IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT [51]**

	Reference No. HRRT 020/2013
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**MARK CHRISTOPHER MEULENBROEK**
	PLAINTIFF
AND	**VISION ANTENNA SYSTEMS LIMITED**
	DEFENDANT

AT INVERCARGILL

BEFORE:
Mr RPG Haines QC, Chairperson
Ms DL Hart, Member
Mr BK Neeson, Member

REPRESENTATION:
Mr RW Kee and Ms JV Emerson for plaintiff
Ms RK Brazil and Ms H Young for defendant

DATE OF HEARING: 15, 16, 17 and 18 September 2014

DATE OF DECISION: 14 October 2014

DECISION OF TRIBUNAL

Introduction

[1] From approximately 2004 Mr Meulenbroek was employed by Vision Antenna Systems Ltd (Vision) as a technician installing television and satellite aerial and cable systems and fixing faults. He was described by Mr GR Stapley, one of the two directors of Vision, as the "face" of Vision in Invercargill for many years and a "fantastic" worker.

[2] Although first baptised into the Seventh Day Adventist Church in approximately March 1987 at sixteen years of age, Mr Meulenbroek left the Church when about twenty. In mid-2011 he rejoined the Church and consistent with his faith wished to keep the seventh day of the week from sunset on Friday to sunset on Saturday as the Sabbath Day.

[3] His employment contract, however, required that he work on Saturdays. When he refused to work on that day he was dismissed by Vision.

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

[5] Mr Meulenbroek 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).

[6] It is not practical to provide a full account of the evidence given over three days. Only the main points will be addressed.

OBSERVANCE OF THE SABBATH

The Fourth Commandment

[7] In the King James Version of the *Bible* the fourth commandment is expressed in the following terms:

> 8 Remember the sabbath day, to keep it holy.
> 9 Six days shalt thou labour, and do all thy work:
> 10 But the seventh day is the sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that *is* within thy gates:
> 11 For in six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the sabbath day, and hallowed it.

Seventh Day Adventists and observance of the Sabbath

[8] The evidence given by Mr Victor Kulakov, an ordained Minister of the Seventh Day Adventist Church and at the relevant time Pastor of the Seventh Day Adventist Church in Invercargill, was that Seventh Day Adventists accept the *Bible* as the only source of their beliefs. Because the week starts on Sunday, Seventh Day Adventists consider Saturday to be the Sabbath Day. Part of observing the Sabbath is the avoidance of any kind of labour from sunset on Friday to sunset on Saturday. By keeping the seventh day free from activities it is possible to focus on nurturing the spiritual and emotional components of life. There are some exceptions where it is considered acceptable to work on Saturday, such as doctors or nurses who need to provide emergency services. While attending a church service is an important part of Saturdays for many Seventh Day Adventists, observing the Sabbath is about more than the ritual of going to church. It is a day to focus on one's relationship with God, to spend time with the family and to look after one's physical and emotional health.

Mr Meulenbroek and the Seventh Day Adventist Church

[9] As mentioned, Mr Meulenbroek first joined the Seventh Day Adventist Church in about March 1987 when he was sixteen years of age. He left the Church when approximately twenty.

[10] In about June 2011 he rejoined the Church and began rebuilding his relationship with God. His wife started attending Church as well.

[11] Mr Meulenbroek believes the Sabbath is a day of rest for Seventh Day Adventists. To observe the Sabbath he does not do any work or buy or sell anything on that day. It is a day for him to spend time with God and family. He usually attends a morning class at the Invercargill Adventist Church at 9.30am and a church service from 11am to 12pm.

He is a church deacon and has responsibilities such as taking up the offering during church services. He said that on rejoining the Church he realised how much he had missed worship and observance.

THE PLAINTIFF'S EVIDENCE

Mr Meulenbroek and Vision Antenna Systems Ltd

[12] Mr Meulenbroek is an experienced television antenna installer, glazier, aluminium joiner and garage door fabricator. In approximately October 2003 he commenced working with Vision as a contract aerial technician. He was paid per installation.

[13] In or about December 2004 he accepted a permanent full-time position in Invercargill with Vision as a senior technician. His duties included carrying out installations (Sky, domestic and commercial), lending technical support to Sky contractors, carrying out quality control inspections and reports of Sky contractor installations, undertaking commercial installations, repairs and call-outs and aiding in the development of Vision's domestic market.

[14] At the relevant time there was a written employment agreement which stipulated that Mr Meulenbroek's hours of work were Monday to Saturday (inclusive) from 8.30am to 4.30pm.

[15] Between December 2004 and July 2009 Mr Meulenbroek worked most Saturdays. From August 2009 he was rostered to work approximately every second Saturday. He was also required to be on call on approximately three to four Sundays per year.

[16] Mr Meulenbroek was initially paid a wage of $15 per hour. This rate was increased from time to time and by 2012 his hourly wage was $19.

January 2012 to June 2012: The request for no Saturday work

[17] When Mr Meulenbroek rejoined the church in June 2011 he was still rostered to work for Vision every second Saturday. He did not immediately request to have all Saturdays off as his faith was at that point still growing. However, by October 2011 he decided to raise the issue of Saturday work with Mr Stapley. At a meeting held at Mr Stapley's Dunedin office Mr Meulenbroek explained that he (Mr Meulenbroek) had returned to the church and because he would be unable to work Saturdays, he might need to find another job. Mr Meulenbroek's evidence is that Mr Stapley replied there was no need for that step to be taken and he would talk to "the team" about it. Because Mr Meulenbroek did not consider it reasonable to expect Saturdays off immediately, he asked for no Saturday work from January 2012 as this would give Vision sufficient time to work out an arrangement. Mr Meulenbroek also suggested to Mr Stapley that when his annual review came due in December it would be a good time to amend the employment agreement.

[18] At about this time Mr Meulenbroek provided Mr Stapley with a letter from Mr Kulakov dated 28 October 2011 verifying that Mr Meulenbroek was an active member of the Seventh Day Adventist Church and that he was commanded to observe the Sabbath Day.

> I am writing to you regarding Mark Meulenbroek who is an active member of our church. Mark has recently recommitted to his spiritual values and, through his knowledge of the Bible, desires to keep the seventh day of the week from sunset on Friday to sunset on Saturday as the Sabbath Day. This means that he would set this time apart for worship and rest. Mark's faith means a lot to him and we support and encourage him in this decision.

> We request, on his behalf, that arrangements be made to give him this freedom to not work on Saturday. Mark understands the demands of his work and is willing to work additional hours at any other time of the week including Sunday.
>
> We appreciate your consideration and trust that you can allow Mark to follow what he believes is right.

[19] Mr Meulenbroek said that some time after the meeting he was telephoned by Mr Stapley and told he could have Saturday's off because he was a good worker. No dates were mentioned but Mr Meulenbroek took the arrangement to mean there would be a permanent arrangement to the effect that he would not have to work Saturdays.

[20] However, it soon became apparent that Mr Stapley held a different view of the outcome of the discussions with Mr Meulenbroek. By email dated 17 November 2011, while confirming that in early 2012 Mr Meulenbroek would be rostered out of regular Saturday work altogether, Mr Stapley added a qualification that it would be a "test to see how it will work" and Vision reserved the right to request Mr Meulenbroek to work Saturdays if an urgent situation arose. The email relevantly stated:

> … As early next year as is practical we will rout you out of regular Saturday work altogether as a test to see how it will work.
>
> You are to work out the two Saturdays you have swapped with Nathan before we can do this.
>
> We reserve the right to request you to work Saturdays if a urgent situation arises. Our current Employment Agreement remains as a 6 day working week to cover this.
>
> We may arrange to have you work additional Sunday call out's but will discuss this further once we have arranged the Saturdays off routs next year.

[21] Believing the agreement was that there would be no Saturday work at all from January 2012 onwards, Mr Meulenbroek responded by email dated 19 November 2011 emphasising that he would be unavailable to work any Saturday including urgent situations:

> Just [confused] with your email as I thought you verbally [agreed] to no more Saturday work as from 1 January 2012.
>
> …
>
> My request is no more Saturday work from 1 January 2012. I will be unavailable to work any Saturday including urgent situations. I am unavailable for afterhours commercial callouts from sunset Friday to sunset Saturday.
>
> I am happy to work all day Sunday & every Sunday if required. I place GOD first in my life and Saturday is a sacred time for me & GOD. I hope you can appreciate that & respect me for it.
>
> …
>
> I stand firm and will find another job if I have to choose between GOD and a job.
>
> …

[22] By email dated 21 November 2011 Mr Stapley responded that Vision was unable to agree to a "no Saturday work" request "at this time" and that rostering Mr Meulenbroek out of Saturday work was a trial only. Vision could not commit to this long term. He said that he (Mr Stapley) had been as helpful and conciliatory as he could but Mr Meulenbroek's refusal to work Saturdays had changed the situation "significantly" and that Mr Stapley would be seeking legal advice. In the meantime he would continue with the agreement to run a trial of no rostered Saturday work.

[23] Mr Meulenbroek's response of 23 November 2011 was non-confrontational and for this reason ambiguous. While stating that he would work Saturdays if rostered to do so (and this included 2012) he maintained his request that he receive no more Saturday work but emphasised that this was a request only and he did not wish to jeopardise his current employment. Nevertheless he sought an assurance that his request would become permanent. He did not agree to a trial run:

> I am NOT refusing to work Saturdays. While I am in employment with Vision, I will work Saturdays if you rout me in. This also includes 2012.
>
> …
>
> I am only REQUESTING that from 1 January 2012 that I receive no more Saturday work. I am requesting no more commercial callouts from sunset Friday to sunset Saturday.
>
> …
>
> There is no need to seek legal advice because either you want to do this or you don't. I wouldn't do anything to jeopardize my [current] employment or to leave you in an uncompromising position.
>
> I need your assurance that my request becomes permanent and this would make me unavailable in urgent situations. I do not agree to a trial run.

[24] By letter dated 30 November 2011 Mr Stapley replied that while he could not commit to a permanent removal of Saturday work, he would do his best to accommodate "an interim trial period" to assess if reduced Saturday work was feasible. He had considered Mr Meulenbroek's request at length and concluded that the interim offer was the best he could do to take Mr Meulenbroek's religious beliefs into account.

[25] In an email dated 10 December 2011 Mr Meulenbroek agreed to see how things worked out in the future but stressed that if required to work Saturdays, he would have no other choice but to seek other opportunities. He placed God first in his life and could not operate "on a part-time basis with God". No job or money would take that away. Much as he loved his job, he loved God the most. He concluded by pointing out that the Saturday compromise was "no big deal" considering he was already rostered off every second Saturday:

> In reply to your letter dated 30 November 2011, I'd like to express my appreciation for all that you have done so far to respect my religious beliefs. I am willing to accept your terms to reach a point of compromise to see how it will work out for the future.
>
> I greatly appreciate the Saturdays I've had off lately. I would greatly appreciate if this arrangement became more permanent. I cannot operate on a part-time basis with GOD.
>
> …
>
> I must stress with urgency however, that if I am required to work Saturdays, then I will have no other choice but to seek other opportunities that meets my needs. I have other options which I have been exploring.
>
> I place GOD first in my life and no job or money will take that away. As much as I love my job I love God the most.
>
> …
>
> The Saturday compromise really is no big deal considering I already got every 2nd one off to begin with.
>
> …

[26] By letter dated 17 January 2012 Mr Stapley, after referring to the fact that Mr Meulenbroek had been rostered off regular Saturday work without problems being caused, noted the ambiguity in Mr Meulenbroek's apparent acceptance of the offer of a trial period while stating that if required to work Saturdays, he would have to look for other opportunities. Mr Stapley sought confirmation that Mr Meulenbroek would make himself available "to support us on Saturdays when called upon":

> …
>
> I am pleased that you have accepted my offer of a trail period to give us a chance to assess the impact of your request. This trial has been running for some weeks now with us not routing you any regular Saturday work without any issues that I am aware of.
>
> I am a little concerned however at your statement in the abovementioned letter that reads;
>
> > "I must stress with urgency however, that if I am required to work Saturdays, then I will have no other choice but to seek other opportunities that meets my needs. I have other options which I have been exploring."
>
> My email dated 17 November, in which I outlined the conditions of the trial that we are currently running, clearly states that during the trial, we will be calling on you to work Saturdays in situations where we have no other options.
>
> As these points of view clearly contradict each other, I am writing to seek your conformation that you will in fact make yourself available to support us on Saturdays when called upon.
>
> Should this not be the case Mark I would have to re-evaluate the options of continuing with this trial so please let me know your thoughts.

[27] Mr Meulenbroek was at that time having health problems with ulcerative colitis and feeling stressed. It appears that he did not reply to this letter and hoped that everything would work out and that he would not be required to work any Saturdays.

[28] As it turned out, from January 2012 to June 2012 he was not rostered to work on any Saturday and as time went on he assumed that the issue had been resolved. He began to feel more comfortable and happier. This positive change was commented upon by Mr Kulakov in his evidence. Mr Kulakov also stated in his evidence that as Mr Meulenbroek attended church more regularly he (Mr Meulenbroek) expressed a wish to become more serious and committed in his relationship with God. He told Mr Kulakov that he did not want to be "on a part time" basis with God and decided not to work on Saturdays. Mr Kulakov described this as a natural process of the maturing of any person when they learn about God and grow in their spirituality. They move from being attendees to becoming committed.

June 2012 to August 2012: Vision's request that Mr Meulenbroek work on Saturday

[29] On 29 May 2012 Mr Meulenbroek received a call from the Vision office asking him to cover an upcoming Saturday as one of the contractors was off. Mr Meulenbroek replied that he was unavailable. On 31 May 2012 he received a call from Mr Stapley asking why he had declined. Mr Meulenbroek wrote to Mr Stapley by email dated 1 June 2012 stating unequivocally that he would not agree to work on Saturdays, emphasising that it was not a matter of convenience but of spiritual importance. Mr Meulenbroek again said he could not operate on a part-time basis with God. If Mr Stapley decided he had to work on Saturdays he (Mr Meulenbroek) would have to resign:

> I thought I should clarify in writing where I stand with regards to working on Saturdays.

> As I informed you in my earlier correspondence to you, Saturday is a day when I go to church. Since I'm a member of the Worldwide Seventh-day Adventist Church, I'd like to keep Saturday as a Holy Sabbath along with about 19 billion members.
>
> It is not a matter of convenience but a matter of spiritual importance to me! Since everyone is allowed to decide for him or herself what they believe, I'd like to exercise this right and choose to spend my Saturdays for spiritual purposes.
>
> I'm more than willing to work on Sundays or on any other day and as much as it is required, but I'd like to keep my Saturdays free from work. If I can't have all Saturdays off with Vision, I will have to look for another job. I'm sure I will have other good options. Most importantly, I believe that GOD is my partner who will provide for me since I put Him first in my life.
>
> To answer your point on working Saturdays when called upon, I don't agree to this as I said previously I can't operate on a part-time basis with GOD.
>
> Although I'm still willing to work with Vision, but if you decide that I must work on Saturdays I will have to put in my resignation.
>
> I will give you every opportunity possible to reach a compromise, but I do have my limits. If you disregard my request and require me to work on Saturdays, this will jeopardise my future with Vision.
>
> …

[30] Mr Stapley replied by email dated 13 June 2012, stating that Vision was assigning Mr Meulenbroek to work on Saturday 16 June 2012:

> In my previous replies to you on this matter I have outlined, in detail, the reasons behind our requirements for Saturday work. It is not personal and, because of our contractual obligations, working Saturdays is a requirement of all our installation Technicians.
>
> In an attempt to accommodate your request I offered you a compromise for a trial where in return for receiving no regular Saturday work we would call on you to help out occasionally. In your letter dated 10 December you accepted these terms so we have not given you regular Saturday work since that date.
>
> As I have already discussed with you last week, we now require your help so, **we will be routing you installation work this Saturday 16 June**. I expect you to complete all this work on the scheduled day (Saturday).
>
> Should this requirement cause you to question your future with Vision then I will be disappointed as I have done everything I can to help you as you are a valued member of our team. It [is] the team as a whole I am protecting with this insistence that you work the days outlined in our current employment agreement. [Emphasis in original]

[31] By email dated 13 June 2012 Mr Meulenbroek replied that he would not be able to work on 16 June 2012 as he had Church commitments. He also asked for a review of his employment contract as soon as possible and advised that he had begun looking for another job.

[32] In a letter sent on 15 June 2012 (it is incorrectly dated 15 July 2012) Mr Stapley warned that refusal to work on the days stipulated in the employment agreement without good explanation constituted a refusal to follow reasonable and lawful instruction and could give rise to summary dismissal. Mr Meulenbroek was given an opportunity to "explain" his actions:

> Re Refusal to follow lawful instruction
>
> Dear Mark,
>
> I am very concerned at this latest turn of events. As you are well aware, we have a 7 day a week contract with Sky and it is essential that we meet our contractual obligations. For this reason, all installation employees are required to be available to work on Saturdays. Your

refusal to work this Saturday has required us to make other arrangements to ensure the work is completed with a minimum of disruption to our contract work.

Not only does this disrupt our business but it places additional pressure on other technicians have to cover your absence. This can potentially cause resentment given all employees would obviously prefer to not work on a Saturday.

Refusal to work on the days stated in your employment agreement without good explanation constitutes a refusal to follow reasonable and lawful instruction. Such action is considered by the company as serious misconduct and could give rise to summary dismissal. Therefore I give you this opportunity to explain your actions.

We have corresponded at length over recent months regarding your desire to cease work on Saturdays. Your explanations to date do not override your obligations to us as your employer as stated in our Employment Agreement. We as a company have done everything we can to minimise the impact of the requirement for Saturday work on you. This included setting up a system in December of last year to run a trial with no regular Saturday work routed to you with occasional support with Saturday work from you when we need it. You agreed to these terms in writing.

…

[33] Mr Meulenbroek replied by email dated 20 June 2012 stating that he could not be on part-time terms with God and therefore abstained from any kind of work every Saturday:

In response to your letter dated 15 July 2012 (should be June) I would like to apologize for not being clear enough in my previous correspondence to you with regards to where I stand regarding my occasional work on Saturdays.

Ever since the beginning of our dialogue on this issue I have been thinking about it and it helped me to be more clear and specific where I stand in my own head. As I mentioned to you a number of times, I can't be on part time terms with God.

I abstain from any kind of work and go to church every Saturday and I would like to keep it this way. Once again, accept my apology for not making myself clear on this right from the very start.

Further on this issue, I would like to request that we review my work contract with Vision and I hope we can find a compromise where I can have every Saturday off and do ANY required work on any Sunday instead, even if you require me to work every Sunday!

I believe since we live in a free country we should be able to find a compromise and have a win – win resolution.

[34] The response from Mr Stapley dated 26 June 2012 was that future refusal to work on a Saturday would lead to disciplinary action likely to result in dismissal. Mr Stapley asserted that the company stance had "nothing whatsoever to do with [Mr Meulenbroek's] beliefs. We reproduce only the following paragraphs:

…

Our inability to be flexible on the requirement for you, and all technical staff to be available for work on Saturdays has nothing at all to do with your beliefs or what you intend to do with your Saturdays. It is a simple rule to ensure we are able to meet our contractual obligations, year round, while maintaining stability within our workforce. Each member of our Sky installation team has to be seen to do their part in helping with Saturday work. To this end we spend time setting up rosters taking into account everyone's desire to not work on Saturdays while maintaining our workload and keeping it fair.

…

… **Should you refuse to work another Saturday, we will consider this serious misconduct warranting instant dismissal.** Again I say Mark that any disciplinary action we are forced to

> take relates to a refusal to follow lawful instruction and as such has nothing whatsoever to do with your beliefs.
>
> …
>
> Unfortunately we are unable to offer you an employment agreement that does not include Saturday work so we must continue with our employment agreement in its current form. The best we can offer you is the deal we have on the table of no scheduled Saturday work. However for this to remain we MUST have your assurance that you will make yourself available for Saturday work when called upon for help.
>
> … [Emphasis in original]

[35] On the same day (26 June 2012) Mr Kulakov sent a further letter to Mr Stapley explaining that because of his beliefs in God and the *Bible*, Mr Meulenbroek had dedicated the Sabbath as a special day between him and God. For this reason he could not work on Saturday. Mr Kulakov emphasised that this was not a matter of convenience but of principle. Mr Stapley was urged to support Mr Meulenbroek in being true to his beliefs and to allow him to not work on Saturdays.

[36] Both Mr Meulenbroek and Vision then consulted lawyers but no resolution was achieved.

[37] On 20 August 2012 Mr Meulenbroek received an email from Mr Stapley which advised that Vision had "a busy couple of weeks coming up soon" and it was expected that Mr Meulenbroek would be asked to help with Saturday work "very soon". Mr Stapley also advised that early September was "looking tight". He would let Mr Meulenbroek know for sure closer to the time whether he was required but trusted that Mr Meulenbroek would "see fit to help us as agreed". Mr Meulenbroek did not reply or respond to the email, feeling angry that Mr Stapley appeared to be ignoring his (Mr Meulenbroek's) need for Saturdays off. Mr Stapley's persistence about Saturday work was making Mr Meulenbroek feel weary.

[38] On 27 August 2012 Mr Meulenbroek received an email from Mr Scott Pullar of the Vision Dunedin office asking Mr Meulenbroek to "cover" the coming Saturday as "a couple of techs" were "off" and Nathan Cumberland was off to Te Anau. Mr Meulenbroek immediately responded that he could not help due to other commitments. The following day Mr Stapley wrote to Mr Meulenbroek by email advising that Mr Meulenbroek was "obliged" to be available for work on Saturdays and that Mr Meulenbroek was now being instructed that he was required to work Saturdays when rostered on. Any further refusal could result in termination of his employment following a disciplinary meeting:

> As per the terms and conditions set out in your signed employment agreement and our subsequent agreement reached (during our correspondence regarding Saturday work), you are obliged to continue to be available for work on Saturdays. This has been discussed at length and we have endeavoured to not roster you for Saturday work in good faith. As agreed however there will be times when we do roster you on for Saturday work and you agreed to be available when this occurred.
>
> Please take this email as a clear reasonable and lawful instruction that you are required to work Saturdays when rostered on. Any further refusal to work will be seen by the company as "failure to follow lawful instruction" and therefore **may result in termination of your employment, subject of course to any explanation you provide at a disciplinary meeting**.
>
> Please respond with your intentions and a clearer explanation as to why you are unavailable if this is still the case. [Emphasis in original]

[39] When Mr Meulenbroek responded that correspondence of this nature was to go through his lawyer Mr Stapley replied by email dated 29 August 2012 to the effect that if

Mr Meulenbroek had "an acceptable reason such as a pre-organised commitment" he (Mr Stapley) would consider trying to find a replacement for the forthcoming Saturday shift:

> Mark, if you have an acceptable reason such as a pre-organised commitment I will consider trying to find a replacement for this Saturday's shift. I may not be able to though so you need to respond ASAP to me regarding this Saturday's shift.
>
> Depending on this outcome, if we are able to get someone in this Saturday to cover your absence, you will then need to work the following Saturday.
>
> Please respond as soon as possible regarding this urgent matter.

[40] On the same day Mr Meulenbroek replied that he was unavailable to work on Saturday as he wished to observe his religious practice:

> I am unavailable to work on Saturday so that I may observe my religious practice, so therefore I am unavailable to work this Saturday or any future Saturday.
>
> I appreciate your efforts to date to respect this right. I am happy to assist with any additional work on Sunday as may be required.
>
> …

7 September 2012: The dismissal

[41] By this stage Mr Meulenbroek was feeling very stressed and thought that walls were closing in on him. He felt torn between observing the Sabbath and the demands by Mr Stapley that he work on Saturdays.

[42] By letter dated 29 August 2012 Mr Stapley gave notice that Vision intended convening a disciplinary meeting to hear Mr Meulenbroek's "explanation to this matter" and that depending on his explanation, disciplinary action could be taken up to and including instant dismissal.

[43] The disciplinary meeting took place on 5 September 2012 at Invercargill. Present with Mr Meulenbroek was his lawyer (Ms R Wilson) and Mr Kulakov. Mr Meulenbroek gave his account of the reasons why he could not work on the Sabbath and Mr Stapley said that he would notify the outcome of the meeting soon.

[44] On 7 September 2012 Mr Stapley telephoned Mr Meulenbroek to advise that he had reached a decision and wanted to meet with Mr Meulenbroek face to face. It was agreed that they would meet at Mr Meulenbroek's home that afternoon along with Mr Phil Corbett, a Supervisor employed by Vision. When Mr Stapley and Mr Corbett arrived they were invited into Mr Meulenbroek's home. In the presence of Mrs Meulenbroek Mr Stapley served a letter on Mr Meulenbroek stating that his employment at Vision had been terminated for serious misconduct. The relevant paragraphs of the letter follow:

> Thank you for meeting with us on Wednesday 5 September 2012. A copy of this letter will also be sent to your lawyer.
>
> We again expressed our concern at this meeting regarding your ongoing refusal to work Saturdays when rostered on. Your lawyer gave her perspective on the matter and you both tried to come up with different options that might work so that you did not need to work Saturdays in the future.
>
> While I reiterated that the purpose of the meeting was to discuss your refusal, we were willing to once again consider alternatives to dismissal. Unfortunately you remain of the position that no alternatives exist. As you're aware we have already endeavoured to find ways of reducing your Saturday work. This effort on our part however was conditional upon you having to work some Saturdays when needed.

> As discussed, other staff have to carry the burden of your absence and when they are absent due to sickness or annual leave, we require you to step up and work those Saturdays. You acknowledged at this meeting Mark, that other staff would feel strongly about their own personal commitments, stating that sport can be like a religion for some. We agreed with this but had to emphasize to you that sport is most often played on a Saturday.
>
> This aside, we have kept reminding you that on occasion, we must roster you on Saturdays. It is simply unacceptable for you to refuse and we did not hear any explanations for your refusal that satisfy us that you should not be dismissed. A decision has therefore been made to terminate your employment for serious misconduct. Specifically that you have flat out refused to follow a lawful and reasonable instruction.
>
> …

[45] Mr Meulenbroek went into shock at this point and was unable to really read the letter. He pleaded with Mr Stapley to keep him on until he had found another job. Mr Stapley replied that Mr Meulenbroek must have seen the writing on the wall a long time ago. Becoming angry, Mr Meulenbroek asked Mr Stapley and Mr Corbett to leave his house. They replied that they needed to collect all Vision's property and started taking items out of Mr Meulenbroek's work van. Mr Meulenbroek felt that his privacy was being invaded and had no control over the situation. Having just been told that he was dismissed, dealing with property collection on top was too much. He could not think clearly what was his and what belonged to Vision. Mrs Meulenbroek (who had also gone into shock by this point) initially suggested to her husband that Mr Stapley be allowed to take the gear which belonged to Vision but Mr Meulenbroek was given no chance to remove his personal belongings. Mrs Meulenbroek called a friend from the Church to come over to assist. That friend asked Mr Stapley and Mr Corbett to leave and then called the Police. Only after the Police arrived did Mr Stapley and Mr Corbett finally leave.

[46] Mr Meulenbroek said that the whole experience was humiliating and it is a day he will never forget.

[47] Mrs Meulenbroek was so concerned about her husband's mental state she asked their neighbour (Mr Colin Hamlin) to come and talk to him.

[48] Mr Hamlin said that around 8.30pm on 11 September 2012 Mrs Meulenbroek asked him to talk to her husband. When he arrived he found Mr Meulenbroek walking around his backyard in the dark "like a zombie". Visiting Mr Meulenbroek on other occasions around this time Mr Hamlin said that he would describe Mr Meulenbroek as being in quite a bad state and Mr Hamlin was concerned that Mr Meulenbroek would hurt himself:

> I would describe Mark as being in quite a bad state in those days. He was a screwed up mess and his mind had gone all wonky. He didn't know what he was going to do for money or where he was going to get work. He couldn't see a light at the end of the tunnel. I was quite concerned that he would hurt himself.

[49] Mr Kulakov stated that on 7 September 2012 he received a telephone call from Mr Meulenbroek and was told by Mr Meulenbroek that he had been dismissed. Mr Kulakov described Mr Meulenbroek as "quite distraught", his voice was shuddering and he could tell that Mr Meulenbroek was shaking as he spoke to Mr Kulakov on the telephone. The amount of stress he perceived was "absolutely enormous". So concerned was he for Mr Meulenbroek's safety that he visited him at least once a week after that and asked Church members to stay close to him and to provide emotional support.

Post-dismissal

[50] Mr Meulenbroek tried hard to find employment but found this really difficult. He felt under enormous pressure as he was the sole income earner in the household. Being unwell due to stress he received a sickness benefit for a brief period in November 2012 and thereafter received the unemployment benefit in January and February 2013. Mrs Meulenbroek said that it was as if her husband had lost purpose in life and she had to constantly try to come up with ways to keep him motivated. He felt humiliated at having to go to Work and Income. She went with him and could see his face going pale when he was there. Financially the couple found things extremely difficult. The Church helped out with food vouchers and friends brought food. Both Mr Meulenbroek and his wife found this humiliating. Mr Hamlin, who visited Mr Meulenbroek frequently following the events of 7 September 2012 said that he could tell that Mr Meulenbroek found it degrading having to rely on a benefit and handouts.

[51] Mr Meulenbroek was offered a full time job with a company in Greymouth as a Sky installer but declined. The pay was less than that earned at Vision and the relocation costs were almost $3,000. A move would also mean that Mr Meulenbroek would be away from his family, friends and Church. Mr Meulenbroek did manage to find part time casual work in Invercargill until January 2013 when he started a full time job as a technician for a company which installed home theatre systems. Unfortunately that company closed at the end of 2013 and Mr Meulenbroek was made redundant. In April 2014 he found full time employment with DX Mail as a postie.

THE DEFENDANT'S EVIDENCE

[52] Because the narrative of events is largely uncontested, we do not intend revisiting that narrative in the context of outlining the case presented by Vision. Instead we will endeavour to describe Vision's perspective of the issues.

Vision and its relationship with Sky

[53] Vision was established in 1994 to coincide with the arrival of Sky television into the Dunedin market and Sky remains the company's largest source of income. In 2011 and 2012 the proportion of Sky sales to total sales was 67%.

[54] Vision's competitor for Sky work is Otago Aerial Specialists Ltd. In 2012 the work was divided by Sky on the basis of 65% to Vision and 35% to Otago Aerial Specialists.

[55] Because Vision works hard at retaining Sky work Mr Stapley said that Vision goes out of its way to comply with Sky requirements, whether contractual or informal. He summarised this approach in the phrase "We say Yes to Sky and do things their way". This has proved a successful formula and has led to Vision going from the smallest installation company to the second largest, moving into both Otago and Canterbury.

[56] Annual contract negotiations with Sky were described as tough, with Sky keeping a close watch on Vision meeting key performance indicators (KPIs).

[57] From its Dunedin office Vision controls its team of technicians throughout Otago and Southland. They maintain a combination of employed staff alongside contractors. Overall, manpower levels are balanced so that Sky is provided with acceptable work volumes during the busiest times while keeping everyone busy enough in the quiet times to remain economically viable. When busy, Vision will allocate in excess of 100 jobs per day out of the Dunedin office and when quiet, less than 60. Busy and quiet periods can last for weeks or months on end.

[58] The region is divided into geographical areas for service called locators which are allocated days of service. Some receive service every day, some once a week and Vision attempts to mesh all areas together for maximum efficiency and minimum travel for the technicians.

[59] In 2012 there were two contractors and one commercial technician in Gore; two staff and three contractors in Invercargill; five contractors and one technical staff (assigned to Sky) in Dunedin; six contractors and two technicians in Christchurch; one contractor in Ashburton; one staff in Wanaka and one contractor in Alexandra.

[60] Each job has a "points value" determined by the expected timeframe of the specific job. Faults receive the lowest number of points while installation receive the highest. To pre-plan its workload, Vision liaises with Sky and allocates manpower to locators and days with an indication of the amount of work (or points) which can be done on those days. The customer service representatives employed by Sky then book work into the manpower and points framework provided by Vision. Any requested changes to Vision's manpower levels are dependent on factors such as whether work has already been booked in a particular location to the level of points previously indicated by Vision. Changes require the advance approval from Sky and it involves a lot of planning and adjusting within their system. Sky does not appreciate having to make changes without good reason and will reject changes if the workload is high or pre-bookings do not allow.

[61] Vision sets its points to allow a small buffer to accommodate illness, breakdowns and the like. When such incidents arise the remaining technicians carry the additional work which would otherwise have been carried by the technician who is no longer available. Mr Stapley said that the system works well if Vision is down a man for a day or two but longer term leave requests must be submitted in writing and cover is planned accordingly. Contractors will usually take their leave when workloads are down and incoming work can be covered with the remaining workforce. It is also possible to move a technician in from another region that is quiet. Sky's permission and planning is required for this to be done. In extreme situations Vision can ask to have its points reduced but this is dependent on the level of pre-booked work. Booked work must be done.

[62] Each afternoon between 2pm and 3pm Vision receives from Sky the work allocation for the following day. This is the first time Vision knows exactly what work it has on hand for the following day. Work allocation to available technicians appears on their mobile devices around 4pm. Work that cannot be completed on a scheduled day must be rescheduled through Sky with an explanation as to why it cannot be completed. This adds to administration for both Vision as well as Sky and can become cumbersome. Vision prefers to avoid rescheduling work if at all possible. It is important to Vision that work is only returned in an extreme situation as incomplete work returned more than a few times a year will be discussed at contract negotiation time and can be instrumental in having Vision's annual allocation of work reduced.

[63] This means that as Vision currently has 65% of the available work in its area of operation, if it returns ten jobs it will only get 65% back from the pool.

[64] Saturday is an important day for Sky installations. Sky programming is dominated by professional sport programmes which occupy the Friday evening and Saturday television timeslots. This is the busiest time for installations and service work. For the last twenty years Vision has made it clear to all persons employed by it or taken on as a contractor that Saturday work is required. On the other hand, Sundays are quiet with no

installation work booked because there is no administration or Health and Safety support in place. Vision has no difficulty getting Sunday work done.

[65] Produced in evidence was a letter dated 28 March 2014 from Sky in which the following points are made. First, the commercial reality of Sky's business requires Sky to ensure that its customers are serviced to a high standard. Sky, in turn, holds its contractors to a very high standard. Sky does not hesitate to pass the work on to another contracting business that can provide those services. Second, in general the start of any week tends to be quieter with the most busy period being towards the end of the week, peaking on a Saturday. In other words, Fridays and Saturdays tend to fill with work more quickly than any other day of the week. Third, while Sky acknowledges that work can fluctuate and notification of work may often not leave a lot of time for contracting companies to ensure sufficient cover, ultimately that is the contractor's responsibility. Vision's performance in this area is a KPI for its contract with Sky. Failure to meet this KPI could result in a reduction of contract percentage allocation.

Mr Meulenbroek's request to end Saturday work

[66] Mr Stapley acknowledged that Mr Meulenbroek was "a fantastic worker and a significant loss to us" but in his evidence complained that his (Mr Stapley's) "greatest frustration" was that Mr Meulenbroek "would not listen to our point of view on this particular subject" and did not take on board "the difficult position his request placed Vision in". If Mr Stapley tried to speak to him about it, Mr Meulenbroek would become "agitated and upset within a minute or two of listening to our viewpoint. He would interrupt, raise his voice and reject our opinion". Mr Stapley was personally saddened to come to the decision to dismiss Mr Meulenbroek as he was a valuable member of the team, was the face of Vision in Invercargill for many years and customers and contractors all liked working with him. However, his inability to work Saturdays became unworkable because of "the destabilising effect of that inability".

[67] Mr Stapley agreed that at the meeting in October 2011 at Dunedin Mr Meulenbroek told him that he (Mr Meulenbroek) had gone back to the Church and requested that he not be required to work Saturdays, Mr Stapley believes he told Mr Meulenbroek that it was not a request that could be accommodated but he (Mr Stapley) would get back to Mr Meulenbroek after consulting with the senior management team.

[68] Mr Stapley points to the email correspondence from November 2011 to support his contention that from the outset Vision did not agree to roster Mr Meulenbroek out of Saturday work. Rather, the arrangement was that he would be rostered out of regular Saturday work as a test to see if the arrangement could be made permanent. However, the employment contract stipulated an obligation to work Saturdays and Mr Meulenbroek had to make himself available on Saturdays when called upon.

[69] Mr Stapley said that he was of the view that Vision did everything it could to accommodate Mr Meulenbroek's need not to work Saturdays. The measures taken were:

> **[69.1]** The making of a permanent reduction to the Saturday points in Invercargill. This reduction was small enough that Vision hoped there would be no repercussions from Sky at the next contract negotiation. It was also arranged that the Saturday workload on the remaining technicians would be slightly increased.

[69.2] The institution of a trial period to run throughout 2012 during which Mr Meulenbroek would be required to work on Saturdays only if an urgent situation arose.

Failure of the accommodation efforts

[70] Mr Stapley said that Vision was prepared to accommodate Mr Meulenbroek's "no Saturday work" request to the "large extent" it did because Mr Meulenbroek had undertaken verbally and in writing to be available for Saturday work if Vision was desperate.

[71] However, each time Vision requested his support through 2012 Mr Meulenbroek refused to work. While Mr Stapley believed there were unrecorded occasions between March and June 2012 when Saturday work was requested and refused, he accepted that there were in effect only three such occasions:

[71.1] Friday 16 March 2012 when Mr Meulenbroek was required to assist on a job at Nightcaps.

[71.2] Saturday 16 June 2012. The events have been set out above.

[71.3] Saturday 1 September 2012 with an alternate option of working on Saturday 8 September 2012. Again, the relevant email correspondence has been set out above.

[72] In cross-examination Mr Stapley conceded that the alleged refusal to work on Friday 16 March 2012 was a mistaken reading of the facts. It is clear from the documentary evidence that the alleged event took place not on Friday 16 March 2012 but Thursday 15 March 2012. In the result on only two occasions did Mr Meulenbroek refuse to work on a Saturday, being Saturday 16 June 2012 and Saturday 1 September 2012 with an alternative of Saturday 8 September 2012.

[73] In relation to the request to work either Saturday 1 or Saturday 8 September 2012 the consequence was that Vision was unable to complete work Sky had allocated for that day. Vision had no choice but to contact Sky and advise them of the situation. The work went to the opposition company (Otago Aerial Specialists Ltd).

[74] Mr Stapley spoke at length about the challenges faced on Saturdays. Not only was it usually a busy day, it was also a family day for most staff and contractors. They will not find out until late on the preceding Friday whether they are required to work on Saturday so no plans can be made in advance unless it is a Saturday they are rostered off work. Vision will always load as much Saturday work as possible onto contractors to give employed staff the time off requested but eventually, everyone requests a break.

[75] If on only a few occasions in a year Vision asks Sky to reduce workload, Sky are accepting and willing to help. If this happens more often, Sky is not happy, particularly when there is customer demand during "live sport" screening time. The number of these requests as well as the number of days Vision is not able to complete all its assigned work are always reported back in a negative way during contract negotiations. This can and does have an effect on the negotiated price or overall allocated work volumes.

[76] Mr Stapley further added, however, that in general Vision's workload had decreased, partly through market saturation. This had created opportunity for contractors to request leave or time off. At the same time (ie during 2012) Sky had

rolled over Vision's work allocation, meaning no change to the contract terms through the period in question leading up to Mr Meulenbroek's dismissal.

[77] With regard to the requests for time off, Mr Stapley said that Vision had been fortunate during the early part of 2012 in that there had been no significant incidents which had left the company a man down and requiring help from Mr Meulenbroek. As the company moved into May and June the work level eased somewhat, allowing contractors time to take a break and to get rest. Vision's approach is to authorise leave when it believes the company can cope with the workload with the remaining manpower. However, if anything changes the company can find itself in trouble and in need of assistance from all available hands. Such incidents could be vehicle breakdowns, accident, illness or even a storm damaging dish installations.

[78] The entire team, both installation staff and support staff together with contractors were initially happy to support Vision in its plan not to require Mr Meulenbroek to work regularly on Saturdays. However, when they started missing out on leave requests or having to work extra Saturdays to cover his refusals to support the team, grumbles began. Even staff working in other regions and not directly affected by Mr Meulenbroek's refusals were beginning to question why they were required to work most Saturdays when Mark "was not even prepared to help" on occasion. Mr Stapley said that Vision works as a team and no one liked to work on a Saturday. To have one person allowed to work outside the team environment was beginning to destabilise and frustrate the entire team.

[79] The following three cumulative factors began to weigh on the minds of Mr Stapley and his co-director:

[79.1] The effect on Vision's reputation with Sky.

[79.2] Loss of work to a competitor.

[79.3] The effect on the morale and team work on the installation team.

[80] Expanding on the question of morale Mr Stapley said that because no one wished to work Saturdays each person had to share the burden. This included Mr Meulenbroek who had to be the "backstop" and available to help when all else failed. He had to play his part. While initially other staff and technicians supported Mr Meulenbroek, as the months went by they were getting ground down and a bit annoyed that they couldn't get as many Saturdays off as Mr Meulenbroek. When Vision pushed the technicians stationed at Gore to cover Invercargill they were not only reluctant to cover someone else's turf on a Saturday, they were even more reluctant to cover for someone "who was not doing his share". This was a general view shared by staff and contractors. People began to realise that even if they had a problem, Mr Meulenbroek would not help out. Mr Stapley referred to Mr Meulenbroek as "dropping us into it". Asked if this attitude was conveyed by him to staff and contractors, Mr Stapley said that he had not intended to.

[81] Mr Stapley said that all he was asking Mr Meulenbroek to do was to help out as agreed. He was expected to pull his weight and when he failed to do so in relation to the June request Mr Stapley sent his email dated 29 August 2012 advising Mr Meulenbroek that he would need to work the following Saturday unless he had an acceptable reason "such as a pre-organised commitment". Mr Stapley said that he was "upping the pressure to find out what [Mr Meulenbroek] saw as an urgent enough situation to help out Vision as agreed".

[82] On the morale point, Vision called Mr Nathan Cumberland who is employed by Vision in Invercargill as a technician. He worked alongside Mr Meulenbroek for between one and one and a half years. While Mr Cumberland acknowledged that when he was offered the position it was emphasised that work on Saturdays was a requirement, the commitment to work on Saturdays was never pleasant as he had family commitments. Because Mr Meulenbroek was removed from Saturday work Mr Cumberland ended up having to work extra Saturdays to cover. It became harder for Mr Cumberland to arrange Saturdays away. He said it became "really annoying" and he found it hard to not get resentful of Mr Meulenbroek because he (Mr Cumberland) was missing out on family functions and hunting trips. Mr Cumberland expressed his resentment to Vision management. He said:

> I don't know about particular arrangements made with [Mr Meulenbroek] as it was not my business but I do know that on several occasions from January 2012 onwards that we got desperate for cover and [Mr Meulenbroek] was asked to help and wouldn't.

[83] Mr Cumberland did not accept Mr Meulenbroek's evidence that other workers did not mind and could continue to accommodate him. Those co-workers expressed some concern to Mr Cumberland over not being able to get short notice leave because Mr Meulenbroek was not available and they felt "bad" for Mr Cumberland working all the time as it was not "a fair way to do things".

[84] Mr Cumberland said that he was not a religious man but understood what it means to some people who are. However, he believes that personal thoughts or beliefs should not get in the way of one's work, especially if it is at the expense of other people's free time and beliefs. He believes spending time with his family and friends is as important to him as other people's beliefs in their deity.

[85] The evidence of Mr Corbett, Operations Manager for Vision, was that Saturday work is **first** given to contractors and staff are used last for the leftover scheduled work. He further said that it was only in the last three years that Vision had been able to alternate staff Saturdays off. Prior to this it was expected by Sky that all installation technicians were available every weekend. While none of the team like working on Saturdays it is stressed to prospective staff at the first interview that Saturday work is a fixed requirement. He also said that the request made by Mr Meulenbroek to be rostered off work each and every Saturday was one of the most difficult requests to be made by a technician. During the trial period from January to July 2012 accommodating Mr Meulenbroek meant that there was no buffer in the roster should anything go wrong. He added that loading up the others with additional work was not good for team morale and matters reached a point where the trial arrangement was becoming unsustainable.

The dismissal

[86] Mr Stapley accepts that the day became extremely unpleasant for all concerned. Had he known events would unfold as they did he would never have gone to Mr Meulenbroek's home. He accepts that after he told Mr Meulenbroek of the dismissal decision Mr Meulenbroek became upset, very agitated and asked him to leave the house. When Mr Stapley asked if he could take the stock and equipment Mr Meulenbroek asked him to leave it until Monday. In hindsight Mr Stapley wishes he had done so. Mr Stapley claims, however, that because Mrs Meulenbroek suggested to her husband that he let Mr Stapley take the items there are then, that Mr Meulenbroek agreed. Although Mr Meulenbroek helped Mr Stapley and Mr Corbett load the van he was very angry. The situation was tense and they (Mr Stapley and Mr Corbett) worked quickly. When they were nearly finished another man approached to say that they were

trespassing and were to leave the property. Mr Stapley replied that Mr Meulenbroek had invited them but at about this point the Police arrived. After discussing the situation with them it was agreed that the van and equipment would be picked up the following Monday.

Other evidence

[87] While it is not practical to provide a comprehensive summary of all of the evidence called by the parties it should be mentioned that Vision called as a witness an employee (Mr Peter Royal) who is an adherent of Gaudiya Vaishnavism. He told the Tribunal that he has never felt discriminated against by Vision because of his religion and has been allowed an extended period of leave (five to six consecutive weeks) to attend a pilgrimage in India. He has also been given leave at short notice on two occasions to allow him to attend retreats in New Zealand. At staff functions Vision has pre-arranged food consistent with Mr Royal's special diet. Mr Royal's religious beliefs do not, however, require the observance of the Sabbath or any other days of rest.

Legal submissions for Vision

[88] The essential submissions for Vision are:

> **[88.1]** Mr Meulenbroek has not established to the civil standard that he was discriminated against by reason of his religious belief. While it is conceded that his observance of the Sabbath was a factor, it was not causative of the dismissal. The trigger was Mr Meulenbroek's refusal to honour an arrangement Vision believed was in place, namely the provision of back up on a relatively few number of Saturdays each year (between two to six occasions, more likely four). Mr Meulenbroek's inability to work on the Sabbath was not "the" material ingredient in the decision to terminate Mr Meulenbroek's employment.
>
> **[88.2]** The decision to terminate stemmed from "a desperate need" to ensure sufficient cover on Saturdays to meet contractual obligations. Mr Meulenbroek's employment was terminated not because of his religious belief but due to his inability to work on a critical day of the week which was essential and necessary for business efficacy.
>
> **[88.3]** The appropriate comparator person is one employed by Vision to do the same work as Mr Meulenbroek but who is not of Mr Meulenbroek's religious belief, but who also refused to work Saturdays.
>
> **[88.4]** In any event Vision has proved on the balance of probabilities that it did all it reasonably could to accommodate Mr Meulenbroek's religious beliefs. The ultimate decision to dismiss was made because Vision genuinely believed that Mr Meulenbroek's inability to work on a Saturday was causing unreasonable disruption to Vision's business.
>
> **[88.5]** Mr Meulenbroek failed to facilitate Vision's accommodation. While it is accepted by Vision that Mr Meulenbroek's growing faith ultimately precluded his fulfilment of his promise, Mr Meulenbroek could have discussed other ideas that might have assisted Vision to accommodate him further. This did not occur.
>
> **[88.6]** Vision has proved to the civil standard that matters reached the point of "unreasonable disruption" to its business activities.

[89] Before addressing the legal issues it is necessary that we first make an assessment of the witnesses.

ASSESSMENT OF WITNESSES

[90] The two main witnesses were Mr Meulenbroek and Mr Stapley. While to a substantial degree their evidence converged, some differences remained. We are accordingly required to record our assessment of the two men as witnesses. In relation to the other witnesses there are no credibility issues.

[91] Mr Meulenbroek impressed as a careful, conscientious and diffident individual without pretention or ambition. His humility was patent, readily conceding in cross-examination points which others may have contested. We accept without reservation that he was a careful and honest witness.

[92] Mr Stapley was rightly proud of the fact that together with his co-director he has built Vision into a successful company which has survived where similar installation firms have failed. Vision has gone from the smallest installation company to the second largest in Canterbury, Otago and Southland. It has done so by going out of its way to comply with Sky requirements. Mention has been made of the evidence given by Mr Stapley that "We say Yes to Sky and do things their way". Because Sky has for a number of years been Vision's largest source of income, the annual contract negotiations are a constant spectre and it is clear that meeting Sky's performance standards is Mr Stapley's daily preoccupation. These organisational and business imperatives coloured Mr Stapley's evidence and indeed his entire approach to Mr Meulenbroek's refusal to work Saturdays. That is, Mr Stapley perceived events through the single prism of business efficacy and the need to say "Yes" to Sky. While he was in essence an honest witness his lack of objectivity coloured not only how he dealt with Mr Meulenbroek's request for no work on the Sabbath, it affected also his evidence to the Tribunal. This tunnel vision or lack of objectivity means that when the evidence of Mr Meulenbroek and Mr Stapley is in conflict, we prefer the evidence of Mr Meulenbroek. It also means that in relation to the question whether, in accommodating Mr Meulenbroek's observance of the Sabbath, Vision's activities were unreasonably disrupted, we are sceptical of Mr Stapley's claims.

[93] In the present context we focus on two assertions made by Mr Stapley:

> **[93.1]** That Mr Meulenbroek was ambivalent whether in 2012 he would work Saturdays.
>
> **[93.2]** That Mr Meulenbroek was contractually bound to work every Saturday and that his refusal to work Saturdays when called upon to do so was a breach of the trial run arrangement and ultimately, of the employment contract itself.

[94] On the question of ambivalence, Mr Stapley's interpretation of events is one dimensional. Mr Meulenbroek's version of events is supported by the fact that in his email of 19 November 2011 he refers to the agreement. When in October 2011 Mr Meulenbroek told Mr Stapley that he had returned to the Church, was unable to work Saturdays and might need to find another job, we find that Mr Stapley replied that there was no need for that step to be taken and he would talk to "the team" about it. A short time later Mr Stapley telephoned to advise Mr Meulenbroek that he could have Saturdays off because he was a good worker.

[95] It was only later, by email dated 17 November 2011 that Mr Stapley introduced for the first time that rostering Mr Meulenbroek out of Saturday work was a trial only, not a permanent arrangement. In our view this rider was an afterthought to the verbal agreement that Mr Meulenbroek have Saturdays off. It is also noteworthy that in his email of 17 November 2011 Mr Stapley treated the issue as an employment matter, referring to the employment agreement. He showed no understanding of the fact that Vision was dealing with a right of first importance, a right which Vision had a duty to accommodate unless it would unreasonably disrupt its activities.

[96] Mr Meulenbroek's immediate response of 19 November 2011 was to refer to the verbal agreement that there would be no more Saturday work from 1 January 2012. He reiterated, in unequivocal terms, that he placed God first in his life and would be unavailable to work **any** Saturday "including urgent situations". Mr Meulenbroek could not have been more clear as to his position. It is to be noted again that his reference to the verbal agreement of no Saturday work is a virtually contemporaneous record which confirms his oral account of the agreement.

[97] It was only when Mr Stapley by email dated 21 November 2011 introduced a very different tone to the discussion by referring to the fact that he would be taking legal advice and that Mr Meulenbroek's refusal to work Saturdays had changed the situation "significantly" that Mr Meulenbroek replied on 23 November 2011 in non-confrontational terms. It is correct that he said that he was not refusing to work Saturdays in 2012 but it was plain that his concern was to avoid jeopardising his current employment. Bearing in mind that Mr Stapley is a confident, energised and outgoing individual it is obvious that the retiring and self-effacing Mr Meulenbroek would wish to avoid a confrontation. While his email of 23 November 2011 is certainly ambiguous (agreeing to work in 2012 but simultaneously pressing the request for no rostering from sunset Friday to sunset Saturday), it would have been clear to the objective observer that Mr Meulenbroek was caught between serving God and keeping his job. This is precisely the dilemma which ss 22 and 28(3) endeavour to avoid. It is the reason why the employer has a duty to accommodate the practice unless it can be shown that the employer's activities would be unreasonably disrupted. Mr Stapley's ignorance of this obligation led him to believe that in his email dated 23 November 2011 Mr Meulenbroek had entered into a binding agreement to work Saturdays as required.

[98] There was no doubt that Mr Meulenbroek's return to his faith was genuine. Not only did Mr Stapley not challenge Mr Meulenbroek, he had Mr Kulakov's letter of 28 November 2011 attesting to Mr Meulenbroek's recent re-committal to his spiritual values. That Mr Meulenbroek put his faith ahead of his job was reinforced by his email of 10 December 2011 in which, while stating that he was willing to accept Mr Stapley's terms "to reach a point of compromise to see how it will work out for the future", Mr Meulenbroek simultaneously insisted that he could not operate on a part-time basis with God and if required to work Saturdays he would have no choice but to find other opportunities.

[99] In our view Mr Meulenbroek was at this early stage (2011) doing his best to avoid confronting Mr Stapley with the fact that his (Mr Meulenbroek's) faith was becoming central to his life and that ultimately, the demands of his faith would override everything else. Mr Stapley saw everything in terms of the employment contract and the existence of the so-called interim arrangement to which Mr Meulenbroek had agreed. He never shifted from this narrow perspective and became confrontational over the issue:

[99.1] When Mr Meulenbroek was later asked in June 2012 to work, he sent an email to Mr Stapley on 1 June 2012 stating unequivocally that he would not work on Saturdays, emphasising that it was not a matter of convenience but of special importance. Mr Stapley's response was aggressive, sending an email dated 13 June 2012 assigning Mr Meulenbroek work on Saturday 16 June 2012. He ignored Mr Meulenbroek's email of 1 June 2012 and instead went back to the email sent by Mr Meulenbroek seven months earlier on 23 November 2011. Again Mr Stapley showed no consciousness of Vision's obligations under the Human Rights Act.

[99.2] When Mr Meulenbroek again categorically refused to work on 16 June 2012 Mr Stapley made reference to the possibility of summary dismissal for serious misconduct and gave Mr Meulenbroek an opportunity "to explain his actions", commenting that his explanations up to that point did not "override your obligations to us as your employer as stated in our Employment Agreement". It was asserted that the company had done everything it could to minimise the impact of the requirement for Saturday work.

[99.3] Mr Meulenbroek's reply dated 20 June 2012 could leave the reader in no doubt that Mr Meulenbroek refused to work on the Sabbath. Mr Stapley, responded as if the circumstance were a dispute over the employment contract and warned Mr Meulenbroek that disciplinary action was likely.

[99.4] Mr Kulakov sent a further letter explaining that because of his beliefs in God and the *Bible*, Mr Meulenbroek had dedicated the Sabbath as a special day between him and God.

[99.5] Vision's response was to ask Mr Meulenbroek to work on a Saturday in September 2012 and Mr Meulenbroek would only be excused if he could show "an acceptable reason such as a pre-organised commitment". In other words, Mr Meulenbroek's faith, as attested to not only by Mr Meulenbroek but also by Mr Kulakov, was not an "acceptable reason".

[99.6] When Mr Meulenbroek refused to work as directed he was dismissed on 7 September 2012.

[100] What is extraordinary about this narrative is that Mr Stapley kept holding Mr Meulenbroek to the supposed "agreement" to which Mr Meulenbroek gave his "acceptance" in the emails dated 23 November 2011 and 10 December 2011. He ignored the oral agreement of October 2011 and Mr Meulenbroek's unequivocal email dated 19 November 2011 which, after referring to that agreement, told Mr Stapley that he (Mr Meulenbroek) would be unavailable to work any Saturday. This is the same unequivocal message given by Mr Meulenbroek in his emails of 1 June 2012, 13 June 2012 and 20 June 2012. Against this background the demand that Mr Meulenbroek work on Saturday 1 or Saturday 8 September 2012 was provocative as Mr Stapley knew that Mr Meulenbroek would once again refuse. This came over clearly during Mr Stapley's evidence when he said:

> I was upping the pressure to find out what he saw as an urgent enough situation to help out as agreed.

[101] Our conclusion on the facts is that Vision chose to see the unfolding events through the lens of the employment contract. It acted in complete ignorance of its obligations under the Human Rights Act. The claim that the dismissal was based on a breach of the employment contract is accordingly a hollow one, particularly when on

Vision's own account Mr Meulenbroek was required to work on only between two and six Saturdays a year. We accept there was no malice. Vision, like many employers, was focussed on running its business and making a profit. But it clearly had no real appreciation of its obligations under the Human Rights Act and of the need to take informed advice.

[102] We address now the legal issues.

THE LEGAL ISSUES

The importance of the right to freedom of religion

[103] In *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 (24 February 2014) at [53] to [57] the Tribunal emphasised the importance of the right to freedom of religion, including the right to manifest one's religion or belief in worship, observance, practice and teaching. This right is enunciated in Article 18 of the International Covenant on Civil and Political Rights, 1966:

> ***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.

[104] The right to freedom of religion has been described as "far-reaching and profound". See the UN Human Rights Committee in *General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion)* (1993). As pointed out by the Human Rights Committee in this *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.

[105] In *Nakarawa* reference was also made to the special status of the right to freedom of thought, conscience and religion, it being one of the few non-derogable rights specified by Article 4(2) of the Covenant. The decision added at [54] that:

> 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.

[106] Implementation of New Zealand's treaty obligations under the International Covenant on Civil and Political Rights is achieved not only by s 13 of the New Zealand Bill of Rights Act 1990 (freedom of religion) but also by s 15 (freedom to manifest religion and belief):

> **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.

[107] These rights are further reinforced by the non-discrimination provisions of the Human Rights Act, the Long Title of which recites that it is an Act which has among its purposes the provision of better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights. Section 21 specifically identifies religious belief as a prohibited ground of discrimination. Section 22(1)(c), in turn, stipulates that it is unlawful for an employer to terminate the employment of an employee by reason of the employee's religious beliefs (in circumstances in which the employment of other employees employed on work of that description would not be terminated):

> **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.

[108] 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.

[109] 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.

[110] These provisions were considered in *Nakarawa*, the facts of which closely resemble those in the present case. The correctness of *Nakarawa* was not challenged before us by the Director or by Vision although Vision submitted that the decision was distinguishable on the facts.

APPLICATION OF THE LAW TO THE FACTS

Two primary legal issues

[111] At the centre of this case lie two issues:

> **[111.1]** Whether Mr Meulenbroek has established, on the balance of probabilities, that his employment with Vision was terminated by reason of his religious beliefs in circumstances in which the employment of other employees employed on work of the same description would not have been terminated; and if so
>
> **[111.2]** Whether Vision has established, on the balance of probabilities, that it accommodated the practice of observing the Sabbath until the adjustment of its activities to accommodate that practice unreasonably disrupted those activities.

Issue 1 – whether Mr Meulenbroek's employment was terminated by reason of his religious beliefs

[112] Mr Meulenbroek was, by all accounts, a model employee who until he re-engaged with his faith, had worked most Saturdays between December 2004 and July 2009. From August 2009 he had been rostered to work approximately every second Saturday. Had he not in June 2011 re-joined the Seventh Day Adventist Church in Invercargill there is no doubt that he would have worked every Saturday on which he was called upon to do so by Vision. The only reason he was dismissed was because his rediscovered faith prevented him from working on the Sabbath. In these circumstances Mr Meulenbroek submitted it is established, on the balance of probabilities that his employment was terminated because his religious beliefs disabled him from working on Saturdays as contracted.

[113] In closing submissions it was conceded by Vision that Mr Meulenbroek' religious practice was a factor in the dismissal, but the argument was that the practice was not causative of the dismissal. It was said that the trigger was Mr Meulenbroek's refusal to honour the agreement that he would provide back-up on a relatively few number of Saturdays each year (between two to six Saturdays, more likely four). It was submitted this refusal was a challenge for Vision which felt it had lived up to its side of the bargain to not roster Mr Meulenbroek on Saturdays as a trial.

[114] It was therefore submitted that the inability of Mr Meulenbroek to work on the Sabbath was not "**the**" material ingredient in the decision to terminate his employment. Rather the decision to terminate stemmed from a need to ensure sufficient cover on Saturdays to meet Vision's contractual obligations. Mr Meulenbroek's employment was terminated not by reason of his religious beliefs, but by reason of his inability to work on a critical day of the week which was essential and necessary for business efficacy. Reliance was placed on the statement in *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537 at [80] that if a number of reasons or causes trigger allegedly discriminatory conduct, the prohibited ground of discrimination must be a substantive and operative factor for that conduct. That decision, in turn, relied on *Human Rights Commission v Eric Sides Motors Company Ltd* (1981) 2 NZAR 447 at 456-457.

Causation

[115] As mentioned, Mr Meulenbroek has the responsibility of establishing, on the balance of probabilities, that in the circumstances described in s 22(1)(c) 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 Meulenbroek 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. In so holding His Honour rejected the *Eric Sides Motors* interpretation ("a substantial and operative factor") because such formulation is capable of being read as requiring too strong a link between the outcome and the prohibited ground. He pointed out that the policy of the legislation is that a prohibited ground of discrimination should play "no part" in the way people are treated.

[116] It follows that the submission by Vision that refusal to work on the Sabbath must be "the" material ingredient in the decision to terminate is unsupported by authority and wrong in principle as requiring too strong a link between the dismissal and the prohibited ground of discrimination.

[117] The more stringent test would also be inconsistent with the purpose of the Human Rights Act (better protection of human rights) and with the fact that the materiality test has been adopted in related contexts. See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109] and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [53] to [64].

[118] In our view the facts are clear and find that Mr Meulenbroek has established to the civil standard that his religious practice was a material factor in his dismissal.

[119] We accordingly conclude that causation has been established on the balance of probabilities.

[120] We turn now to the issue of the comparator group.

The comparator group

[121] Section 22(1)(c) requires a plaintiff to establish that the termination of employment occurred in circumstances in which the employment of other employees employed on work of the same description would not be terminated.

[122] In *Nakarawa* at [65] it was held on the facts that the most natural and appropriate comparator for s 22(1)(c) was a person (or persons) in exactly the same circumstances as the aggrieved person but without the feature of holding a religious belief which required observance of the Sabbath. Citing Tipping J in *Air New Zealand Ltd v McAlister*

at [51] and [52] the Tribunal defined 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.

[123] For Vision it was submitted that the facts in *Nakarawa* are distinguishable in that the decision there to dismiss was immediate and as a direct result of AFFCO being informed of Mr Nakarawa's belief that the Sabbath was to be observed. In the present case, it was claimed, Vision sought alternatives during a trial period of about six to eight months. It was conceded by Vision that a narrower comparator in *Nakarawa* would have led to a result that conflicted with the purpose of the protections afforded by the Human Rights Act.

[124] Because of the claimed distinction between the present case and *Nakarawa*, it was submitted that the comparator used in *Nakarawa* would be too wide if applied to the present facts and would create an invasive result. It was submitted that to achieve "justice and balance" for both parties the comparator should be a person employed by Vision to do the same work as Mr Meulenbroek, who was not of a religious belief but who refused to work Saturdays.

[125] The issue is whether the comparator group is persons not of a religious belief requiring observance of the Sabbath or those who, in addition to not having such religious belief, also refuse to work Saturdays.

[126] In our view the latter formulation (advanced by Vision) is too narrow and will render illusory the protection of s 22(1)(c) of the HRA. As explained by Elias CJ for the majority in *Air New Zealand Ltd v McAlister* at [34] the task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue and a comparator will not be appropriate if it effectively deprives part of the statutory scheme of its operation:

> The task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue, taking full account of all facets of the scheme, including particularly any defences made available to the person against whom discrimination is alleged. A comparator which is appropriate in one setting may produce a completely inapt result in another. It will certainly do so if it effectively deprives part of the statutory scheme of its operation.

See also *Ministry of Health v Atkinson* at [66] to [70].

[127] As stated in *Child Poverty Action Group Inc v Attorney-General* at [51], it is necessary to come back to why it is that a comparison is being undertaken. It is to sort out those distinctions which are made on the basis of a prohibited ground. It is also necessary to compare apples with apples and hence the inquiry focuses on analogous or comparable situations:

> [51] It is also necessary to come back to why it is that a comparison is being undertaken. The need to consider this exercise arises, at least in part, because legislation and policy decisions all involve to a greater or lesser extent differential treatment or the making of distinctions of some sort. What the Court is trying to do by reference to the comparator is to sort out those distinctions which are made on the basis of a prohibited ground. The Court is looking at the reality of the situation not, as Iacobucci J said in *Law v Canada (Minister for Employment and Immigration)* [1999] 1 SCR 497 at [57], "in the abstract". It is necessary also to be comparing apples with apples and hence the inquiry focuses on analogous or comparable situations. The comparator exercise, as has been said on earlier occasions, is simply a tool in that analysis.

[128] In *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [139] to [140] it was said that if the comparator group is to be used to assist in

determining whether there is discrimination, the selection of the comparator group "must be conducive to a determination of the potential impact of the impugned policy without a negation of its relevance":

> [139] We consider that if the comparator group is to be used to assist in determining whether there is discrimination, the selection of the comparator group "must be conducive to a determination of the potential impact of the impugned policy without a negation of its relevance". From the perspective of those with intellectual disabilities who need day services the source of government funding is irrelevant. What is relevant to them is that they are able to participate in government funded day services up until the age of 65 but when they turn 65 they cannot. The only difference in their circumstances is their age. The comparator group selected should be one that enables a determination of whether this difference is on the basis of age or on some other (non-discriminatory) basis.
>
> [140] We therefore consider that the proper comparator group in this case is one where the group differs in their circumstances from the affected group only on the basis of the alleged ground of discrimination (here, age). That enables a comparison to be made of like with like. The question can then be asked whether that different treatment is "on the basis of age or not. For these reasons we consider that IDEA Services' comparator group is appropriate. Apart from age, the characteristics of each group and their circumstances are the same. Those in the comparator group are able to access government funding for day services (through the MSD's vocational services funding). Those that are over 65 years cannot. We consider that the different source of government funding potentially can be considered at the next stage (that is whether the difference is on a prohibited ground) and/or when considering whether the differential treatment is justified. [Footnote citations omitted]

[129] Given these statements of principle we remain of the view that the proper comparator group in this case (as in *Nakarawa*) is one where the group differs in circumstances from the affected person only on the basis of the belief that paid work cannot be undertaken on the Sabbath. This enables a comparison to be made of like with like and best fits the statutory scheme. This is what the Tribunal intended to achieve in *Nakarawa* by defining the comparator group as comprising persons employed to do work of the same kind and who were not of a religious belief that required observance of the Sabbath. The comparator group put forward by Vision negates the relevance of religion and therefore is not conducive to a determination whether religion played a part in the decision to dismiss.

[130] The point is perhaps captured in the following extract from Ahdar and Leigh *Religious Freedom in the Liberal State* (2nd ed, Oxford, 2013) at 116:

> Woljciech Sadurski explains: 'But it would be absurd to claim that "non-religion" (i.e. activities and beliefs irrelevant from the point of view of religious beliefs, and from the point of view of the religion-agnosticism-atheism disputes) must be treated the same as religion'.
>
> The proper comparison can hardly be between someone who refuses available employment to observe the Sabbath and someone who declines work because it is his golfing day; likewise '[a]n improper comparison would be between celebrating the Eucharist and skiing'. One ought to compare apples and apples, that is, 'human activities or organizations that are so similar or parallel in nature that they are functionally equivalent'. As Sadurski scolds, 'you cannot, without running into absurdity, be neutral between *x* and everything that is non-*x*, including those things which are totally irrelevant from the point of view of *x*'. [Footnote citations omitted]

[131] The need to compare like with like was also emphasised in *B v Waitemata District Health Board* [2013] NZHC 1702 at [53] and [54].

Findings on Issue 1

[132] For all these reasons we reject the comparator group advanced by Vision and conclude that Mr Meulenbroek's employment was terminated in circumstances in which

the employment of other employees employed on work of the description required of Mr Meulenbroek but who were not of the religious belief that required observance of the Sabbath would not have been terminated.

[133] It follows that we are satisfied that Mr Meulenbroek has established to the civil standard that his employment was terminated for reason of a prohibited ground of discrimination, being his religious beliefs.

[134] We turn now to the second legal issue, namely whether Vision has established, on the balance of probabilities, that accommodation of Mr Meulenbroek's observance of the Sabbath would have unreasonably disrupted its activities.

Issue 2 – whether Vision has established adjustment of its activities would unreasonably disrupt those activities

[135] 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 ("must") to accommodate that practice 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 Vision. See HRA s 92F(2). This was not disputed by Vision.

[136] In *Nakarawa* at [74] the Tribunal held that 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.

[137] To the foregoing two further points must be added:

[137.1] Vision asserts that its accommodation of Mr Meulenbroek's inability to work on the Sabbath had a detrimental effect on the morale of its employees and contractors. As to this, it is necessary to observe that employee morale is a factor to be applied with caution. Objections based on attitudes inconsistent with human rights are an irrelevant consideration. See *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970 at 988:

> The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration … The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were *ad idem* with their employer.

[137.2] In the same decision the Supreme Court of Canada at 983 observed that its case law has approached the issue of accommodation in a "purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry". We are of the view that the same purposive approach should be taken to s 28(3) of the HRA.

[138] The difficulty faced by Vision in addressing s 28(3) of the HRA is that it had little or no awareness that it had a duty as an employer to accommodate Mr Meulenbroek's inability to work on the Sabbath. From beginning to end the "problem" was viewed from the perspective that as an employer Vision had the right, under the employment contract, to require Mr Meulenbroek to work every Saturday and that rostering him off Saturday work was an indulgence on Vision's part. When Mr Meulenbroek refused to reciprocate this indulgence by working Saturdays when required, the disciplinary process was initiated leading to his dismissal.

[139] Mr Meulenbroek's "unreasonable" refusal to work Saturdays when his help was needed was seen by Vision and the other technicians as letting the team down. It was

unfair that he was resting at home on Saturdays while others were working and missed out on hunting trips and time with their family. In Mr Stapley's words, Mr Meulenbroek was "dropping [Vision and its staff] in it". Notwithstanding that Mr Meulenbroek unequivocally communicated his refusal to work on the Sabbath by emails of 1 June 2012, 13 June 2012 and 20 June 2012, Mr Stapley continued to press and press again. Indeed the demand to work on Saturday 1 or Saturday 8 September 2012 has earlier been characterised by us as provocative. Mr Stapley said in evidence:

> I was upping the pressure to find out what he saw as an urgent enough situation to help out as agreed.

[140] This is not the hallmark of an employer attempting in good faith to discharge the statutory obligation to accommodate Mr Meulenbroek's religious practice. Indeed it is clear that his spiritual need to observe the Sabbath was not seen as relevant. We refer here in particular to Mr Stapley's letter of 15 June 2012 which stated that the refusal to work on Saturdays "without good explanation" constituted a refusal to follow reasonable and lawful instruction and that Mr Meulenbroek's explanations "do not override your obligations to us as your employer". His email of 29 August 2012 opened with the statement:

> Mark, if you have an acceptable reason such as a pre-organised commitment I will consider trying to find a replacement for this Saturday's shift.

[141] Both these communications make it clear that Vision did not accept Mr Meulenbroek's religious practice as "good explanation" or "an acceptable reason" for not working on the Sabbath.

[142] Our conclusion is that there was no serious attempt to accommodate Mr Meulenbroek's religious practice because the importance of that practice was not understood and Vision was ignorant of the fact that it had a duty to accommodate even though disruption would be caused.

[143] It was plain during the giving of evidence by Mr Stapley that he had given no or no meaningful consideration to other forms of accommodation which could have been explored or adopted. Accommodation was not explored with an open mind. We refer by example to Mr Meulenbroek's repeated offer to work every Sunday, thus guaranteeing to Mr Cumberland and contractors every Sunday off. No longer would they have to stay at home all day on call on those Sundays for which they were rostered, receiving insignificant remuneration for such callouts as might eventuate. Mr Stapley was dismissive of the proposal but Mr Cumberland thought the arrangement could work. Another example is the proposition put in cross-examination that Mr Meulenbroek's position could have been shared. Mr Stapley plainly had not previously contemplated the possibility, stating he would have to think about it. He then went on to dismiss it.

[144] It was clear from Mr Stapley's evidence that it was for Mr Meulenbroek, not Vision, to come up with proposals for accommodation. In closing submissions it was even claimed that it was "incumbent on the employee to facilitate implementation". That submission, however, is based on a fundamental misunderstanding of the principle involved and of the case law. The right not to be discriminated against is not a right which operates on some days of the year but not on others. As stated in *Nakarawa* at [74.5], the search for an accommodation must involve the employee and the employee must, to a certain extent, help out with efforts to arrive at an accommodation. This search, however, cannot put at risk the protected interest. The proposal by Mr Meulenbroek that he work on every Sunday is precisely the kind of cooperation envisaged in *Nakarawa*. It would not infringe Mr Meulenbroek's religious beliefs and it

would be of relevant and direct assistance to the employer and the other workers by guaranteeing that they would not have wasted on-call Sundays.

[145] We address now the three reasons given by Mr Stapley for contending that the accommodation of Mr Meulenbroek's religious practice unreasonably disrupted Vision's activities:

> **[145.1]** Detrimental effect on Vision's reputation with Sky.
>
> **[145.2]** Loss of work to a competitor.
>
> **[145.3]** Adverse effect on the morale and team work of the installation staff and contractors.

Detrimental effect on Vision's reputation with Sky

[146] Under the heading "The Defendant's Evidence" we have set out at some length Vision's relationship with Sky. We do not doubt the commercial imperative that Vision take into account the need to perform to the standards agreed to with its largest client. Nor do we doubt the need for Vision to take into account any financial burden that may be involved in accommodating a practice under s 28(3).

[147] However, when asked at the hearing how much work was lost during the trial period, Mr Stapley said that he had not made any calculation. He did not know what work was lost or what the financial loss was to Vision. He said the major concern was the loss of contract percentages. Asked if any percentage had been lost during or as a consequence of the 2012 trial period he answered "No". He also confirmed his written statement of evidence that since 2011 the Sky workload had been steadily reducing. This was because 80% of homes now have Sky and so growth opportunities are limited. Asked if Vision had lost any work allocation in the negotiations with Sky during the period in question, the answer was again "No". Asked in re-examination whether he could provide evidence of a financial loss flowing from the accommodation of Mr Meulenbroek's religious practice, Mr Stapley said that there was an actual loss but he had not thought about it in those terms. He believed that Vision was losing work on Saturdays but did not know what that cost was. In short he could produce no evidence of any financial impact on Vision flowing from the trial or by any consequential reduction in work from Sky. He expressed concern that Sky could conclude that Vision was not meeting the KPIs, but there was no evidence that Vision was not meeting the KPIs. Similarly there was no evidence that Sky had any issues with Vision because Mr Meulenbroek was not (allegedly) pulling his weight.

[148] Where an employer relies on the "unreasonably disrupt" proviso in s 28(3), the employer must establish an evidential foundation for the operation of that proviso. Impressionistic evidence of increased expense or loss of work will generally not suffice. Care must also be taken not to put too low a value on the duty (s 28(3)) to accommodate a practice. See *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 at [60] and [61].

[149] In the present case there is simply no evidence of discernible financial detriment to Vision or any adverse commercial consequence as a result of the nearly nine month trial period conducted in 2012.

Loss of work to a competitor

[150] Mr Stapley's evidence was that on only one occasion during the 2012 trial period was work lost to a competitor. The value of that work he was unable to quantify. It can be inferred that it was insignificant. Our view is that in this respect there was no identifiable disruption.

Adverse effect on morale

[151] The evidence was that staff and contractors were unhappy because they believed Mr Meulenbroek had it easy on Saturdays and that while they were prepared to help him out he refused to help them when they needed a Saturday off. There was, however, no evidence of resignations or threatened resignations.

[152] In his written statement of evidence Mr Stapley referred to the "destabilising effect" of Mr Meulenbroek's inability to work Saturdays. He said that the destabilisation was upsetting the other technicians who had to carry extra work on Saturdays to make up for Mr Meulenbroek's absence. Mr Stapley said that they were needing their breaks as well. He accepted, however, that not every technician worked Saturdays from January to September 2012 (the trial period). He had not prepared a chart showing the difference between what the technicians would have worked if Mr Meulenbroek had worked Saturdays and what they actually worked because of his refusal to work Saturdays. Asked whether he could say with any certainty what difference, if any, there was, he answered "not really".

[153] Asked what efforts were made to assist staff morale, Mr Stapley said that he did not know much about Mr Meulenbroek's religion and just told staff that it was important that Mr Meulenbroek not work on a Saturday. It is to be noted that Mr Stapley did not think of getting Mr Kulakov in to explain to staff the religious reasons behind not working on the Sabbath. Nor did Mr Stapley himself try and upskill so that he could explain the matter sympathetically to staff. Indeed he did not even speak to employees about Mr Meulenbroek's offer to do their Sunday work. This is to be contrasted with Mr Cumberland's evidence that if Mr Meulenbroek did work each Sunday there would be a positive benefit to all technicians.

[154] In our view it is unlikely staff morale would have been an issue had there been better communication by Vision management and a genuine explanation of the importance of Mr Meulenbroek's beliefs. Mr Cumberland said that he had not had any real explanation of why Mr Meulenbroek could not work on Saturdays.

[155] It is our further view staff morale became an issue because the situation was so badly handled. No real attempt was made to help staff and contractors understand the importance of the right to religious belief and the fact that Mr Meulenbroek did indeed hold a "right". The problem lay in the messaging. In our view Vision had an obligation to portray the situation not as a negative development requiring the workforce to carry an additional and unwanted burden but as the exercise by Mr Meulenbroek of a fundamental right possessed by all, a right protected by the HRA in the form of a duty on the employer to accommodate the practice. As Mr Corbett said, staff perceptions were that Mr Meulenbroek had it easy because of his religion. Notwithstanding Mr Stapley's denial, this was the message being sent out (possibly inadvertently) by Vision management, tainting the perception of the other employees. The message was not that he had strong religious beliefs and the right not to work on Saturday, it was that he was the fly in the ointment. The perception that Mr Meulenbroek was "the problem" is illustrated by the demonstrably false assertion (and belief) that the Nightcaps callout

miscarried because it happened on a Friday and Mr Meulenbroek retreated home to be there by nightfall. In actual fact the event occurred on a Thursday and whatever the reason for Mr Meulenbroek not accepting the callout, it had nothing to do with his religion. But Vision, as an unsupportive employer, perpetuated the belief it was due to his religious beliefs.

[156] The morale issue is possibly best summarised by the evidence given by Mr Cumberland. He said that the additional Saturday workload caused him to be resentful of Mr Meulenbroek as he was missing out on family functions and hunting trips with friends. His view was:

> I am not a religious man but I understand what it means to some people who are. I do believe that any personal thoughts or beliefs should not get in the way of your work, especially if it's at the expense of other peoples free time and beliefs.
>
> I believe spending time with my family and friends is as important to me as peoples belief in the deity.

[157] In these circumstances it is necessary to recall the statement (which we adopt) by the Supreme Court of Canada in *Central Okanagan School District No. 23 v Renaud* that objections based on attitudes inconsistent with human rights are an irrelevant consideration. In the case of Vision, it is clear that staff and contractors were, like Mr Cumberland, of the view that religious beliefs should not get in the way of work. But this is precisely the point of s 28(3) of the HRA.

Overall conclusions on Vision's three points

[158] While Vision's evidence attempted to portray a "parade of horribles" which would be visited upon it should it be required to accommodate Mr Meulenbroek's refusal to work on the Sabbath, on its own admission the number of occasions on which Mr Meulenbroek's services on a Saturday were required in 2012 were between two to six. Given that there are 52 Saturdays in each year, it is difficult to see how under-manning on two to six Saturdays per annum could lead to unreasonable disruption of Vision's activities. Indeed, the complete absence of data relating to the economic impact of compliance with s 28(3) underlines the fact that something other than unreasonable disruption was behind Mr Meulenbroek's dismissal. In our view the September manpower "crisis" leading to Mr Meulenbroek being required to work on either Saturday 1 September 2012 or Saturday 8 September 2012 has every appearance of artificiality. Mr Meulenbroek's emails of 1 June 2012, 13 June 2012 and 20 June 2012 were unequivocal statements that he would not work on Saturdays. Knowing that there was no ambiguity to Mr Meulenbroek's position, Mr Stapley decided to "up the pressure" to find out what Mr Meulenbroek saw as an urgent enough situation to help out Vision. Given the almost invisible number of Saturdays on which Mr Meulenbroek was required to work under the "trial" arrangement and further given that the company well understood his refusal was an absolute one, his dismissal had nothing to do with the claimed contractual responsibilities of Vision. Furthermore the "grumbles" from the other technicians had by no means reached the claimed "destabilization" stage asserted by Mr Stapley. They were, in any event, irrelevant as they were based on attitudes inconsistent with human rights. We also doubt whether an employer who has been complicit in lowering staff morale can take the "benefit" of such lowering.

Findings on Issue 2

[159] By the widest of margins Vision has failed to establish to the civil standard the "unreasonable disruption" exception in s 28(3).

CONCLUSIONS ON LIABILITY

[160] As we are satisfied that Mr Meulenbroek has established to the civil standard that his employment was terminated for reason of a prohibited ground of discrimination (being his religious beliefs) and as we are further of the view that Vision has failed to establish to the civil standard the "unreasonable disruption" exception allowed by s 28(3), we conclude that the termination of Mr Meulenbroek's employment was unlawful and Vision committed a breach of Part 2 of the HRA.

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

[162] Nor is it necessary to address Mr Meulenbroek's alternative case under s 65 of the HRA based on indirect discrimination.

REMEDY

[163] 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 92I(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.

[164] 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).

[165] 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) …

[166] 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, full submissions were heard on 18 September 2014.

A declaration

[167] 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 Meulenbroek of a formal declaration that Vision breached s 22 of the HRA. Indeed to withhold such declaration would be unfair.

[168] We now address the question of damages.

Damages for pecuniary loss

[169] Mr Meulenbroek seeks damages under s 92M(1)(a) for loss of wages in the sum of $7,896.66 together with Kiwisaver contributions of $231.43, a total of $8,128.09. The period is from 24 September 2012 to 17 February 2013. The amount sought is the balance after deducting other income received during this period, including payments from Work and Income.

[170] For Vision two principal points were made as to the quantum sought for lost wages:

> **[170.1]** Mr Meulenbroek turned down an offer of employment in Greymouth as a Sky installer and therefore failed to mitigate his loss. As to this, it is not at all clear that the employment offer in Greymouth had realistic long term prospects given that the population in Greymouth, we would think, is a quarter of that in Invercargill. In addition, the pay was less and the cost of relocation was almost $3,000. The move would also mean Mr Meulenbroek would be away from his family, friends, Church and the network of support they provided when those who knew him held genuine concerns for his safety. In our view the failure to accept employment in Greymouth does not represent a failure to mitigate loss.
>
> **[170.2]** As Mr Meulenbroek received a sickness benefit for a short period it can be assumed that had he remained employed by Vision he would have been off work for the same period. We do not see any merit to this suggestion. The only reason why Mr Meulenbroek received social welfare assistance was because the circumstances of his dismissal caused a breakdown in his health.

[171] Given these findings we conclude that the pecuniary loss claimed by Mr Meulenbroek has been established and damages of $8,128.09 are to be awarded for loss of wages.

[172] Mr Meulenbroek also seeks an award under s 92M(1)(a) in the sum of $6,929.90 for legal advice in the period leading to his dismissal. Quantum was not disputed by Vision. In our view these damages have been established and are similarly to be awarded in favour of Mr Meulenbroek.

Damages for humiliation, loss of dignity and injury to feelings

[173] Mr Meulenbroek seeks an award of damages of $30,000 under s 92I(3)(c) and 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.

[174] We have found Mr Meulenbroek to be a careful, conscientious and diffident individual without pretence or ambition. He was rightly described by Mr Stapley as a "fantastic worker and a significant loss to [Vision]". But when Mr Meulenbroek did not put the interests of Vision ahead of his own, he received little support:

> **[174.1]** Initially it was agreed with Mr Stapley that he would be rostered off Saturday work so that he could observe the Sabbath.
>
> **[174.2]** This was subsequently changed to a trial period of indefinite duration. Vision treated the issue as an employment issue determined by the terms of the employment contract. It was never seen by Vision as a human rights issue. The practice of observing the Sabbath was never perceived as something Vision was required to accommodate under s 28(3) of the HRA.
>
> **[174.3]** Mr Meulenbroek's response of 19 November 2011 was unequivocal. There had been an agreement that there would be no further Saturday work and he was unavailable to work on the Sabbath.
>
> **[174.4]** But when Mr Stapley on 21 November 2011 introduced a different tone to the discussion Mr Meulenbroek replied in non-confrontational terms as he did not wish to jeopardise his employment. He said he was not refusing Saturday work but pressed his request not to work on the Sabbath. Because Vision put to one side its obligations under the Human Rights Act, Mr Meulenbroek was criticised for being "ambiguous" in his response.
>
> **[174.5]** Six months later, his faith having deepened, Mr Meulenbroek refused to work any Saturday and so informed Vision in his emails of 1 June 2012, 13 June 2012 and 20 June 2012. The subsequent request by Vision that he work on 1 or 8 September 2012 was extraordinary, as was Mr Stapley's explanation that he was "upping the pressure". We have characterised this action as provocative as it was known that Mr Meulenbroek would refuse.
>
> **[174.6]** The circumstances in which the dismissal letter was served on 7 September 2012 were insensitive, to say the least and left Mr Meulenbroek shocked and deeply distressed. His wife was so concerned for his safety that she asked a neighbour (Mr Hamlin) to come and speak to him. Mr Hamlin described finding Mr Meulenbroek walking around his backyard in the dark "like a zombie". In the following days he was "a screwed up mess". Mr Kulakov spoke to Mr Meulenbroek on the evening of 7 September 2012 and described him as "distraught" and "under absolutely enormous" stress. He too was concerned for Mr Meulenbroek's safety and arranged support to be provided by fellow members of the Seventh Day Adventist Church.

[175] The feature of this prolonged and protracted process stretching over some 10 months was Vision's almost complete insensitivity to Mr Meulenbroek's repeated statements about the importance of his faith. His sincere expression of belief was simply put aside as irrelevant. In an understatement, Mr Meulenbroek said that Mr Stapley's persistence made him weary.

[176] Mr Meulenbroek's own words further described his humiliation, loss of dignity and injury to feelings when he spoke of Mr Stapley's emails always challenging him, making him feel as if he might be dismissed at any time. He felt "as if the walls were closing in on him" and felt powerless to do anything. He was not listened to and felt as if his religious commitment was disrespected by Vision and had little value. He described being fired from his job at Vision as "horrible". He loved his job and was good at it. He really wanted to keep working for Vision. On the day of his dismissal Mr Stapley did not leave his home as requested and it was grossly insensitive to repossess Vision's equipment there and then, as Mr Stapley finally accepted. As Mr Meulenbroek said in his evidence, he found the whole experience "so humiliating" and it was "a day I will never forget".

[177] In these circumstances we find little to mitigate Vision's actions. It was claimed that the trial run of six months of no Saturday work showed a genuine effort to find a solution. But for the reasons given, this is only half the story. In the circumstances detailed earlier, Vision's actions were in truth at best insensitive and without any understanding of the legal obligations under the HRA.

[178] As outside observers we cannot but note how badly Vision handled the request by Mr Meulenbroek to not work on the Sabbath. A dedicated, conscientious and "fantastic" worker was reduced to a "zombie" state by Vision's failure to respect his religious belief and to observe its obligations under the HRA as an employer. Applying *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53] and *Director of Proceedings v O'Neil* [2001] NZAR 59 at [29] cited in *Nakarawa* at [96] and [97] we find Mr Meulenbroek has established to the civil standard all three of "humiliation, loss of dignity and injury to feelings". It will also be clear from our findings that the causal connection between the breach of s 22(1) and the damages has been clearly established.

[179] In these circumstances we are of the view that the facts as found by us are of a different level of gravity to those in *Nakarawa*. Furthermore, because there is a substantial subjective element to the assessment of humiliation, loss of dignity and injury to feelings we find that the impact of the discriminatory dismissal had a far greater impact on Mr Meulenbroek than on Mr Nakarawa. In these circumstances we believe that the appropriate award of damages is $25,000.

Training order

[180] As in *Nakarawa*, we cannot leave this case without drawing attention to the lack of awareness, at senior management level, of the non-discrimination obligations placed on an employer by the Human Rights Act. At all times Vision treated this case as an issue which turned exclusively on the terms of the employment contract. This was an entirely mistaken view.

[181] When during closing submissions Ms Brazil was asked to address the question of a training order as a potential remedy, she replied that Vision was "open" to the making of such an order.

[182] Our conclusion is that such an order should be made under s 92I(3)(f). As the Tribunal observed in *Nakarawa* at [104] remedies such as a declaration and damages are, in a sense, palliative. Their importance is not 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]

[183] The failures by Vision must be remedied and not repeated. We are of the view that requiring Vision to implement a training programme focussed on its responsibilities under the Human Rights Act is the most effective means of achieving that end.

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

Concluding observation

[185] Like so many employers and enterprises in New Zealand, Vision is a small company without a human resources department and without access to other resources typical in larger operations. It did not know of or comprehend its obligations under the Human Rights Act. We suspect that such failure is common to small and medium enterprises and to those that advise them. The wider lesson to be learnt from this case, therefore, is that unless the relevant provisions of the Human Rights Act are understood and diligently applied, financial consequences of a potentially substantial nature can follow. The need to take properly informed advice must be emphasised.

FORMAL ORDERS

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

[186.1] A declaration is made under s 92I(3)(a) that Vision Antenna Systems Ltd committed a breach of s 22(1) of the Human Rights Act 1993 by discriminating against Mr Meulenbroek for reason of his religious beliefs.

[186.2] Damages of $8,128.09 are awarded against Vision Antenna Systems Ltd under ss 92I(3)(c) and 92M(1)(a) of the Human Rights Act 1993 for pecuniary loss in the form of lost wages.

[186.3] Damages of $6,929.90 are awarded against Vision Antenna Systems Ltd under ss 92I(3)(c) and 92M(1)(a) of the Human Rights Act 1993 for pecuniary loss in the form of legal expenses.

[186.4] Damages of $25,000.00 are awarded against Vision Antenna Systems Ltd 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 Meulenbroek.

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

COSTS

[187] Costs are reserved:

[187.1] Mr Meulenbroek is to file his submissions within 14 days after the date of this decision. The submissions for Vision Antenna Systems Ltd are to be filed within a further 14 days with a right of reply by Mr Meulenbroek within seven days after that.

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

[187.3] 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 DL Hart**	**Mr BK Neeson**
Chairperson	**Member**	**Member**