IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 9**

	Reference No. HRRT 011/2011
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**JALESI NAKARAWA**
	PLAINTIFF
AND	**AFFCO NEW ZEALAND LIMITED**
	DEFENDANT

AT HAMILTON

BEFORE:

Mr RPG Haines QC, Chairperson
Ms PJ Davies, Member
Mr MJM Keefe JP, Member

REPRESENTATION:
Mr MD Benefield for Plaintiff
Ms ME Wilson for Defendant

DATE OF HEARING:	**19 December 2011**
DATE OF LAST SUBMISSIONS:	**28 November 2013 and 23 January 2014 (plaintiff) and 11 December 2013 and 31 January 2014 (defendant)**
DATE OF DECISION:	**24 February 2014**

DECISION OF TRIBUNAL

Introduction

[1] Mr Nakarawa says that his religious beliefs require him to observe the Sabbath from sunset on Friday to sunset on Saturday. In obedience to the Fifth Commandment engagement in paid employment during these hours is not possible.

[2] When Mr Nakarawa commenced employment with AFFCO New Zealand Ltd (AFFCO) in December 2010 he was required to work the night shift and to work overtime on Saturdays. Mr Nakarawa was prepared to work the night shift and to work overtime provided this did not involve working on Friday nights and on Saturdays prior to sunset. This was unacceptable to AFFCO and Mr Nakarawa was dismissed.

[3] The issue in these proceedings is whether there was unlawful discrimination based on Mr Nakarawa's religious beliefs.

[4] Mr Nakarawa has not taken proceedings under the Employment Relations Act 2000 because s 112 of that Act precludes such proceedings when (as here) a complaint is made under the Human Rights Act 1993 (HRA).

An apology to the parties

[5] Before the evidence is addressed the long delay in publishing this decision must be acknowledged and an apology offered to the parties. The case was not overlooked. Rather delays regrettably occurred because all members of the Tribunal are part-time appointees and despite best endeavours it is not always possible to publish decisions timeously.

Opportunity to update submissions

[6] By *Minute* dated 31 October 2013 the parties were offered an opportunity to update their submissions and to comment on case law uncovered by the Tribunal's own researches. The plaintiff's submissions were received on 28 November 2013 and the defendant's submissions on 11 December 2013. By *Minutes* dated 13 December 2013 and 19 December 2013 the parties were offered an opportunity to be heard on further issues. In response the plaintiff filed submissions on 23 January 2014 and the defendant on 31 January 2014. All of the post-hearing submissions filed by the parties have been taken into account by the Tribunal in the preparation of this decision.

The witnesses heard by the Tribunal

[7] Mr Nakarawa was the only witness called in support of his case. AFFCO called two witnesses, being Mr Kevin Casey, at the relevant time a Production Manager at the Horotiu Plant in Hamilton and Ms Rebecca Ogg, also a Production Manager at the Horotiu Plant. Mr Casey is now living in Australia and gave evidence via audio-link.

The plaintiff's evidence – overview

[8] It is not practicable to provide a comprehensive summary of the evidence given by Mr Nakarawa. An overview only follows.

[9] Mr Nakarawa holds a Bachelor of Arts from the University of South Pacific and LLB and LLM degrees from the University of Waikato. He is presently working on his PhD thesis at that University. He is married with six children. He and all the members of his family belong to the Church of God and believe that, as required by the Fifth Commandment, the Sabbath must be observed. This means that no paid employment may be engaged in during the period between sunset on Friday and sunset on Saturday.

[10] Mr Nakarawa's previous work experience includes working as a Corrections Officer at Waikeria Prison near Te Awamutu and as a temporary worker at Huttons in Hamilton. At Huttons he worked overtime, but not during the hours of the Sabbath. Overtime was

voluntary and by arrangement Mr Nakarawa was able to avoid shifts and overtime which involved working during hours prohibited by his religious beliefs.

[11] Responding to an advertisement for casual workers at the AFFCO Horotiu plant, Mr Nakarawa on Monday 6 December 2010 went to the plant and, along with many other applicants, filled in and submitted an application form "Application for Employment and Induction Form – New Casuals". Relevant points arising from this document are:

> **[11.1]** Under the heading "Terms and Conditions under which employment would be offered" it is stated that AFFCO has a Collective Agreement with the NZMWU governing employment of union members. If the applicant is a member of the union the Collective Agreement will govern that person's employment with the company. If the applicant is not a union member the company will offer instead an Individual Employment Agreement (IEA) that contains the same terms and conditions as the Collective Agreement which "will apply for the first thirty days of your employment". Mr Nakarawa was not a union member. As matters transpired, the events in question occurred within the first thirty days of Mr Nakarawa's employment by AFFCO and it will be necessary therefore for reference to be made to the Collective Agreement.
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> **[11.2]** The list of questions required to be answered by the applicant included:
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> > **[11.2.1]** "Are you prepared to work overtime?" Mr Nakarawa answered "Yes".
> >
> > **[11.2.2]** "Please tick which shifts you are prepared to work". The options given were "Day", "Night" and "Either". Mr Nakarawa ticked the "Day" option only.
>
> **[11.3]** In the section "Induction Information" it is stated that the company has the right to manage and control its business and to make "reasonable rules and regulations" as to the hiring, conduct, duties, discipline and dismissal of persons in its employment. The document goes on to state that these rules "are not intended to be oppressive" and that there "may be circumstances that fall outside of these rules and these will be dealt with on an individual basis". Included in the grounds for immediate dismissal is a refusal to follow "lawful and reasonable instructions".
>
> **[11.4]** The applicant was required to sign a Declaration in which he or she stated that he or she will at all times comply with "reasonable orders and instructions" given by the employer.

[12] Shortly after lodging his application form Mr Nakarawa received a telephone call asking him to attend an interview at the AFFCO plant. That interview took place a few days after Monday 6 December 2010, probably Wednesday 8 December 2010 which for convenience will be referred to as the pre-employment interview of 8 December 2010. Upon arrival for the interview Mr Nakarawa was told to wait and he noted that a number of applicants were entering and leaving the office, not only for filing application forms but also for interviews. When Mr Nakarawa's turn came he entered the office and was met by Mr Kevin Casey, then a Production Manager. Mr Casey went through Mr Nakarawa's application form. After one or two minutes Mr Casey asked Mr Nakarawa two questions. First, why he (Mr Nakarawa) should be employed. As to this Mr Nakarawa explained that he was mature, dependable and had been working at Huttons in a similar industry.

Second, Mr Nakarawa was asked if he could work overtime. He responded in the affirmative as he had also on his application form. When given an opportunity to ask any question he asked that he be allocated to work on the day shift. Mr Casey asked Mr Nakarawa whether he knew other Fijians who were working at the plant and whether Mr Nakarawa consented to a drug test. Thereafter he was offered the job and left. The process lasted about five minutes.

[13] In cross-examination Mr Nakarawa was criticised for not having disclosed on the application form or at the interview with Mr Casey his inability to accept work in the period from sunset on Friday to sunset on Saturday. Mr Nakarawa responded that he answered all the questions on the form as required and in particular had stated that he was prepared to work the day shift. At the interview Mr Casey had said nothing specific to the effect that it was important to AFFCO that employees be able to work overtime on Saturdays. He had not been asked specifically if he was available for Saturday work. He added that religious matters were personal to him and he was reluctant to raise them with others. He had assumed that given his request to be on the day shift and given his experience at Huttons where overtime was voluntary and worked out between the employer and employee, the same would apply at AFFCO. There was nothing in the application form or in what Mr Casey said at the interview which indicated a contrary regime applied at AFFCO. Mr Nakarawa was clear that he was not asked about his availability over the weekend. Had he been asked if he could work on Saturdays he would have answered "No".

[14] A few days later Mr Nakarawa received a call from AFFCO telling him to report for work on Monday 13 December 2010 at about 4pm. When he arrived as instructed he found that he was with a group of between 40 to 50 workers seated in a hall. They were taken through housekeeping matters and the induction manual by different staff. Thereafter they were divided into groups to tour the factory before they lined up in front of the plant manager's office to sign their IEA contracts. He described the process as "touch and go" meaning that when he entered the office the plant manager quickly addressed the contract and then asked Mr Nakarawa to sign it. The new employees then had to line up to see a doctor and did not start work until about 10pm that night.

[15] The IEA signed by Mr Nakarawa on 13 December 2010 was in a standard form in which there were several blank spaces to be adapted to the individual person. Mr Nakarawa's name had already been added to the form and the space:

> You are employed as _____ but agree that you may be moved to other positions or asked to undertake other duties within your capabilities during your employment with us.

had also been completed by way of handwritten addition so that the phrase relevantly read:

> You are employed as Offal Night but agree …

[16] Mr Nakarawa was asked to sign the document but given no opportunity to read it first. Nor was he given a copy. He asked that one be provided. His copy was received two days later.

[17] The IEA states on the first page that because the Collective Agreement applied during the first thirty days, "a copy of the Collective Agreement between AFFCO and the Union will be provided to you". Mr Nakarawa says that such document was never provided. The first time he saw it was when he received the Agreed Bundle of Documents filed in these proceedings. He accepts that he did not ask AFFCO for the

document but points out that the IEA stipulates that a copy of the document "will be provided to you".

[18] Monday 13 December 2010 was Mr Nakarawa's first day of employment at the AFFCO plant. After the induction process he commenced work at about 10pm and finished at about midnight. He was told to return at 3.30pm the next day, Tuesday 14 December 2010. In the result he worked each of Monday 13 to Thursday 16 December 2010.

[19] As mentioned, Mr Nakarawa did not receive a copy of the IEA until Wednesday 15 December 2010 and did not have opportunity to read it thoroughly until Thursday 16 December 2010. He then realised he had been assigned to work night shifts only.

[20] On Friday 17 December 2010 Mr Nakarawa was ill and did not report for work but returned to work on Monday 20 December 2010, Tuesday 21 December 2010 and Wednesday 22 December 2010. On Wednesday 22 December 2010 Mr Nakarawa spoke to his supervisor, Mr Ross Reynolds, and told him that he (Mr Nakarawa) was unable to work on Saturdays for religious reasons. Mr Nakarawa was hoping to put in a request to be moved to the day shift. However, Mr Reynolds told him that as he (Mr Nakarawa) had indicated willingness to work overtime, that included Saturdays. Mr Nakarawa said that he was willing to work overtime generally but had never been asked specifically about his availability on Saturdays.

[21] On Thursday 23 December 2010 Mr Reynolds accompanied Mr Nakarawa to a meeting with Mr Casey. Mr Casey also referred to the fact that Mr Nakarawa had agreed to work overtime, which included Saturdays. Mr Nakarawa pointed out that overtime was generally open to any time or day and not specific to Saturdays. His understanding of overtime work was that it was voluntary and not compulsory. In respect of the issue of his not being available on Saturdays, he told Mr Casey that he (Mr Nakarawa) had not been asked specifically about working on Saturdays.

[22] Mr Casey told Mr Nakarawa that if he (Mr Nakarawa) could not work on Saturdays he did not meet the needs of the company and he should go home. After Mr Nakarawa said that there was nothing he could do apart from bringing his problem to the attention of Mr Reynolds and Mr Casey, he was given the choice of either going home immediately or working that shift before finishing off. Mr Nakarawa requested not only to work that shift but also to work two days in the following week before finishing off. That was agreed to. On his last night at work, just prior to the shift ending, Mr Casey approached Mr Nakarawa to confirm that that would be Mr Nakarawa's last day of work. He shook Mr Nakarawa's hand and wished him well for the future.

[23] Asked why he had delayed approaching Mr Reynolds until Wednesday 22 December 2010 (just over one week after commencing employment), Mr Nakarawa said that he did not have opportunity until after he had read the IEA on Thursday 16 December 2010 and he had also been trying to come to terms with his situation. He had asked to be on the day shift but had been assigned to the night shift without discussion or consultation and had believed that overtime would be voluntary and by negotiation, as at Huttons, not compulsory. He believed Wednesday 22 December 2010 was the first reasonable opportunity he had had to raise the issue with Mr Reynolds.

[24] It was suggested in cross-examination that Mr Nakarawa had at the application stage deliberately failed to disclose his inability to work on the Sabbath in order to secure a position at the AFFCO plant and to then procure a day shift allocation. Mr

Nakarawa firmly rejected this allegation. Our credibility assessment follows later in this decision. It was also put to Mr Nakarawa that as AFFCO operates from early morning to late at night with overtime on Saturdays, his omission to mention his inability to work Friday evening shifts and overtime on Saturday was an omission of information AFFCO was entitled to. Mr Nakarawa stated that the omission was not deliberate and the facts had to be seen in the context of what was asked of him in the application form and what was said at the interview with Mr Casey in the week of 6 December 2010. Our assessment of the question and of the answer also follows later in this decision.

[25] On 30 December 2010, his last day at work, Mr Nakarawa wrote a letter to Mr Reynolds. In this letter Mr Nakarawa recorded his recollection of events. As Mr Nakarawa's credibility has been put in issue by AFFCO we reproduce the terms of this letter in full. It will be seen that Mr Nakarawa is very clear in stating that the question of his availability to work on Saturdays was not raised during the employment interview with Mr Casey on Wednesday 8 December 2010:

> I refer to our discussion on 22/12/10 and the verbal termination of my casual employment contract at our meeting with Kevin Casey on 23/12/10.
>
> When I saw you on 22/12 I explained that on religious grounds I am unable to work from sunset Friday to sunset Saturday. In your response you stated that I agreed to work overtime when questioned during interview and this includes working on Saturdays. However, you advised that you would take the matter up.
>
> On 23/12 I saw you and Kevin regarding the matter. From the outset, Kevin took up the same position as yours, stating that he had posed the question of working on Saturdays during my interview. I replied that I do not recall being asked specifically as to my availability to work on Saturdays. In any event Kevin was adamant that I do not meet the company's needs if I am unable to work on Saturdays thus the termination of my employment. While I respect the decision I make the following observation for whatever it is worth.
>
> During our meeting with Kevin no reference was made to my individual employment contract or the AFFCO Introduction Manual. I note that my religious belief was never addressed even though it is the crux of the whole matter. It is ironic that page 16 of the Induction Manual contains an assurance of respect to my rights of values and beliefs and yet my employment was basically terminated on religious ground.
>
> I maintain that the question of my availability to work on Saturdays was not raised during interview. I presumed that overtime work (including Saturdays) is voluntary but it is now apparent that I was mistaken.
>
> Under the circumstances I am looking at my options, in particular whether the decision taken against me amounts to discrimination on religious grounds.
>
> Your views would certainly assist in clarifying the issue.

[26] By letter dated 6 January 2011 Mr Jamie Ginders, Plant Manager at Horotiu, asserted that the days and hours of work would be determined by AFFCO and that Mr Nakarawa was correct in saying that the matter of religious belief had not been addressed. This was because it (religious belief) was not relevant. Mr Ginders also asserted that Mr Nakarawa's employment had not been terminated. The relevant paragraphs of the letter follow:

> 1. You were employed on a "Casual Basis" where it is quite clearly set out in the agreement signed by you, that the days and hours of work would be determined by the Company on an as required basis. I note also that you had also indicated on your application form that you would be available to work overtime as and when required. Clearly this indicates that you have changed your position after you [were] employed.
>
> 2. …

3. Your status as an employee has not changed in that you allege your employment has been terminated – this is not correct. You will remain on our books for at least the term of the agreement as a casual. If your situation changes in relation to hours of work then let us know as soon as you can so that we can reconsider you for any work that is going at the time. If our hours of work change during the term of our agreement we will let you know.

4. We very strongly refute the accusation of religious discrimination. You are correct in that the matter of religious belief has not been addressed – this is simply because it is not relevant.

[27] Mr Nakarawa replied promptly by letter dated 12 January 2011. We do not intend reproducing the entire text as the letter is too long. The points made by Mr Nakarawa included:

> **[27.1]** Any overtime mentioned to him had not been specific to a particular day and as such, Mr Nakarawa had been available for overtime which was, in any event, voluntary, not compulsory.
>
> **[27.2]** As to the assertion that his status as an employee had not changed, at the meeting with Mr Reynolds and Mr Casey it had been made clear that his employment had been terminated. No mention had been made of his name remaining on the books.
>
> **[27.3]** At this meeting no attempt had been made by Mr Casey and by Mr Reynolds to address Mr Nakarawa's religious beliefs. Mr Casey had said that if Mr Nakarawa could not work on Saturdays he did not meet the needs of the company.

[28] Thereafter the complaint was lodged with the Human Rights Commission.

[29] We turn now to the evidence called by AFFCO.

The AFFCO evidence

[30] Again we intend providing a summary only of the evidence led by AFFCO.

[31] Mr Casey gave evidence that he was appointed to the position of Production Manager for the Horotiu plant in 2007 and resigned to move to Australia at the end of 2010. At the beginning of each season the Horotiu plant employs a large number of casual workers to staff both the day and night shifts. For casual employees there is no ongoing expectation of employment. As Production Manager it was his job to screen and interview all applicants and determine which of them would be employed. In 2010 Rebecca Ogg was also a Production Manager at the Horotiu plant. When possible they interviewed the prospective applicants together.

[32] Over the course of his four years as Production Manager Mr Casey had interviewed hundreds of applicants. The interviews usually took between ten and fifteen minutes and appointments were spaced fifteen minutes apart. Before meeting with an applicant Mr Casey would review the Application for Employment and Induction Form and at every interview would explain that the day shift runs from Monday to Friday from 6.30am to 3.30pm and the night shift from Monday to Friday from 3.30pm to midnight. Overtime would be available for up to one hour every day and on Saturday. Mr Casey said that he always asked whether the applicant would pass a drug test, whether there was anything to prevent him from working overtime and whether he could work both shifts.

[33] Mr Casey said he remembers interviewing Mr Nakarawa although he cannot recall whether Ms Ogg was present at the interview as well. He said that he asked Mr Nakarawa whether he could work the hours of the shifts and whether he could work an extra hour per day and on Saturdays. Mr Nakarawa was only offered employment based on the fact that he said he could work the hours of the shifts and there was nothing to prevent him from working overtime. If Mr Nakarawa "had been honest" with Mr Casey at the time of his interview he would not have been offered employment because he could not work the hours required by AFFCO. It had nothing to do with his religious beliefs. Mr Casey did not accept that the interview lasted the short time deposed to by Mr Nakarawa. Mr Casey said that all interviews lasted at least ten minutes.

[34] When Mr Casey met with Mr Nakarawa on 23 December 2010 in the company of Mr Reynolds, Mr Casey had told Mr Nakarawa that by not being able to work on Saturdays he was not able to meet the needs of AFFCO. He and Mr Nakarawa then agreed that he (Mr Nakarawa) would finish work the following week.

[35] Mr Casey's attention was drawn to the "Code of Conduct/House Rules" which are part of the Application for Employment and Induction Form and in particular the statement that the company rules "are not intended to be oppressive. There may be circumstances that fall outside of these rules and these will be dealt with on an individual basis". He was asked why Mr Nakarawa's case had not been addressed in terms of this provision. Mr Casey said that had he been told of Mr Nakarawa's situation at the pre-employment interview Mr Nakarawa would not have been employed as he could not do overtime. He based his decision purely on the needs of the company. Because Mr Nakarawa did not meet those needs, his employment had been terminated.

[36] Mr Casey also said that a copy of the Collective Agreement with the NZMWU was held in an office at the Horotiu plant. Asked how a new employee would know that it was there he said that at the induction the employee would have received a copy of the IEA. Asked what documentation AFFCO had referring to the Human Rights Act and the prohibition on discrimination on the grounds of religion, he said that he was not aware of any. However, he believed that as a matter of common sense he would know people's rights and would not discriminate against them. He was not aware of any training given by AFFCO on the subject. He said that in December 2010 the plant was putting on another shift and for that reason had been looking for between 60 to 70 new employees. He described it as a busy time. Had Mr Nakarawa disclosed his religious beliefs and inability to work on the Sabbath he would not have been employed. AFFCO would have been able to find a replacement for him as they then had a number of applicants. He said that working overtime was compulsory for casual employees.

[37] In relation to the IEA, Mr Casey said that it was he who had written on that document the phrase "Offal Night" as a description of Mr Nakarawa's employment. He had not then been aware that Mr Nakarawa had ticked only the day shift option on the Application for Employment and Induction Form and for that reason had not considered Mr Nakarawa for employment on the day shift. He was not aware of any reason why Mr Nakarawa had not been offered work on the day shift. Asked why, when made aware that Mr Nakarawa was unable to work from sunset on Friday to sunset on Saturday he had not explored whether a workaround solution could be found, Mr Casey said that it was because Mr Nakarawa was unable to work on a Saturday. AFFCO aimed to have an employee working for a full week. He said that if an employee was unable to work overtime the available work could not be done and this would result in "a huge cost" to

the company. He asserted that commercially it was not possible for the company to accommodate a person who was unable to work from sunset on Friday to sunset on Saturday. Asked whether, at the time of his meeting with Mr Nakarawa on 22 December 2010 positions were available on the day shift, Mr Casey said that he did not know. What he did know was that if Mr Nakarawa stayed on the night shift and was unable to work on the Sabbath, AFFCO would lose revenue. Asked whether AFFCO could employ another person to cover those hours, Mr Casey said that it was not something that AFFCO had done before and the company would still lose revenue. As to the letter dated 6 January 2011 written by Mr Ginders and in particular paragraph 3 in which Mr Nakarawa was advised that his status as an employee had not changed and that he would remain on the AFFCO books for at least the term of the agreement as a casual, Mr Casey said that he was not aware of the letter and was not working for AFFCO when it was written.

[38] Ms Ogg deposed that along with Mr Casey, she was tasked with the job of interviewing potential staff. She and Mr Casey had a number of set questions which were asked at every interview. She had sat through 500 interviews with Mr Casey and he had never failed to ask these questions. The interviews themselves took ten to fifteen minutes to complete. Included in the standard questions is one asking the applicant whether there is any reason why he or she would not be able to work either from 6.30am to 3.30pm or from 3.30pm to midnight Monday to Friday with overtime of up to one hour per day during the week and on Saturdays. She does not recall being present at Mr Nakarawa's interview.

[39] Ms Ogg said that if an applicant advised that he or she was unavailable for overtime on Saturday he or she would not be employed. If an applicant stated that he or she could only work either a day or a night shift then AFFCO endeavoured to assign them to that shift. Mr Nakarawa had advised he could work the day shift and he was offered a night shift position, which he accepted. In her view he should have told AFFCO that he could not work from sunset Friday to sunset Saturday as this meant he could not work a full night shift with the overtime on Saturday which AFFCO required.

[40] Ms Ogg said that based on seeing Mr Casey interview many applicants, she was of the belief that Mr Casey told Mr Nakarawa that overtime was required both during the week and on Saturdays. However, in her evidence she conceded that the process at that time involved interviewing between 60 to 80 people at a time and further conceded that she did not believe she was present at Mr Nakarawa's interview. No record is kept as to who in fact is present during the interview process. She also conceded that the list of questions asked of each particular applicant is not retained, nor are the particular answers. If a response given by an applicant did not suit the company requirements a decision would be made on the spot that the person was not suitable. A record would be made on the application form if necessary.

[41] Asked how an applicant would know that inability to work on Saturdays ruled out employment by AFFCO, Ms Ogg replied that they probably would not know. There was nothing in the documentation that stated that if the applicant would not or could not work overtime, including overtime on Saturdays, they should not apply.

[42] Asked if any questions were put to applicants to ascertain whether there were any religious issues which might impact on their ability to work on certain days or to work overtime, Ms Ogg answered in the negative. She said that AFFCO was not concerned with the reasons why a person could not do overtime. AFFCO was only concerned whether the individual could meet the needs of the plant.

[43] Referring to the question said to be put to all applicants ("is there any reason why you would not be able to work any of the hours listed above?"), Ms Ogg said that this was couched in general terms to give the applicant an opportunity to raise any issue they wished. It was the responsibility of the applicant to raise any of the prohibited grounds of discrimination.

The submissions for Mr Nakarawa

[44] For Mr Nakarawa it was submitted:

> **[44.1]** Saturday overtime was not, in terms of the employment agreement, a mandatory requirement.
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> **[44.2]** AFFCO made no attempt to meet the requirements of the HRA.
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> **[44.3]** Mr Nakarawa's employment by AFFCO was terminated because his religious beliefs precluded him from meeting the inflexible requirement that he work night shifts and overtime on Saturdays. This breached ss 21(1)(c) and 22(1) of the HRA.

The submissions for AFFCO

[45] For AFFCO it was submitted:

> **[45.1]** Mr Nakarawa had been employed as a casual employee. His employment came to an end at the conclusion of his period of engagement/employment (ie each Friday at the end of the shift) and he was therefore not unjustifiably dismissed. AFFCO had simply chosen not to re-engage him for a further shift and as a casual employee, there was no lawful requirement for AFFCO to do so.
>
> **[45.2]** Mr Nakarawa breached the requirements of s 4 of the Employment Relations Act (duty of good faith) by omitting to advise AFFCO that he could not work from sunset Friday to sunset Saturday.
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> **[45.3]** Mr Nakarawa further breached s 4 of the Employment Relations Act by accepting a position on the night shift when he knew that he could not work from sunset Friday to sunset Saturday.
>
> **[45.4]** AFFCO expects all staff to not unreasonably withhold their permission to work overtime. Mr Nakarawa could never work overtime on a Saturday and therefore did not meet the needs of AFFCO. AFFCO did not discriminate on religious grounds as the only issue was the availability to work and AFFCO treats all staff equally in terms of the overtime requirement.
>
> **[45.5]** The only way the requirements of Mr Nakarawa could be accommodated would have been for AFFCO either to lose product by being a man down or to employ an additional employee to work the shifts Mr Nakarawa should have worked. Both of these solutions would have been an unreasonable disruption to AFFCO's activities and would have been unreasonable in all the circumstances given that Mr Nakarawa was a new employee, indeed a casual employee who intended to work only for a few months. That would have come at additional cost to AFFCO.

[46] The legal issues must be determined in the context of the specific facts of the case. We must now determine those facts and make findings of credibility.

EVIDENCE ASSESSMENT

[47] In the main, the conflicts of evidence are in relation to:

> **[47.1]** What was said at Mr Casey's pre-employment interview with Mr Nakarawa on Wednesday 8 December 2010 following the submission by Mr Nakarawa of his application form dated 6 December 2010.
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> **[47.2]** What was said at the meetings when Mr Nakarawa met with Mr Reynolds (22 December 2010) and Mr Reynolds and Mr Casey (23 December 2010).

Credibility assessment

[48] Mr Nakarawa was a credible witness. He impressed as a humble, modest and diffident individual. His evidence was given in a forthright and unembellished manner. He readily conceded points adverse to his case, including acknowledging that at the pre-employment interview he had not told Mr Casey of his inability to work from sunset Friday to sunset Saturday. He conceded he could have made disclosure. We found his explanation entirely credible. That is, he had asked to be on the day shift, he had not been specifically asked if he was available for overtime on Saturdays and his previous experience at Huttons was that overtime was voluntary. His evidence was given without exaggeration and with no detectible self interest, bias or ex post facto rationalisation. In addition his evidence was consistent with his letters to AFFCO dated 30 December 2010 and 12 January 2011. The first was written on the same day as his last shift and can properly be regarded as a document made contemporaneously with the events in question and when those events were fresh in Mr Nakarawa's mind. Much the same applies to the letter dated 12 January 2011 written only two weeks later in response to the AFFCO letter dated 6 January 2011.

[49] Mr Casey, on the other hand, kept no notes. Nor did Mr Reynolds and Ms Ogg. Mr Reynolds was not called to give evidence and Ms Ogg conceded that she was not at the pre-employment interview conducted by Mr Casey on 8 December 2010. Nor did she speak to Mr Nakarawa at the induction on 13 December 2010. She was not present at the meetings on 22 and 23 December 2010.

[50] We address now Mr Casey's claim that he remembered interviewing Mr Nakarawa and in particular asking him whether he could work the hours of the day shift (6.30am to 3.30pm) and of the night shift (3.30pm to midnight) as well as overtime for up to one hour every day and on Saturday. In assessing this evidence we have taken into account the following factors:

> **[50.1]** At the beginning of each season the Horotiu plant employs a number of casual workers to staff the day and night shifts. As Production Manager it was Mr Casey's job to screen and interview all applicants and determine who would be employed. In the course of his four years as Production Manager Mr Casey interviewed "hundreds of applicants". Ms Ogg said she had been present at some 500 of such interviews by Mr Casey. From this it can be deduced that Mr Casey would have seen many hundreds of applicants over the four year period in question. In December 2010, when Mr Nakarawa was interviewed, the plant was putting on a new shift and AFFCO was looking for between 60 to 70 new employees. Mr Casey described this as a busy time. We are of the view that in these circumstances, in the absence of an accurate contemporaneous record or notes by Mr Casey, it is highly unlikely that Mr Casey would have a clear and

accurate recollection of what was said at Mr Nakarawa's particular interview as opposed to a general recollection that he did conduct a pre-employment interview with Mr Nakarawa and that at each interview it is his intent to put to each applicant the same questions. For Mr Nakarawa, on the other hand, the interview was a unique event. Given his genuine religious beliefs and further given that at Huttons those beliefs had been accommodated, Mr Nakarawa had good reason to be highly sensitive to anything that might have been said by Mr Casey to the effect that it would be impossible for Mr Nakarawa to accept employment with AFFCO without disobeying the prohibition on working on the Sabbath. Within twelve days Mr Nakarawa wrote to AFFCO explicitly recording that the question of his availability to work on Saturdays had not been raised at the interview. Mr Casey, on the other hand, made no claim to have kept an equally early record of his recollection of the interview. Indeed no such record was referred to by him and he left for Australia soon afterwards. It was clear to us during Mr Casey's evidence that he has reasoned that he did tell Mr Nakarawa about Saturday overtime because this is what he routinely intends to say at interviews. This is not, in our view, persuasive evidence given the volume of interviews conducted by Mr Casey, the complete absence of any record of what was said at the interview and his over-confident if not dogmatic insistence that because it is his practice to ask the same questions at all interviews, this was in fact done in Mr Nakarawa's case.

[50.2] Mr Casey was working under considerable pressure. When he inserted into the IEA the description of Mr Nakarawa's position as "Offal Night" he was unaware that Mr Nakarawa had ticked only the day shift option on the application form. The failure to properly read and understand the form may well be indicative of Mr Casey having to process a large number of applications in a short space of time but it also underlines that he could miss the obvious and fail to follow his usual practice. Such failure occurred notwithstanding Mr Casey's assertion that at the pre-employment interview he reviews the application form and conducts an interview which lasts between 10 to 15 minutes. Mr Casey told the Tribunal that he was not aware of any reason why Mr Nakarawa was not offered the day shift. In our view Mr Casey's ignorance of the fact that Mr Nakarawa had stated on the application form a preparedness to work the day shift only points strongly to Mr Casey having assumed that he could allocate Mr Nakarawa to any shift chosen by Mr Casey without regard to Mr Nakarawa's wishes and without any genuine consideration being given to whether there was any good reason why he could not be offered work on the day shift. In these circumstances there is very real doubt whether Mr Casey was correct in asserting that at the interview he reviewed Mr Nakarawa's application form and told him that overtime work, particularly work on Saturdays was a not-negotiable requirement of AFFCO. This, in turn, casts substantial doubt over his account of the balance of the interview.

[50.3] In his evidence to the Tribunal Mr Casey demonstrated a dogmatic and inflexible attitude to employees, overtime and Saturday work. His approach to Mr Nakarawa then and now was that above everything else, the interests of the company were to be served. The particular circumstances of the individual counted for nothing. This has coloured his claimed recollection of events and has diminished the weight we are prepared to give to it.

[50.4] As the Tribunal listened to the evidence of Mr Casey the clear impression gained was that he had what is best described as tunnel vision. That is, an exclusive focus on the interests of AFFCO. The entire focus of the pre-employment interview and subsequent induction process was on the interests of AFFCO. No genuine consideration was given to the company's obligations under the Human Rights Act. The focus was exclusively on the employee being able to "meet the needs of AFFCO". The relationship between an employee and AFFCO was a one way street. This attitude coloured Mr Casey's approach to his dealings with Mr Nakarawa and to the evidence he (Mr Casey) gave to the Tribunal. In his view, the "failure" by Mr Nakarawa to disclose his religious beliefs was an absence of honesty. Even if Mr Nakarawa had been honest at the pre-employment interview, he would not have been offered employment simply because he could not work the hours "required" by AFFCO. Mr Casey's assertion that this had nothing to do with Mr Nakarawa's religious beliefs demonstrated an almost complete lack of understanding of the prohibition on discrimination, particularly discrimination in the workplace. Specifically, once Mr Casey became aware of Mr Nakarawa's religious reasons for not working on the Sabbath, no consideration at all was given to the duty on AFFCO to accommodate Mr Nakarawa's request subject to the unreasonable disruption limitation in s 28(3).

[50.5] In our view, these factors taken in combination, led Mr Casey to assume that because he remembers Mr Nakarawa and because he usually makes it clear that Saturday overtime is required, it follows that that is what he definitely said to Mr Nakarawa. We do not, in the circumstances, accept that such an assumption can be made, particularly in the absence of any concrete contemporaneous note or record made by Mr Casey. It is also to be noted that neither Mr Casey nor Ms Ogg stated that it was made explicit to applicants at the pre-employment interview that overtime at the end of each shift and on Saturdays was compulsory and that if the applicant could not work these overtime hours, employment was not offered. On their own evidence the ambiguous manner in which the point is made at the pre-employment interview can only lead to miscommunication.

Conclusions on the evidence

[51] For all of these reasons we prefer the evidence of Mr Nakarawa to that of Mr Casey. Without attempting an exhaustive list of findings, our primary conclusions are:

[51.1] The responses given by Mr Nakarawa on his application form were honest. In particular he stated that while he was prepared to work overtime, he was prepared to work day shifts only. Mr Casey took into account the affirmative answer (being prepared to work overtime) but took no account of (and indeed appears to have ignored) the immediately following response by Mr Nakarawa that he was prepared to work the day shift only.

[51.2] The Induction Information on the application form expressly states that the rules made by AFFCO to manage its business would be "reasonable" rules and that those rules were not intended to be oppressive. It acknowledges that there may be circumstances that fall outside of the rules and that those circumstances will be dealt with on an individual basis. Furthermore, any instructions to an employee would be both lawful and reasonable. The Declaration made by the applicant acknowledges a duty to comply only with "reasonable orders and instructions". The clear inference is that an applicant would not be discriminated

against on any of the prohibited grounds of discrimination listed in s 21 HRA and s 105 of the Employment Relations Act.

[51.3] It was entirely reasonable for Mr Nakarawa to have assumed from this documentation that, as at Huttons, he would not be required to work between sunset on Friday and sunset on Saturday.

[51.4] At the pre-employment interview with Mr Casey on Wednesday 8 December 2010 Mr Nakarawa made an oral request to be allocated to the day shift. The question of his availability to work on Saturdays was not raised. During the interview Mr Nakarawa presumed that overtime work (including Saturday) was voluntary. He was not told that such work was a non-negotiable, inflexible requirement. Had he been asked if he could work on Saturdays he would have answered "No".

[51.5] As to the dispute concerning the length of the pre-employment interview, whether it was approximately five minutes (as claimed by Mr Nakarawa) or between ten to fifteen minutes (as claimed by Mr Casey), time estimates are difficult to make. The dispute over the length of the interview is not one which can be productively explored. It is more important to concentrate on what was said and done during the interview itself.

[51.6] It was reasonable in the circumstances for Mr Nakarawa not to mention his inability to work from sunset Friday to sunset Saturday as he had provided all the information required of him by AFFCO in the application form. Nothing in that form or what was said at the pre-employment interview by Mr Casey necessitated the voluntary disclosure of a matter which was of some sensitivity to Mr Nakarawa (and no doubt to others) and which he was reluctant to raise. It is to be noted that the application requires a good deal of other information about an applicant, including 21 questions under the heading "Occupational Health Profile". There are also three questions relating to criminal convictions and criminal proceedings. It would have been a simple matter for a question to have been added either to the form or to the interview as to whether there were any religious or other reasons for the applicant being unable to work overtime, including between sunset Friday and sunset Saturday. If working overtime during the week (including on Fridays) and working overtime on Saturdays was of such critical importance to AFFCO, such should have been made unambiguously clear not only on the application form, but also at the interview. In this regard neither the version of the questions as described by Mr Casey in his evidence nor the version as described by Ms Ogg in her evidence achieves this end. Rather, following a description of the hours and of the fact that overtime is available on Saturdays, the applicant is simply asked whether there is any reason why he or she would not be able to work any of these hours. The form of the question falls well short of alerting the applicant to the fact that even if he or she has sought employment on the day shift only, unless he or she is prepared to work both shifts plus overtime each day plus overtime on Saturdays, employment will not be offered.

[51.7] On 13 December 2010 Mr Nakarawa was asked to sign the IEA without first having had real opportunity to read it. Nor was he then given a copy. He did not receive the requested copy until two days later but even then it was not accompanied by a copy of the Collective Agreement, notwithstanding that the IEA states that such copy would be produced and notwithstanding that Mr Nakarawa

had been asked to declare in the IEA that he had received a copy of the Collective Agreement and of the IEA and had read and understood its terms and conditions.

[51.8] The declaration on the IEA required Mr Nakarawa to comply only with "reasonable orders and instructions" given by the employer.

[51.9] Clause 9 of the Collective Agreement at paras (c), (d) and (f) records that the intent of the agreement is (inter alia) to reflect a balance of rights, to create a cooperative and participatory climate of industrial relations based on mutual respect and trust and to provide conditions of employment which are fair and equitable to workers and the company and which safeguard their various interests. Clauses 11 and 12 provide for "reasonable overtime" and mention is made of the fact that any request by AFFCO that the employee work weekends will not be "unreasonably withheld". It is expressly stated that shifts will be "negotiated and agreed to". On the facts we have found, there was no such negotiation.

[51.10] Upon realising that his request to be on the day shift had apparently been overlooked, on Wednesday 22 December 2010 Mr Nakarawa spoke to his supervisor, Mr Reynolds and told him that he (Mr Nakarawa) was unable to work on Saturdays for religious reasons. When Mr Reynolds asserted that Mr Nakarawa had indicated willingness to work overtime and that included Saturdays, Mr Nakarawa replied that he was willing to work overtime generally but had never been asked specifically about his availability on Saturdays.

[51.11] On Thursday 23 December 2010 Mr Nakarawa met with Mr Reynolds and Mr Casey. Mr Casey also referred to the fact that Mr Nakarawa had agreed to work overtime, which included Saturdays. Mr Nakarawa pointed out that overtime was generally open to any time or day and not specific to Saturdays. His understanding of overtime work was that it was voluntary and not compulsory. He said that Mr Casey had not specifically asked him about working on Saturdays during the pre-employment interview. Mr Casey told Mr Nakarawa that he (Mr Nakarawa) did not meet the needs of the company if he could not work on Saturdays and that he should go home. Following further discussion Mr Nakarawa was given the choice of either going home or working the shift before finishing off. Following a request by Mr Nakarawa that he be permitted to work two days in the following week before finishing off, this was accepted. On his last night at work and just prior to the shift ending, Mr Casey approached Mr Nakarawa to confirm that that would be Mr Nakarawa's last day of work.

[51.12] There was no or no material delay in Mr Nakarawa speaking to Mr Reynolds on 22 December 2010 to raise the day shift and Sabbath issues. Mr Nakarawa had only had opportunity to read the IEA on Thursday 16 December 2010 and had been ill on Friday. On the Monday and Tuesday of the following week he had been trying to come to terms with his situation. On realising that his request to be on the day shift had either been overlooked or ignored he spoke to his supervisor. There is no foundation for the allegation that Mr Nakarawa accepted a position on the night shift and deliberately failed to disclose the Sabbath prohibition in order to secure a position at the AFFCO plant and to then procure a day shift allocation. Similarly there is no basis at all for the allegation that he was in breach of s 4 of the Employment Relations Act (mutual duty of good faith). He answered all questions truthfully and provided all the information

requested of him. He believed on reasonable grounds that overtime was voluntary, not compulsory. At the end of the day it is the responsibility of the employer not to discriminate against an employee (or prospective employee) on the grounds of religious belief and it is the responsibility of the employer to put in place a process to ensure that the employer's responsibilities are discharged. It is not the responsibility of the victim (or potential victim) of unlawful discrimination to put an employer on notice of the employer's responsibilities. As the facts of the present case show, the victim may well assume that the employer is aware of his or her statutory responsibilities under the Human Rights Act and will faithfully discharge those obligations.

[51.13] In any event when at the first practical opportunity after realising that his request to be on the day shift had been overlooked or ignored Mr Nakarawa drew the attention of his supervisors to his inability to work on the Sabbath, Mr Nakarawa was met with the uniform response that, because he could not meet the needs of the company, his employment was terminated. There was no discussion of or attempt at accommodation by AFFCO. Indeed accommodation was not perceived as an issue AFFCO was even required to address. The company's obligations under s 28(3) of the HRA were simply not addressed by management.

[51.14] The subsequent assertion by AFFCO in its letter dated 6 January 2011 that Mr Nakarawa's employment had not been terminated was written in ignorance of the fact that Mr Casey had told Mr Nakarawa on 23 December 2010 that his employment had been terminated and on 30 December 2010 confirmed that that would be Mr Nakarawa's last day of work. In any event, the statement in the AFFCO letter that it would reconsider Mr Nakarawa for work provided he accepted the hours of work required by AFFCO was itself a refusal or an omission to employ Mr Nakarawa on work which was clearly available (s 22(1)(a) HRA)

[51.15] AFFCO has submitted, in line with Mr Ginders' letter dated 6 January 2011, that Mr Nakarawa was not dismissed. Rather he was simply not re-engaged for a further period. As to this, our finding of fact is that Mr Nakarawa was clearly and unambiguously dismissed. He was told by Mr Casey that if he (Mr Nakarawa) could not work on Saturdays he did not meet the needs of the company and he should go home. He was given the choice of either going home immediately or working that shift before finishing off. On his last night at work, just prior to the shift ending, Mr Casey approached Mr Nakarawa to confirm that that would be Mr Nakarawa's last day of work. He shook Mr Nakarawa's hand and wished him well for the future. Mr Casey also described Mr Nakarawa's employment as having been terminated. In any event, even if we are wrong, keeping Mr Nakarawa "on the books" while refusing to offer him work because of his religious beliefs is a constructive refusal or omission to employ contrary to s 22(1)(a) of the Act or constitutes the offering of less favourable terms of employment contrary to s 22(1)(b) of the Act.

[52] We address now the legal issues.

THE RIGHT TO MANIFEST RELIGION

[53] The right to manifest one's religion or belief in worship, observance, practice and teaching is an integral component of freedom of religion. Article 18 of the International Covenant on Civil and Political Rights, 1966 provides:

> ***Article 18***
>
> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[54] The right to freedom of thought, conscience and religion is described by the UN Human Rights Committee in *General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion)* (1993) as "far-reaching and profound". The special status of the freedom is given particular expression by its denomination as a non-derogable right in ICCPR Article 4(2). Freedom of thought and religion is not infrequently termed, along with freedom of opinion, the core of the Covenant, since this nucleus demonstrates that the International Bill of Rights is based on the philosophical assumption that the individual as a rational being is master of his or her own destiny: Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, NP Engel, Kehl, 2005) at p 408.

[55] As pointed out by the Human Rights Committee in the *General Comment* at para [4], freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts:

> 4. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.

[56] Addressing the limitations permitted by Article 18(3) to the freedom to manifest one's religion or beliefs, the Human Rights Committee *General Comment* at para [8] notes that the freedom from coercion to have or to adopt a religion or belief cannot be restricted and the limitation clause (Article 18(3)) is to be strictly interpreted:

> In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may

be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.

[57] Article 18 of the Covenant is reflected in sections 13 and 15 of the New Zealand Bill of Rights Act 1990:

> **13 Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> **15 Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

[58] The differences between these provisions and Article 18 do not require examination here as the same language is used to describe the right to manifest religion or belief.

THE HUMAN RIGHTS ACT – RELIGION AND EMPLOYMENT

[59] Against this background it is possible to turn to the provisions of the Human Rights Act which address discrimination in the context of employment. Specific recognition is given to the importance of the right to freedom of religion and of the right to manifest one's religion in "practice". The primary provision relevant to the present facts is s 22. Discrimination by reason of any of the prohibited grounds is unlawful both in relation to an applicant for employment and in relation to an employee:

> **22 Employment**
>
> (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—
>
> (a) to refuse or omit to employ the applicant on work of that description which is available; or
>
> (b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or
>
> (c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
>
> (d) to retire the employee, or to require or cause the employee to retire or resign,—
>
> by reason of any of the prohibited grounds of discrimination.
>
> (2) It shall be unlawful for any person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment differently from other persons in the same or substantially similar circumstances by reason of any of the prohibited grounds of discrimination.

[60] Where a religious belief requires adherents to follow a particular practice, an employer must accommodate that practice provided the adjustment does not unreasonably disrupt the employer's activities. See s 28(3):

> **28 Exceptions for purposes of religion**
>
> (1) …

(2) …
(3) Where a religious or ethical belief requires its adherents to follow a particular practice, an employer must accommodate the practice so long as any adjustment of the employer's activities required to accommodate the practice does not unreasonably disrupt the employer's activities.

[61] Finally, s 35 provides:

> **35 General qualification on exceptions**
>
> No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

Discrimination in employment – whether a breach of Human Rights Act 1993, s 22

[62] Broadly speaking, s 22(1) prohibits discrimination in the employment place by reason of any of the prohibited grounds of discrimination. Religious belief is included within the list of prohibited grounds of discrimination.

[63] Mr Nakarawa has the responsibility of establishing, on the balance of probabilities, that in one or more of the circumstances listed in s 22(1)(a), (b), (c) or (d) he was discriminated against by reason of his religious beliefs. The correct question raised by the phrase "by reason of" is whether the prohibited ground was a material ingredient in the making of the decision to treat Mr Nakarawa in the way he was treated. See *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49] per Tipping J.

[64] In the present case there can be no doubt that the reason for the termination of Mr Nakarawa's employment was his obedience to the Commandment that he not work from sunset on Friday to sunset on Saturday. Had he not been of that religious belief, he would have been able to work shifts and overtime without religious restriction. Mr Casey and Mr Reynolds knew that such restriction prevented Mr Nakarawa from working from Friday sunset to Saturday sunset and dismissed him on this ground. Causation is established.

[65] We turn now to the issue of the comparator group. As observed by Tipping J in *Air New Zealand v McAlister* at [61] to [64], the prohibitions in s 22(1)(a) and (d) are absolute and neither involves comparison with other persons. On the other hand, s 22(1)(b) and (c) introduce a comparative approach. Of this pair of provisions, the facts are such that only s 22(1)(c) needs to be addressed in terms of the comparator group. The most natural and appropriate comparator in terms of the statutory language in s 22(1)(c) is the person (or persons) in exactly the same circumstances as Mr Nakarawa but without the feature of holding a religious belief which requires observance of the Sabbath. We define the comparator group as comprising persons employed by AFFCO at the Horotiu plant to do work of the kind required of Mr Nakarawa and who were not of a religious belief that required observance of the Sabbath from sunset on Friday to sunset on Saturday. See *Air New Zealand Ltd v McAlister* at [51] and [52] per Tipping J.

[66] Before addressing the particular subsections, it is to be noted that s 22(1) deals with the treatment of prospective employees as well as existing employees. See *Air New Zealand Ltd v McAlister* at [22] and [25] per Elias CJ and Blanchard J.

[67] Addressing now s 22(1)(a), this provision has application insofar as AFFCO asserts that Mr Nakarawa, as a casual employee, was kept on its books following his last day at work (30 December 2010) but not offered further employment because of his inability to work in the period sunset Friday to sunset Saturday. A material ingredient to the making of the decision was Mr Nakarawa's religious beliefs. The prohibition on discrimination being absolute, no comparator need be found.

[68] As to s 22(1)(c), Mr Nakarawa's employment was terminated in circumstances where the employment of other employees employed on work of the kind required by Mr Nakarawa would not be terminated. Again, a material ingredient to the making of the decision was Mr Nakarawa's religious beliefs.

[69] As to s 22(1)(d), should it be said that Mr Nakarawa was not dismissed but resigned, it is equally clear that he was caused by AFFCO to resign by reason of his religious beliefs and no comparator need be found.

[70] As to indirect discrimination (HRA, s 65), our findings are such that consideration of this issue is unnecessary. We do note, however, that as in *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 at [37], s 65 does aid in the interpretation of the specific prohibitions on discrimination in Part 2 of the HRA by explaining what amounts to discrimination.

[71] Our conclusion in relation to s 22(1) is that Mr Nakarawa has established to the civil standard that there was unlawful discrimination as defined in s 22(1)(a), (c) and (d).

[72] We now address the exception in s 28(3).

The application of Human Rights Act 1993, s 28(3) – the exception

[73] Where a religious belief requires its adherents to follow a particular practice, s 28(3) of the HRA imposes on the employer a mandatory statutory duty to accommodate that practice ("must") so long as any adjustment of the employer's activities required to accommodate the practice does not unreasonably disrupt the employer's activities. The onus of proving the exception lies on AFFCO. See HRA s 92F(2).

[74] On the facts found this provision is to be interpreted and applied as follows:

> **[74.1]** The statutory obligation on the employer to accommodate a particular practice is engaged once the employer has actual or constructive notice of that practice.
>
> **[74.2]** The mandatory duty to accommodate necessarily requires that the employer give good faith consideration to the obligation. To the degree that the section provides protection to a practice, such protection must be afforded and it must be afforded proactively. This is implicit in the duty to "accommodate". That duty will not be discharged where no consideration is given to the question of accommodation. The purpose of s 28(3) would be defeated if, upon being put on notice of the practice, an employer could, as here, dismiss the employee without any attempt at all to accommodate and to then, after the event, advance an "unreasonable disruption" justification. Ex post facto justifications will seldom have credibility.
>
> **[74.3]** Sabbatarianism is a "practice" within the ambit of this provision.

[74.4] Section 28(3) requires the employer to accommodate this practice. The provision requires the employer to accept that such accommodation will require adjustment of the employer's activities and even disruption of those activities.

[74.5] The employer must offer a real, acceptable solution in keeping with the fundamental rights of the (potential) victim of discrimination. That is, the employer must make a significant, serious and sincere effort. It must explore the various possibilities open to it for organising its work schedule differently. The search for an accommodation must also involve the employee and the employee concerned must, to a certain extent, help out with efforts to arrive at an accommodation.

[74.6] If an employer cannot comply with the duty to accommodate it must demonstrate that it cannot act on the request without unreasonably disrupting its activities.

[74.7] The term "unreasonably disrupt the employer's activities" is a relative term and cannot be given a hard and fast meaning. Each case will necessarily depend on its own facts and circumstances and it will come down to a determination of "reasonableness" under the unique circumstances of the particular employer-employee relationship. The individualised nature of the duty to accommodate was rightly emphasised, albeit in a slightly different context, in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal* 2007 SCC 4, [2007] 1 SCR 161 at [22].

> 22 The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street. In *O'Malley* (at p. 555) and *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970, the Court recognized that, when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed. As Sopinka J. wrote in *Central Okanagan*, "[t]he complainant cannot expect a perfect solution" (p. 995). The obligation of the employer, the union and the employee is to come to a reasonable compromise. Reasonable accommodation is thus incompatible with the mechanical application of a general standard.

[74.8] If the "unreasonably disrupt" proviso is to be relied upon by an employer, the employer must establish an evidential foundation for the operation of that proviso. Section 28(3) requires an evaluative analysis of the reasonableness or proportionality of the employer's response. As recognised in *Smith v Air New Zealand Ltd* at [161] (although in a slightly different context), that will ultimately involve a broad value judgment. Weight must be given to the significance of the right in question (here to manifest one's religion) and to the purpose of the Human Rights Act which is to "better protect" human rights in New Zealand in general accordance with (inter alia) the International Covenant on Civil and Political Rights.

[75] Our findings of fact are that when told by Mr Nakarawa that he was unable to work from sunset on Friday to sunset on Saturday, Mr Casey and Mr Reynolds told him that he should go home. While he was ultimately allowed to finish the particular shift and to

work two days the following week, his employment was nevertheless unambiguously terminated. Neither Mr Casey nor Mr Reynolds appeared to be aware of the employer's obligations under ss 22 and 28(3) of the HRA and no attempt whatever was made to accommodate Mr Nakarawa's religious practice. Mr Casey and Mr Reynolds were deaf to his point that he had asked to work the day shift, that he was willing to work overtime generally but had never been asked specifically about his availability on Saturdays. No attempt was made to enter into a discussion or dialogue with Mr Nakarawa over the issue. He did not meet the needs of the company and therefore his employment was terminated.

[76] In these circumstances it is not possible for AFFCO to now assert, ex post facto, that it can rely on the "unreasonable disruption of the employer's activities" exception in s 28(3). The time for investigating the accommodation issue was, at the very latest, when Mr Nakarawa drew express attention to his religious beliefs, not after the event of his dismissal.

[77] In the alternative we conclude that the evidence given by AFFCO to the effect that it could not find a workaround solution was unpersuasive, artificial and contradictory. In particular, Mr Casey gave evidence that AFFCO were at the time recruiting an equal number of day and night shift employees, that he had not been aware of the request made by Mr Nakarawa in the application form that he be on the day shift and Mr Casey was not aware of any reason why Mr Nakarawa had not been offered the day shift.

[78] In these circumstances the claim made by Ms Ogg that AFFCO would find it "unmanageable" to accommodate Mr Nakarawa's religious practice is somewhat hollow. Her claim that it was not viable to cater for the requirements of each of 500 employees at the Horotiu plant was beside the point. The "parade of horribles" relied on by AFFCO assumed that each of the 500 employees were of a religion which required adherents to follow a particular practice. Yet Ms Ogg stressed that this was the first time that there had been a problem. Indeed, counsel's closing submission was:

> The Plaintiff's claim is the only time the Defendant has ever appeared before the Human Rights Tribunal. The Defendant employs over 4,000 people throughout New Zealand and of different religious denominations. They employ and cater for the religious requirements of Halal slaughter men and have never had the issue of religious discrimination raised before, despite the fact that the Defendant has been in existence for over 100 years.

[79] Even if the case is approached from the (erroneous) perspective that Mr Nakarawa was employed on a casual basis and remained on AFFCO's books (see the assertion in Mr Ginders' letter dated 6 January 2011) it was made clear that Mr Nakarawa would only be considered for employment if he agreed to work the night shift, overtime and Saturdays. Insistence on a complete capitulation to AFFCO's demands is not what can sensibly be described as a good faith discharge of the employer's duty under s 28(3) to make a significant, serious and sincere effort to accommodate the practice.

[80] Our conclusion is that at all times the focus of AFFCO and its managers was exclusively on the interests of the company. There was no awareness of the prohibition on discrimination in s 22 of the HRA or on the mandatory though qualified duty in s 28(3) to accommodate religious practices. In the result there was a complete failure to address the company's responsibilities under these provisions.

[81] In the circumstances there is no need to address s 35 of the HRA.

REMEDY

[82] Section 92I(2) of the HRA provides that in proceedings under s 92B(1) of the Act (as here), the plaintiff may seek any of the remedies described in s 92B(3). That is, if the Tribunal is satisfied (as we are) on the balance of probabilities that the defendant has committed a breach of Part 2, the Tribunal may grant one or more of the following remedies:

> (a) a declaration that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint:
> (b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order:
> (c) damages in accordance with sections 92M to 92O:
> (d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach:
> (e) a declaration that any contract entered into or performed in contravention of any provision of Part 1A or Part 2 is an illegal contract:
> (f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act:
> (g) relief in accordance with the Illegal Contracts Act 1970 in respect of any such contract to which the defendant and the complainant or, as the case may be, the aggrieved person are parties:
> (h) any other relief the Tribunal thinks fit.

[83] It is no defence that the breach was unintentional or without negligence on the part of the party against whom the complaint is made but the Tribunal must take the conduct of the parties into account in deciding what, if any, remedy to grant. See s 92I(4).

[84] The heads of damages allowed by s 92M(1) are:

> **92M Damages**
>
> (1) In any proceedings under section 92B(1) or (4) or section 92E, the Tribunal may award damages against the defendant for a breach of Part 1A or Part 2 or the terms of a settlement of a complaint in respect of any 1 or more of the following:
> (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the complainant or, as the case may be, the aggrieved person for the purpose of, the transaction or activity out of which the breach arose:
> (b) loss of any benefit, whether or not of a monetary kind, that the complainant or, as the case may be, the aggrieved person might reasonably have been expected to obtain but for the breach:
> (c) humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person.
> (2) …

[85] It is further provided in s 108B that before the Tribunal grants any remedy under Part 3, it must give the parties to the proceedings an opportunity to make submissions on the implications of granting that remedy and the appropriateness of that remedy. In the present case, following *Minutes* issued on 31 October 2013, 13 December 2013 and 19 December 2013, the Tribunal has received such submissions.

A declaration

[86] We address first the question of a declaration. In the analogous jurisdiction under s 85(1)(a) of the Privacy Act 1993 it was held in *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, SL Ineson and PJ Davies) at [107] and [108] that while the grant of a declaration is discretionary, the grant of such

declaratory relief should not ordinarily be denied and there is a "very high threshold for exception". On the facts we see nothing to justify the withholding from Mr Nakarawa of a formal declaration that AFFCO has breached s 22 of the HRA. Indeed to withhold such declaration would be unfair.

[87] We now address the question of damages.

Damages for pecuniary loss

[88] Mr Nakarawa seeks damages under s 92M(1)(b) in the sum of $12,800 for lost wages calculated on the basis of sixteen weeks of pay from January 2011 to April 2011 (the hourly rate including holiday pay is $20 x 40 hrs per week).

[89] It has not been suggested that in the period during which he was employed by AFFCO the performance of Mr Nakarawa was unsatisfactory or that he would not have wished to work for the entire period from January 2011 to April 2011. Nor has the quantum as such been challenged beyond the double dipping point which is addressed below.

[90] For AFFCO it was submitted that:

> **[90.1]** As a casual employee Mr Nakarawa had no guarantee of employment beyond the last period of engagement. Because there was no guarantee of employment, there was no pecuniary loss as there were no "lost wages". The most Mr Nakarawa lost was an opportunity to be employed in the future. He was not guaranteed to gain any benefit and therefore lost no benefit.
>
> **[90.2]** Awarding lost wages to Mr Nakarawa would open the floodgates for every casual employee who finished the season early or who was not offered further employment to claim lost wages for the entire season. It would change the very nature of casual employment for all casual employees.
>
> **[90.3]** Mr Nakarawa has not disclosed what, if any, income he has received by way of benefit or other employment during the time he has claimed lost wages. If he has received any other income then he is "double dipping" by receiving lost wages in addition to other income.

[91] In our view none of these submissions carry weight:

> **[91.1]** As to the first point, both Mr Casey and Ms Ogg described this period as a busy one. In fact Mr Nakarawa had been employed as part of a new shift. It was because he could not work a full shift plus overtime for up to one hour every day and on Saturday that Mr Nakarawa was told that he did not meet the needs of the company and was to finish up. On the evidence we have heard it is clear that had Mr Nakarawa not been dismissed and notwithstanding his status as a "casual" employee, he would have continued working week to week until the season was over or until he left of his own accord. As we have said, indicative of the expectation of near continuous employment is the fact that working overtime was compulsory for casual employees. Section 92M of the HRA covers those situations where the aggrieved person has suffered a loss of any benefit he or she "might reasonably have been expected to obtain" but for the breach. In our view the amount calculated by Mr Nakarawa represents such sum.

[91.2] As to the floodgates point, we see no merit in this argument as the remedy of damages under s 92M of the HRA is specific to a breach of the non-discrimination provisions of the Act. This answers the submission that workers will turn to the Tribunal to gain monetary compensation "denied them under the employment jurisdiction". The Tribunal's jurisdiction in relation to employment issues is narrow and predicated on a plaintiff first establishing discrimination on one of the prohibited grounds.

[91.3] As to the third point, the issue is whether Mr Nakarawa has lost a benefit he "might reasonably have been expected to have obtained" but for the breach. In assessing this head of damages the Tribunal must focus on the facts, not on a narrow and technical analysis of the employment contract more appropriate to an employment dispute. As we have said, the facts establish that had Mr Nakarawa not been dismissed he would have continued working week to week until he left on his own accord. There was a clear and reasonable expectation of work. That is why the new shift was put in for the plant's busiest time of year. Following dismissal Mr Nakarawa attempted to mitigate his financial losses by tutoring at Waikato University. In the period to April 2011 he earned $682.00. We will deduct this figure from the $12,800.00 sought, leaving a balance of $12,118.00.

[92] In the circumstances the termination of Mr Nakarawa's employment for reason of his religious beliefs clearly resulted in the loss of wages which he might reasonably have been expected to obtain but for the breach. The breach itself was a serious infringement of his right to manifest his religion and a failure to award damages in the form of the loss of a benefit the aggrieved person might reasonably have been expected to obtain but for the breach would undermine this most important of rights. We accordingly award damages under s 92M(1)(b) in the sum of $12,118.00.

Damages for humiliation, loss of dignity and injury to feelings

[93] We come now to the request for an award of damages under s 92M(1)(c) for humiliation, loss of dignity and injury to feelings. Not each of these heads of damages need be established for there to be jurisdiction to make an award.

[94] There must be a causal connection between the breach of s 22(1) and the damages sought. See by analogy *Winter v Jans* HC Hamilton CIV-2005-419-854, 6 April 2004 at [33] and [34]. On the facts, that causal connection has been clearly established.

[95] We have already found that Mr Nakarawa is a humble, modest and diffident individual. We have accepted his evidence that his religious beliefs are deeply personal and he is reluctant to raise them with others. When at the first real opportunity he raised them with Mr Reynolds and Mr Casey he was met with a firm, uncompromising and factually mistaken response to the effect that he had agreed to work overtime but as that was no longer the case, he should go home. Mr Nakarawa's point of view was simply not listened to and no account was taken of the terms of his employment application form, the terms of his IEA, the terms of the Collective Agreement and the terms of the Human Rights Act itself. Mr Nakarawa was treated as if he had obtained his position under false pretences. This was made explicit by both Mr Casey and Ms Ogg in their evidence when they said that Mr Nakarawa had not been honest. It was a claim repeated in cross-examination of Mr Nakarawa and in AFFCO's submissions.

[96] The circumstances brought about by AFFCO and its managers was clearly humiliating to Mr Nakarawa and the casual, if not indifferent dismissal of his sincerely

held religious beliefs caused injury to his feelings. As he put it in his complaint to the Human Rights Commission, "my religious belief was treated with impunity". Neither at the time of the events nor in the course of these proceedings has AFFCO and its management shown any real understanding of the significance religion can have in a person's life and of the profound importance of the right to manifest one's religion. Mr Nakarawa's humility in his dealings with AFFCO must not obscure the fact that he was forced to choose between his religious beliefs and earning much needed income for his family. He felt humiliated and traumatised by the experience. In addition he would not be able to provide for his family financially during the Christmas and New Year period. The injury to his feelings was substantial. As stated in *Director of Proceedings v O'Neil* [2001] NZAR 59 at [29]:

> [29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[97] As to the loss of dignity, we refer to the description given in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53] where Iacobucci J delivering the judgment of the Supreme Court of Canada stated:

> 53 … Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits… Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued….

[98] We are satisfied on the facts that Mr Nakarawa has established to the required standard all three of "humiliation, loss of dignity and injury to feelings".

[99] The amount originally sought ($2,000) is modest when compared with recent awards made by the Tribunal under the analogous provisions of the Privacy Act s 88(1)(c). For example, in *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 (27 March 2012) and in *Fehling v South Westland Area School* [2012] NZHRRT 15 (6 July 2012) damages of $10,000 were awarded. In *Director of Human Rights Proceedings v INS Restorations Ltd* [2012] NZHRRT 18 (23 August 2012) the amount was $20,000 and in *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24 (1 November 2012) the award was $15,000. More recently in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 (20 September 2013) the award was similarly $15,000. While the separate jurisdictions of the Tribunal under the HRA, the Privacy Act and the Health and Disability Commissioner Act 1994 are not to be confused or conflated, nevertheless some parity must be maintained in relation to the common jurisdiction of the Tribunal to award damages for humiliation, loss of dignity and injury to feelings.

[100] The Tribunal is not bound by the amount sought by a plaintiff (as to which see *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760 (8 April 2013) (Fogarty J, GJ Cook JP and Hon KL Shirley) at [103] to [108]). In any event the more recent submissions filed by Mr Nakarawa now seek an award of $15,000.00.

[101] We have already expressed the view that the circumstances in which AFFCO summarily terminated Mr Nakarawa's employment by reason of his religious beliefs

constituted a serious infringement of Mr Nakarawa's right to be free from discrimination in the workplace. The circumstances were compounded by the failure by AFFCO to even attempt a discharge of its duty under s 28(3) to accommodate Mr Nakarawa's religious duty not to work on the Sabbath. In these circumstances we are of the view that the failure of process was near complete, causing Mr Nakarawa significant humiliation, significant loss of dignity and significant injury to feelings. We see no mitigating factors. We recognise, however, that damages under this head are not punitive in intent.

[102] Taking all these factors into account we conclude that damages in the sum of $15,000 are to be awarded to Mr Nakarawa.

Training order

[103] We cannot leave this case without drawing attention to the surprising lack of awareness, at senior management level, of the non-discrimination obligations placed on an employer by the Human Rights Act. We cite by way of example the evidence given by Mr Casey and which is summarised at para [36] above. Reference should also be made to para [50.4] in our credibility assessment and to paras [51.13], [75] and [80] of our findings. We have given consideration to whether we should assist AFFCO by making an order under s 92I(3)(f) to the effect that AFFCO implement a training programme focused on its duties under the Human Rights Act.

[104] Our conclusion is that such an order should be made. Remedies such as a declaration and damages are, in a sense, palliative. Their importance is not be diminished on that account. But they are not on their own directed to preventing future breaches of the Act, especially in relation to others. The fact that s 92I(3)(f) HRA makes specific provision for training orders signifies that the Tribunal must in any particular case consider the need to prevent future breaches of the anti-discrimination provisions of the HRA. This is made explicit by the terms of the provision:

> (f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, **in order to assist or enable the defendant to comply with the provisions of this Act**: [emphasis added]

[105] In the present case we have found that at all material times the focus of AFFCO and its managers was exclusively on the interests of the company. There was no awareness of the prohibition on discrimination in s 22 of the HRA or on the mandatory though qualified duty in s 28(3) to accommodate religious practices. In the result there was a complete failure to address the company's responsibilities under these provisions. This failure was evident at the induction process and continued through to the letter from Mr Ginders who asserted that Mr Nakarawa's religious beliefs were "irrelevant".

[106] Such systemic failure must be remedied and we are of the view that requiring AFFCO to implement a training programme focussed on its responsibilities under the Human Rights Act is the most effective means of achieving this end.

[107] We accordingly order that AFFCO, in conjunction with the Human Rights Commission, provide training to its management staff in relation to their and AFFCO's obligations under the Human Rights Act 1993 in order to ensure that they are aware of those obligations.

FORMAL ORDERS

[108] For the foregoing reasons the decision of the Tribunal is that:

[108.1] A declaration is made under s 92I(3)(a) that AFFCO committed a breach of s 22(1) of the Human Rights Act 1993 by discriminating against Mr Nakarawa for reason of his religious beliefs.

[108.2] Damages of $12,118.00 are awarded against AFFCO under ss 92I(3)(c) and 92M(1)(b) of the Human Rights Act 1993 for loss of benefit in the form of wages Mr Nakarawa might reasonably have been expected to obtain but for the breach.

[108.3] Damages of $15,000.00 are awarded against AFFCO under ss 92I(3)(c) and 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of Mr Nakarawa.

[108.4] It is ordered pursuant to s 92I(3)(f) of the Human Rights Act 1993 that AFFCO, in conjunction with the Human Rights Commission, provide training to its management staff in relation to their and AFFCO's obligations under the Human Rights Act 1993 in order to ensure that they are aware of those obligations.

COSTS

[109] Costs are reserved:

[109.1] Mr Nakarawa is to file his submissions within 14 days after the date of this decision. The submissions for AFFCO are to be filed within a further 14 days with a right of reply by Mr Nakarawa within seven days after that.

[109.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

[109.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Ms PJ Davies**	**Mr MJM Keefe JP**
Chairperson	**Member**	**Member**