 January 2014 requesting a meeting to discuss her ongoing medical condition. The letter summarised the position as follows:

> Just to recap, you are employed as a shop floor team member. You had an accident on 31st August 2012 and ongoing health issues have meant you have not worked your full hours since June 2013, and have been off work since October 2013. This is a considerable period of absence from the business and we can no longer sustain this degree of uncertainty.
>
> The most recent information we have from [GB] is a letter from [the orthopaedic surgeon] (dated 23 December 2013) stating there is no change to the pathology … previously [he] stated that you are continuing to struggle with your ankle and due to the injury you would be best suited to a work environment that is less busy so you can rest and spend less time on your feet.
>
> The information we have to date is that the medical assessor has stated the only 2 medically sustainable job type options are Clerical and Office Support worker, and Alarm Security Monitor. We have been informed your GP has certified you for light duties that restrict lifting, heavy physical repetition, prolonged sitting, walking or standing. You had advised [GB] in October 2013 that you had been told the injury would take two to three years to heal.
>
> The Warehouse is committed to assisting and supporting you where practicable, however given that your condition has been ongoing for some time now we would like to meet to discuss your current employment status and ability to return to work.
>
> …

[12] The meeting foreshadowed in the letter of 16 January 2014 took place on 10 February. Ms Lal's condition was discussed, together with the treatment she was currently undertaking. Other possible roles, such as a clerical role (for which she had been receiving computer training), were canvassed but available options within The Warehouse were assessed as limited. It was noted that it was becoming increasingly difficult to provide light duties for Ms Lal within the context of her current role. It is apparent too that towards the end of the meeting the nub of the issue from Ms Lal's perspective emerged, namely a determination to move to

another store. This is reflected in notes of the meeting which record that: "[Ms Lal] not prepared to do rehab at Newmarket."

[13] A medical certificate from Ms Lal's doctor (Dr Wu) followed on 2 April 2014. Dr Wu supported a gradual return to work plan, clearing Ms Lal for work four hours per day, five days per week from that date with restrictions on heavy lifting, prolonged sitting, prolonged walking and prolonged standing. The Warehouse confirmed that it was able to accommodate these conditions and Ms Lal was advised accordingly. Ms Lal was also advised that an occupational therapist had been organised to assess and monitor the return to work plan. She was reminded of her need to participate in the plan and it was confirmed that the plan would be implemented at the Newmarket store. Ms Lal was subsequently advised that a new acting store manager (Mr Singh) would be involved in her return to work programme. This would have obviated the need for engagement with the then store manager, with whom Ms Lal had previously indicated she had issues.

[14] Despite these steps, Ms Lal failed to engage in the return to work programme. This led to GB advising that Ms Lal's ACC entitlements were to be suspended.

[15] Ms Lal's doctor then provided a report advising that she had been in to see him, that she took issue with the suspension of her entitlements and had reiterated her request to move stores. The doctor's report noted that Ms Lal had advised him that she would:

> … like to start to work in another branch of Warehouse but not at Newmarket branch because she worked there before and she was under a lot of stress including staff abusing her and throwing objects at her. … I hope this will clarify this matter and you assign her part-time job in any other branch of Warehouse and this will solve the problem and do not stop her ACC payment while she is on part-time job.

[16] A letter from Mr Bluegum, a lawyer instructed by Ms Lal at the time, followed shortly thereafter. Mr Bluegum asserted that a previous written warning given to Ms Lal 20 months previously (in respect of improper conduct relating to other colleagues) had been unfair and that the complaint which had given rise to the warning had been manufactured. This backdrop was said to raise issues of hostility in the workplace and the position being adopted by management in respect of Ms

Lal's return to work. Mr Bluegum advised that Ms Lal had lost confidence in management's ability to act fairly and reasonably towards her, and that a combination of these issues had manifested in a stress disorder.

[17] Ms Lal obtained a medical certificate on 14 May 2014 certifying her as being unfit to resume work for 14 days. A further certificate followed on 28 May, advising that she was unfit to return to work for an additional 14 days.

[18] Correspondence between The Warehouse and Ms Lal's lawyer followed, with The Warehouse requesting a meeting to discuss Ms Lal's ongoing absence; her refusal to take part in the return to work programme; and the effect of this on her employment status.

[19] Ms Lal's request for a move to another store was reactivated during the course of a meeting on 21 July 2014. She also referred to concerns about another employee whom I shall refer to as "A". Ms Lal said that she was concerned about working in proximity to "A". The concerns stemmed from an incident which had occurred, and which had been dealt with, some years prior. A number of measures were discussed during the course of the meeting, to accommodate Ms Lal's freshly expressed concerns. Ms Lal also said that a move to another store was necessary because the Newmarket store was busier than others and could not accommodate light duties.

[20] Although the transfer request was considered, it was not regarded as a viable option. This was confirmed to Ms Lal by email dated 22 July 2014. Ms Lal was advised that she could apply for jobs in other stores in the usual way, but the company did not consider it was obliged to accommodate a transfer, due to the way in which its business was structured. Further, it took issue with Ms Lal's assertion that the Newmarket store was busier than other stores, and it did not accept that it was unable to accommodate light duties. Ms Lal was presented with an ultimatum – either return to work in the Newmarket store on light duties or the company would consider termination.

[21] I pause to note that I am satisfied, based on the evidence before the Court, that the company provided light duties to Ms Lal; that such duties were available at the Newmarket store; that the defendant made this clear to Ms Lal during the course of its communications on the topic; and explained what the light duties were and why they were considered appropriate. While I accept that Ms Lal has a strongly held perspective on these matters, her evidence (which tended to be inconsistent and at times vague) was at odds with other evidence before the Court and the evidence of witnesses for the defendant, which I preferred. The company took the step of obtaining specialist advice in relation to the sort of work Ms Lal could safely undertake, and was supported in its conclusions by ACC. The company also put in place measures to address the other concerns which Ms Lal had raised in support of her request for a transfer.

[22] At the 21 July meeting Ms Lal confirmed that she was well enough to do three hours' work per day. The Warehouse undertook to arrange for an occupational therapist appointment as soon as possible, to enable a gradual return to work plan to be implemented. This did not eventuate. On 3 September 2014 Ms Lal provided The Warehouse with a further medical certificate, placing her off work as medically unfit for a further period of 42 days.

[23] Ms Marshall (National Employment Relations Manager at the time) wrote to Ms Lal, via her lawyer, on 11 September 2014. She noted two things. First, that there had been no response to the action plan proposed in earlier correspondence in respect of a gradual return to work; second, that the further medical certificate placed The Warehouse in a difficult position as it could not keep Ms Lal's job open for her indefinitely. Ms Marshall advised that:

> Unless [Ms Lal] can tell us that she can and will return to work at Newmarket store by 30 September we will have no option but to terminate her employment. We are willing to meet to confirm this but I stress that we cannot delay interminably. Can you please confirm receipt of this email and that your client fully understands the import for her.

[24] No response to this correspondence was forthcoming. This prompted Ms Marshall to write directly to Ms Lal on 23 September. The letter set out the steps taken to communicate with Ms Lal's lawyer, together with the text of the earlier

correspondence. The letter went on to specify two options: a gradual rehabilitation programme with an eventual return to normal hours, at the Newmarket store; or termination. Ms Marshall requested that Ms Lal respond by 30 September 2014 with advice as to her prognosis, and providing an update. The opportunity to meet to discuss matters was also extended to Ms Lal.

[25] Ms Lal did not take up the offer of a meeting. Rather, an email was forwarded advising that Ms Lal was having ongoing medical treatment; had an appointment scheduled with Greenlane Hospital pain clinic; was struggling to stand on her leg; the pain had gone to her hip; the physiotherapist had advised that she still needed further strengthening and stretching; and a medical certificate had been provided putting Ms Lal off work until 14 October 2014. The email went on to say that Ms Marshall's correspondence had only been received "on Saturday" and "it doesn't give us much time to think and make a decision." It concluded with the comment that Ms Lal still wanted her job at The Warehouse but "we cannot stop you for doing your part".

[26] Ms Marshall wrote to Ms Lal on 1 October 2014 referring to the 23 September correspondence and giving notice that the company was terminating her employment as at 3 October 2014. The basis for this decision was said to be the considerable period of Ms Lal's absence from work and the company's expressed belief that it could no longer sustain the degree of uncertainty involved in Ms Lal's incapacity and could not hold her position open any longer.

[27] While Ms Lal gave evidence that, as at the date of her dismissal, she was willing and able to return to work, that is not consistent with other evidence before the Court. A medical certificate from ACC notes that Ms Lal was unable to resume any duties at work from 7 May 2014 for 773 days, so well into 2016. I note too that correspondence from Ms Lal sent to The Warehouse two months post-termination, makes it plain that she was still not fit for work at that time. Further medical certificates placed before the Court reflect the fact that she remained unfit for work as at the date of hearing.

[28] It follows that Ms Lal has not been fit for work at any time in the 29-month period following her dismissal to the date of hearing of her challenge (October 2014 to April 2017). While Ms Lal referred to a desire to return to work, her ability to do so is not supported by the medical information before the Court. This evidence is relevant for two key reasons. First, it supports the substantive justification for the decision to dismiss at the time it was made. Second, it undermines the claim for reinstatement. I return to both points below.

[29] To complete the picture, Ms Lal applied for a review of GB's decision to suspend her ACC compensation. The review found that GB's requirement that Ms Lal attend a graduated return to work assessment was reasonable, and that her refusal to attend such an assessment was unreasonable. In this regard the reviewer concluded that:

> I acknowledge that from Mrs Lal's perspective she believes her reasons for not wanting to return to the Warehouse, Newmarket were reasonable. However, after considering all the evidence I believe her reasons for not attending a graduated return to work at the Newmarket store were unreasonable.

## Legal framework

[30] It is well established that an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work.[2] An employer will be justified in dismissing an employee for long term absence where it can be shown that the decision was substantively and procedurally justified.[3]

[31] Section 103A of the Employment Relations Act 2000 (the Act) provides the test for justification of any dismissal. The test requires the Court to determine whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.

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2 *Canterbury Clerical Workers IUOW v Andrews and Beaven Ltd* [1983] ACJ 875 at 877.

3 *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585 (EmpC) at 592; *Dunn v Waitemata District Health Board* [2014] NZEmpC 201, [2014] ERNZ 524 at [25].

[32] Section 103A(3) sets out a number of factors which the Court must consider when assessing the justifiability threshold. Those factors do not sit altogether comfortably with a no-fault-based dismissal, such as dismissal for redundancy or medical incapacity. I approach the issue of termination for medical incapacity within the following broad framework.

[33] The employer must give the employee a reasonable opportunity to recover. The terms of the employment agreement, any relevant policy, the nature of the position held by the employee and the length of time they have been employed with the employer are factors which are likely to inform an assessment of what is reasonable in the particular circumstances.

[34] The employer must undertake a fair and reasonable inquiry into the prognosis for a return to work, engaging appropriately with the employee. This will likely involve seeking and considering relevant medical information. It will also involve explaining the reasons for the inquiry, the possible outcome of it, and providing the employee with an opportunity for input and comment.

[35] The employer must fairly consider what the employee has to say before terminating their employment. An employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable time-frames. An employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the organisation is. For their part, an employee is obliged to be responsive and communicative.

[36] In cases of medical incapacity, and a reduced ability to undertake certain tasks, a level of engagement with attempts to facilitate a return to work may reasonably be expected. Fairness cuts both ways, consistently with the mutual obligations which exist in employment relationships.[4] This latter point has particular relevance in the circumstances of this case, having regard to the level of engagement Ms Lal was prepared to commit to a supported, gradual, return to work.

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4 *Dunn* at [43].

## Substantive justification

[37] I accept, based on the evidence before the Court, that there was no real prospect of Ms Lal returning to work as at the date Ms Marshall decided to terminate her employment. Ms Lal had declined to engage in a gradual return to work at the Newmarket store for reasons which The Warehouse considered but reasonably rejected. And from May 2014 Ms Lal was certified as being fully unfit for work. That position did not subsequently change.

[38] The Warehouse had a volume of information on which to inform its decision, including medical certificates as to Ms Lal's fitness; a workplace assessment; an occupational medical assessment; a vocational rehabilitation assessment; and a functional reactivation programme report. Each of those documents, provided over an extended period of time, confirmed the position as to the extent of Ms Lal's medical incapacity.

[39] More fundamentally, at the time of termination it was clear that Ms Lal would not able to return in any capacity for some time, given the health issues she was confronting. That was reasonably viewed against her reported capacity prior to that date. The position (namely her capacity for work) has remained unchanged. I understood Ms Lal to effectively accept this in evidence. The reality is that the passage of time has proved Ms Marshall's assessment of the likelihood of a return to work to be correct.

[40] Ms Lal did not engage actively in the processes which The Warehouse was attempting to progress, including failing to respond to correspondence following the 21 July 2014 meeting. It was not until approximately six weeks later that there was any communication and the communication received constituted a medical certificate certifying Ms Lal as unfit for work for 42 days from 3 September 2014.

[41] The Warehouse then wrote to Ms Lal advising her that unless she could return to work by 30 September to undertake a gradual return to work plan, it would have no option but to terminate her employment. No response was received to this communication. That was unhelpful. The Warehouse wrote to Ms Lal again on 23

September 2014, reiterating the two options it perceived were available. This then prompted the 28 September 2014 email. It was clear from that reply that Ms Lal was not capable of participating in a return to work programme and was continuing to confront serious health issues requiring ongoing medical treatment.

[42] This meant that by 30 September 2014 The Warehouse understood that Ms Lal was not able to return to work at Newmarket to undertake her return to work plan and that she was fully unfit for work. It was submitted that this was the point at which The Warehouse could fairly 'cry halt' to the employment relationship.[5] I agree. And, as I have said, it transpires that The Warehouse's conclusion that Ms Lal was medically unfit to return to work, even on a gradual basis, was well founded as she has remained medically incapacitated in the period following her termination and right up to the time of trial.

[43] The decision to dismiss on medical grounds was substantively justified.

## Was the decision to dismiss procedurally fair?

[44] It is plain, based on the evidence before the Court, that The Warehouse took numerous steps from an early stage, and consistently up until notice of termination of employment was given, to inquire into issues relating to Ms Lal's incapacity, the extent to which it impacted on her employment, and what could reasonably be done to assist her in a return to work.

[45] These communications clearly put Ms Lal on notice as to what The Warehouse was considering doing and what the potential impact of it was from Ms Lal's perspective. Ms Lal was given a number of opportunities, over a lengthy period, to engage with her employer and to respond to its reasonable concerns. There were numerous discussions and much correspondence, some of which Ms Lal failed to respond to. As Mr McGoldrick (counsel for The Warehouse) observed, some similarities can be drawn with the circumstances which arose in *Dunn v Waitemata District Health Board.* There it was said that:[6]

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5 *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124 at 127.

6 *Dunn*, above n 3.

> [43] Employment relationships involve a two-way street. Both parties have an obligation to be responsive and communicative and to deal with each other in good faith. It ill behoves an employee to complain about a failure to adequately progress a rehabilitative process when they themselves fail to engage in constructive dialogue in a genuine attempt to resolve issues.
> …

[46] In summary, Ms Lal refused to return to work at Newmarket to undertake her rehabilitation, despite the measures that The Warehouse had undertaken to put in place to facilitate it. In July 2014 she advised that she was well enough to work three hours per day, but declined to do so at the Newmarket store. Ms Lal refused to return to have an occupational assessment undertaken, although the proposal was that the assessment would address the concerns she had expressed about returning to her workplace. It had also been proposed that an occupational therapist would monitor Ms Lal's return to work plan, and a new assistant store manager would oversee it. These constructive steps did not, however, prompt the level of engagement from Ms Lal which could reasonably have been expected.

[47] There was a suggestion during the course of hearing that The Warehouse had decided not to follow specialist advice in relation to the provision of light duties, but this suggestion was not borne out by the evidence. While there were medical reports from Ms Lal's medical advisers suggesting a change of stores, these were based on what Ms Lal had told them about the nature of the tasks she was being asked to undertake and the self-reported business of the Newmarket store. The Warehouse was not obliged to take up the suggestions, particularly when it did not agree (for reasons explained to Ms Lal) that a transfer was reasonably required or could be accommodated from an operational perspective. In addition, in considering matters it had a volume of additional information to draw on.

[48] An employer cannot be held to ransom by an incapacitated employee, dictating the terms on which they will return to work and where. An employee can however expect that their concerns will be genuinely considered and appropriately responded to. The employer's actions must be within the range of what a fair and reasonable employer could do in the circumstances.

[49] I accept the evidence given on behalf of The Warehouse that it genuinely considered Ms Lal's responses before taking the decision to dismiss her. It is true that the final piece of correspondence sent on Ms Lal's behalf (dated 28 September 2014) may have prompted another employer to make further enquiries, or proactively provided additional time for Ms Lal to respond. However, the test in s 103A is not what another employer, or the Court for that matter, would or might have done. Rather it is what a fair and reasonable employer *could* do in the particular circumstances. The particular circumstances in this case include the protracted interactions which had occurred up to the date on which the decision to terminate was made. I am satisfied that The Warehouse's response fell within the permitted range.

## Conclusion

[50] I conclude that The Warehouse's decision to dismiss Ms Lal on medical grounds was justified. That means that no relief flows from it. Even if I had found the decision to be unjustified, I would not have ordered reinstatement for the reasons I have already alluded to. Given the issues which Ms Lal continues to confront, reinstatement would not be practical or reasonable. Further, there would have been significant difficulties for Ms Lal in terms of contribution and establishing the extent to which she actually sustained any loss compensatable under s 123(1)(c) of the Act, based on the evidence which was (and was not) before the Court.

## Result

[51] The challenge is dismissed. That means that the plaintiff's associated challenge to the Authority's costs determination (which was pursued on the sole basis that the substantive determination was wrong) is also dismissed.

## Non-publication orders

[52] The Court made an interim order prohibiting the publication of the name or identifying details of the person referred to as "A" in both the Authority's determination and this judgment. Neither party has called "A" as a witness in these

proceedings. Given the serious accusations made against "A", which "A" has not personally had an opportunity to respond to, both parties agreed that it is appropriate that the interim orders be made permanent.

[53] I am satisfied that permanent orders should be made. Accordingly there will be a permanent order made prohibiting the publication of the name or identifying details of "A" pursuant to cl 12 of sch 3 of the Act.

## Costs

[54] Costs are reserved. The parties are encouraged to attempt to agree costs. If costs cannot be agreed, I will receive memoranda, with the defendant filing and serving an application together with any supporting material within 20 working days of the date of this judgment; the plaintiff filing and serving any memoranda and material in reply within a further 14 working days; and anything strictly in response within a further 5 working days. It is likely (absent good reason to the contrary) that costs will be calculated applying Category 2B of the Court's Guideline Scale.

Christina Inglis
Judge

Judgment signed at 3 pm on 1 June 2017