

[3] The Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[4] Mr Bali states that the offer letter which he received from NZLM did not comply with the Settlement in two respects: firstly that the offer of employment was specified as being for a part-time position, and secondly that the offer of employment included a 90 day trial period.

[5] Clause 3 of the Settlement is also relevant in that it contains a term as to the duration of the offer of employment, stating:

3. If Sunil Bali is not able to commence work on or before June 8 2012 then the above offer shall lapse and shall not be extended.

[6] SRG denies non-compliance with the Settlement and states that it has complied in all respects with what had been agreed at mediation as set out in the Settlement.

[7] The matter was brought before the Authority on an urgent basis, and due to the time constraints in the matter, which included not only the date for acceptance by Mr Bali of the offer of employment as contained in clause 3 of the Settlement, but additionally time constraints imposed by Immigration New Zealand relating to Mr Bali's work visa status, the submissions of the parties were discussed via two lengthy telephone conferences on 1 and 6 June 2012.

Determination

Part-Time Definition

[8] Mr Bali had been employed by SRG prior to his employment coming to an end due to the expiry of his work visa in 2011. Mr Bali's employment with SRG was in accordance with

an individual employment agreement, clause 2 of which defined full-time and part-time employment.

[9] Full-time employment was defined in clause 2.1 of Mr Bali's SRG individual employment agreement as being employment on hours of a minimum of 35 per week, part-time employment was defined in clause 2.2 as being employment of less than 35 hours per week. The page containing this clause had been initialled by Mr Bali.

[10] The individual employment agreement with NZLM contains a similar definition, although 40 hours rather than 35 hours is the defining hourly criteria between part-time and full-time employment.

[11] Mr Bali would have been aware of SRG's definition of full-time and part-time employment from his previous employment agreement, and I consider he could have raised this definition as an issue to be noted in the Settlement prior to agreeing and signing it.

[12] However clause 2 of the Settlement states only that the offer of employment is to be for 30 hours per week, and the hours contained in the offer of employment with NZLM provided to Mr Bali are 30 hours per week.

[13] I find that SRG have complied with the requirement in the Settlement that the offer of employment be for 30 hours per week. Moreover I find the definition of full-time and part-time employment to have substantially the same meaning in both the individual employment agreements.

[14] I also note the information provided by Mr Bali who advised that in regards to an application made under the Skilled Migrants category, 30 hours a week is deemed to be full-time employment for Immigration purposes.

Trial Period

[15] Clause 2 of the Settlement specifies that the other terms of the offer of employment are to be: "*substantially the same as contained in his individual employment agreement with SRG Holdings Ltd*".

[16] Mr Bali claims that there has been a restructuring under which his employment has been transferred to NZLM from SRG. However although Mr Garg is a director of both companies, NZLM is a different legal entity to SRG, with a separate company number and

registration. As such the offer of employment made to Mr Bali is for employment with a new employer, and legally NZLM is entitled to apply a trial period.

[17] Mr Bali's individual employment agreement with SRG also contained a trial period provision at clause 14, and consequently I find the trial period provision in the offer of employment with NZLM is "*substantially the same as contained in his individual employment agreement with SRG Holdings Ltd*".

[18] I also note that the Immigration Officer appointed to action Mr Bali's work visa application advised the Authority that the 90 trial period would not adversely affect Mr Bali's work visa application.

[19] I determine that SRG has complied with clause 2 of the terms of the Settlement.

Costs

[20] Mr Kyne has applied for costs on behalf of the Respondent.

[21] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[22] The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*³ at para [48] "*As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.*"

[23] Although an investigation meeting was not held, Mr Kyne has submitted that he had nonetheless had to research the Applicant's claims, prepare verbal responses and provide advice to the SRG in terms of the compliance process and outcome options.

[24] Mr Bali was wholly unsuccessful in his application to the Authority and it is a principle of *PBO Limited (formerly Rush Security Ltd) v Da Cruz* that costs normally follow the event.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2001] ERNZ 305

[25] The urgent matter was considered via telephone conferences for the reasons set out in paragraph [7] above with no investigation meeting taking place, and I take this into consideration in assessing costs.

[26] The telephone conferences occupied approximately 1.5 hours of hearing time and based on the Authority's usual notional tariff based approach⁴, and adopting as a starting point the notional daily tariff of \$3,500.00, this would equate to \$875.00.

[27] Accordingly, Mr Bali is ordered to pay to SRG the sum of \$875.00 as a contribution towards costs.

Eleanor Robinson
Member of the Employment Relations Authority

⁴ *Cliff v Air New Zealand Ltd* (AC47A/06, (unreported) per Judge Shaw at para [10]