

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 253
5386129

BETWEEN

HEMAYATULLAH
HAQUIQZAI
Applicant

A N D

NEW ZEALAND MUSLIM
ASSOCIATION
Respondent

Member of Authority: Rachel Larmer

Representatives: John Coyle, Advocate for Applicant
Jenna Riddle, Counsel for Respondent

Submissions received 19 April 2013 from Respondent
14 May 2013 from Applicant
20 May 2013 from Respondent

Date of Determination: 14 June 2013

COSTS DETERMINATION OF THE AUTHORITY

- A. Mr Hemayatullah Haquiqzai is ordered to pay New Zealand Muslim Association \$7,000 towards its legal costs.**

Employment relationship problem

[1] At a preliminary investigation meeting held on 20 March 2013 the Authority investigated whether Mr Haquiqzai had raised his dismissal grievance within 90 days of his dismissal. This involved determining the date of termination because New Zealand Muslim Association (NZ Muslim Association) said Mr Haquiqzai's employment ended on 9 November 2011 while Mr Haquiqzai said it ended on 20 March 2012.

[2] In a determination dated 28 March 2013 the Authority held Mr Haqiqzai's employment was terminated by letter dated 9 November 2011 and that his employment ended that day because he was summarily dismissed for serious misconduct.¹

[3] During closing submissions on the day of the preliminary investigation meeting Mr Coyle conceded that even if the Authority accepted Mr Haqiqzai's evidence about his employment ending on 20 March it was clear he had not raised his dismissal grievance within 90 days of that date.

[4] This was an appropriate concession because it turned out when Mr Haqiqzai gave his evidence that he had to reply on his Statement of Problem (SoP) to raise his dismissal grievance and the SoP was not served² on NZ Muslim Association until 22 June 2012.

[5] NZ Muslim Association as the successful party is entitled to a contribution towards its actual costs. The parties have been unable to resolve costs by agreement so NZ Muslim Association now seeks indemnity costs of \$9,615.62 inclusive of GST and disbursements. Mr Haqiqzai says costs should lie where they fall or if costs are awarded then they should be moderate.

Relevant facts

[6] The SoP was filed on 19 June 2012 and the Statement in Reply was filed on 9 July 2012. The SiR identified the Authority did not have jurisdiction to investigate Mr Haqiqzai's dismissal grievance because he had not raised it with his employer within 90 days of his dismissal.

[7] The SiR recorded that Mr Haqiqzai's employment ended on 9 November 2011 when he was summarily dismissed for serious misconduct by a letter of that date. It also stated that NZ Muslim Association was not aware of Mr Haqiqzai's personal grievance until the Authority served the SoP on it on 22 June 2012.

[8] A telephone conference (TC) was held on 17 July 2012 and the preliminary jurisdiction issue was set down for hearing on 23 August 2012.

¹ [2013] NZERA Auckland 109.

² By track and trace courier sent by the Authority.

[9] During the TC the Authority indicated to Mr Haqiqzai's then counsel (Mr Dawud Bahadur) that he faced some difficulties in establishing employment was on-going past 28 December 2011 which was the date on which NZ Muslim Association served Mr Haqiqzai with a trespass order to keep him away from his place of work.

[10] Evidence on the 90 day issue was timetabled. Mr Bahadur was told Mr Haqiqzai would have to explain in his witness statement why he believed his employment continued after the trespass order was served on him. The Authority made it clear Mr Haqiqzai's statement needed to explain why he believed the summary dismissal letter dated 9 November 2012 did not end his employment and when and how he claimed his employment had ended.

[11] During the TC Mr Bahadur conceded Mr Haqiqzai had not raised his personal grievance in writing but maintained he had done so verbally. The Authority told Mr Bahadur that Mr Haqiqzai's witness statement would have to specifically cover how (in terms of what he had said and done) and when (the date being critical to the 90 day issue) and to whom (so NZ Muslim Association could make inquiries of the relevant person(s) and respond) he had raised his dismissal grievance.

[12] Mr Haqiqzai continually failed to provide this basic information to the Authority, despite numerous requests for him to do so. I find that there was no good reason for Mr Haqiqzai to have ignored the Authority's requests to provide this critical information in advance of the jurisdiction investigation meeting.

[13] Mr Haqiqzai's on-going failure to comply with the Authority's directions resulted in time and resources being needlessly wasted. If Mr Haqiqzai had provided the information the Authority had directed him to provide, and which it had explained to Mr Bahadur in the first TC and to Mr Coyle in the second TC was necessary in order to determine the 90 day issue, then it would have been obvious that on Mr Haqiqzai's own version of events he had still not raised a dismissal grievance within 90 days of the date on which he claimed he was dismissed.

[14] As it was the Authority had to set the jurisdiction issue down for an investigation meeting so Mr Haqiqzai could be questioned about matters relevant to the 90 day issue in order to see if it could obtain the information from him that he had been directed to provide, but had not provided.

[15] It became clear when Mr Haqiqzai was questioned by the Authority that he believed his employment ended on 20 March 2012 and that he had not raised his dismissal grievance with NZ Muslim Association nor had he instructed anyone to do so on his behalf. That meant he had to rely on the Authority's service of his SoP which had obviously occurred outside the 90 day time limit.

[16] The manner in which Mr Haqiqzai has elected to conduct his case has wasted the resources of the NZ Muslim Association and of the Authority. In particular:

- a. He has continued to file irrelevant information about his substantive claim despite being directed not to do so which the NZ Muslim Association and the Authority have had to review in case it contained any information relevant to jurisdiction;
- b. He has failed to provide relevant information despite being directed to do so. He cannot use the excuse that he did not know what was required because he has been represented at all times, first by counsel and then by an employment advocate. The Authority also carefully set out exactly what information was required in both TCs and in its email communications with the parties.
- c. He put everyone through an investigation meeting which had no prospect of success even if his version of events had been accepted (which it was not).
- d. His continued breach of timetable directions resulted in two investigation meetings being adjourned at a late stage.
- e. He said he was unavailable to attend an investigation meeting for a number of months despite the NZ Muslim Association and the Authority wanting the jurisdiction issue to be resolved in a timely way. This meant the initial investigation meeting which had been scheduled for 23 August 2012 was not actually held until 23 March 2013. This delay was attributable to Mr Haqiqzai.

[17] I am left with the impression Mr Haqiqzai used the Authority proceedings to pressure NZ Muslim Association to settle because Mr Bahadur requested late adjournments on the basis the parties were in settlement negotiations and the matter

was about to settle. Counsel for NZ Muslim Association denied the parties were in settlement negotiations and advised the matter was not about to settle.

[18] Mr Bahadur in correspondence refers to the Tenancy Tribunal proceedings and to adverse publicity about Mr Haquiqzai's situation. Mr Haquiqzai continually filed information about his substantive claims despite the Authority making it clear his substantive claims were not yet being investigated and that it wanted him to confine the information he provided to the 90 day issue. These factors suggest improper motives may have been in play.

Issues

[19] The following issues are to be determined:

- (a) Should NZ Muslim Association be awarded indemnity costs?
- (b) If not, what is the starting tariff for assessing costs?
- (c) Are there any factors that warrant an adjustment to the Authority's usual notional daily tariff of \$3,500?

Should NZ Muslim Association be awarded indemnity costs?

[20] The leading case on indemnity costs is the Court of Appeal decision in *Bradbury & Ors v. Westpac Banking Corporation*³. *Bradbury* involved an appeal against the High Court's award of indemnity costs which was a departure from the usual High Court Rules costs regime, which is completely different from the Authority's approach to costs.

[21] The Authority is a unique jurisdiction which usually adopts a notional daily tariff (currently \$3,500) based approach to costs, with the notional tariff being adjusted on a principled basis to reflect the particular circumstances of each case. However, costs are discretionary so I consider the Authority is able to reflect on the factors which the Court of Appeal in *Bradbury* identified could result in an award of indemnity costs when it is assessing costs.

³ [2009] NZCA 234.

[22] Indemnity costs are exceptional so require “*exceptionally bad behaviour*.”⁴ They may be ordered where a party as behaved either badly or very unreasonably.⁵ The Supreme Court in *Prebble v. Awatere Huata (No.2)*⁶ held there must be “*flagrant misconduct*” to justify an order for indemnity costs.

[23] I consider this case meets the high threshold of exceptionally bad behaviour and flagrant misconduct that brings it into the realm of indemnity costs. In particular:

- (a) Mr Haqiqzai engaged in misconduct which caused loss of time to the Authority and to the NZ Muslim Association by continually breaching the Authority’s directions;
- (b) Mr Haqiqzai’s misconduct resulted in the determination of the jurisdiction issue being delayed by seven months in circumstances where the NZ Muslim Association and the Authority wanted it dealt with earlier than that;
- (c) Mr Haqiqzai proceeded with his claims in wilful disregard of known facts and clearly established law. He was summarily dismissed on 9 November 2011, he was given his final pay advice on 10 November, he was issued with a trespass order for his place of work on 28 December 2011, in early 2012 NZ Muslim Association filed a claim with the Tenancy Tribunal for unpaid rent, it sought and obtained an eviction order and evicted him from his work accommodation. These were clearly not the actions of an employer which was continuing an employment relationship with Mr Haqiqzai from 10 November until 20 March 2012, as he claimed;
- (d) Mr Haqiqzai pursued a “*hopeless case*” because even if his evidence was accepted he was still outside the time limit for raising his grievance. He therefore should not have disputed the jurisdiction point raised by NZ Muslim Association, a fact he did not concede until the latest possible point - closing submissions during the preliminary jurisdiction investigation meeting.

⁴ Supra.

⁵ Ibid 3 para [27].

⁶ [2005] 2 NZLR 467 SC.

[24] The Court of Appeal in *Bradbury* recognised that abandonment of a cause of action in itself does not result in indemnity costs, but a party is entitled to indemnity costs if it can show that the claim against it was hopeless from the outset.⁷ That is certainly the situation here.

[25] I am also concerned about the manner in which this case has been progressed before the Authority. It seems Mr Haqiqzai may have attempted to use the Authority's investigation process to pressure the NZ Muslim Association into settling his claim by dragging the proceedings out and putting NZ Muslim Association to additional and unnecessary costs. I consider such action would amount to misconduct by using litigation for an improper ulterior purpose.

[26] Although I consider that this case does meet the very high test set out in *Bradbury* to warrant an award of indemnity costs, I exercise my discretion not to do so. Mr Haqiqzai has a number of undetermined claims⁸ and I am concerned the indemnity costs sought by NZ Muslim Association are not restricted solely to the jurisdiction issue because the invoices do not show any deduction of time for the unresolved claims Mr Haqiqzai has. The invoices also show time and costs relating to partner supervision and I am not convinced that is an appropriate cost to pass on to Mr Haqiqzai.

[27] I therefore decline to exercise my discretion to award indemnity costs and will instead adopt the Authority's usual notional daily tariff based approach. I am confident that approach is able to do justice between the parties because there is considerable scope for the Authority to adjust the notional daily tariff to take account of matters that in another jurisdiction may have resulted in an award of indemnity costs.

What is the starting tariff for assessing costs?

[28] Although the investigation meeting took less than a full day it ran into the afternoon. The length of the investigation meeting is attributed to Mr Haqiqzai's failure to provide relevant evidence in the statements he filed and to his need for a

⁷ Ibid 1 para [79].

⁸ Unlawful deduction from wages (final pay used to clear rent arrears), unpaid alternative days' holiday claim, penalty claims for breach of his IEA (not paying wages weekly) and breach of the Wages Protection Act (applying wages to rent arrears).

lengthy adjournment whilst Mr Coyle to take instructions prior to presenting submissions about the effect Mr Haqiqzai's evidence had on his claim.

[29] For the purposes of assessing costs I am going to treat this matter as a one day investigation because extensive and in my experience unusual amounts of time and resources were required from the Authority to get this matter to the preliminary investigation stage. This needs to be reflected in costs.

[30] The starting point for assessing costs is therefore the current notional daily tariff of \$3,500. The Authority must then consider whether there are any particular factors which warrant an adjustment to the notional daily tariff.

Are there any factors that warrant an adjustment to the notional daily tariff?

Factors which warrant a reduction in the notional daily tariff

[31] Mr Coyle submits any costs should be moderate due to "*the specific cultural factors associated with the matter.*" He does not explain what those factors are or why they should result in a reduction of costs.

[32] I am not aware any cultural or indeed any other factors which would justify a reduction to the notional daily tariff.

[33] Mr Haqiqzai and NZ Muslim Association are subject to the same laws and therefore rights and obligations as other New Zealand employers and their employees who are employed under New Zealand laws enjoy. These minimum employment laws apply regardless of an employees' or employers' culture, nationality or religious beliefs. It would be inappropriate to adjust costs solely due to a party's culture.

Factors which warrant an increase to the notional daily tariff

[34] There are a number of factors which warrant a significant increase to the Authority's notional daily tariff. These include:

- a. The manner in which Mr Haqiqzai conducted his case put NZ Muslim Association to unnecessary additional costs;
- b. Failure to comply with Authority directions;

- c. The granting of indulgences to Mr Haqiqzai (late adjournments of two investigation meetings, last minute extensions of time, a late change of representative was accommodated);
- d. Three separate requests for an extension of time were made on the day information was due to be filed;
- e. Seven months delay between the date of the first adjourned investigation meeting to the jurisdiction investigation meeting being held;
- f. Two investigation meetings had to be cancelled at the last minute because of Mr Haqiqzai's failure to comply with timetable directions;
- g. Irrelevant material filed and relevant material not provided by Mr Haqiqzai;
- h. Running a case that had no prospect of success;
- i. Two lengthy were TCs required because Mr Haqiqzai appeared to have ignored the information conveyed during the first TC;
- j. Three lengthy SoPs were filed.

[35] Mr Haqiqzai sought the first extension of the deadline for filing evidence on the 90 day issue based on partly on the ground that there were settlement negotiations afoot when NZ Muslim Association said that no settlement discussions had taken place, either through counsel or direct with the NZ Muslim Association. Notwithstanding this, an extension of time was granted for Mr Haqiqzai to file an amended statement of problem which addressed the 90 day issue and his evidence in support of that.

[36] The effect of this late extension was that the investigation meeting which was scheduled for 23 August 2012 had to be postponed to a tentative date in September 2012. Mr Haqiqzai was not available in September so the matter was rescheduled for hearing on 4 October 2012.

[37] On the day that Mr Haqiqzai's statements and Amended Statement of Problem were due his then counsel advised the timetable could not be complied with

because there was a real likelihood of settlement, that 30 to 50 witness would be called and that a joint statement from all these people was required, that there were Tenancy Tribunal proceedings afoot and that new counsel was to be instructed if the matter failed to settle.

[38] The NZ Muslim Association again advised the Authority no settlement discussions or offers had taken place between counsel for the parties or directly between the parties.

[39] The fact that Mr Haqiqzai's counsel suggested that a joint statement from 30 to 50 people was necessary in respect of the 90 day issue demonstrated that Mr Haqiqzai's counsel had not turned his mind to the 90 day issue or the evidence in support. This was despite the specific information that was required in support of the 90 day issue having been fully explained by the Authority during the first TC.

[40] The Authority made further timetabling directions for filing of briefs in relation to the date on which Mr Haqiqzai's employment ended and his raising of his dismissal grievance, expressly emphasising that information was to be restricted to those two issues only.

[41] Mr Haqiqzai's evidence was to be filed on 17 August 2012. However, that afternoon Mr Coyle contacted the Authority to say he was now instructed in the matter and he sought an extension of time for the filing of an Amended Statement of Problem on the basis he had recently been instructed. This was the third time that a request for an extension had been made on the day that evidence was due to be filed by Mr Haqiqzai.

[42] As Mr Haqiqzai's previous counsel (Mr Dawud Bahadur) had previously indicated he would not continue to act in the matter if settlement was not reached it was surprising Mr Coyle was only instructed on the day Mr Haqiqzai's Amended Statement of Problem and his witness statements were due to be filed. Notwithstanding this, he was granted a further extension.

[43] Following the filing of Mr Haqiqzai's witness statements and an Amended Statement of Problem on 20 August 2012, it still remained unclear as to when and how Mr Haqiqzai said his employment had ended. The information he had filed contained a substantial amount of material which was irrelevant to the two matters in

issue and which he had been specifically advised by the Authority not to produce to the Authority.

[44] Mr Haqiqzai was again directed to comply with the Authority's previous direction to provide evidence relevant to the jurisdiction issues to be determined. That did not occur.

[45] As a result of significant deficiencies in the evidence which had been filed by Mr Haqiqzai the investigation meeting scheduled for 4 October 2012 had to be adjourned. This was the second investigation meeting that had been adjourned because of Mr Haqiqzai's failure to comply with the Authority's timetabling directions.

[46] Because of the ongoing breach of its directions and the failure of Mr Haqiqzai to provide any clarity around the date on which he said his employment had ended or about when and how and to whom he had raised his dismissal grievance, the Authority decided not to timetable a new investigation meeting until it had received the Second Amended Statement of Problem and Mr Haqiqzai's evidence on the date of dismissal and raising of his grievance issue.

[47] This evidence was not forthcoming so the Authority held a second TC to clarify to Mr Coyle exactly what evidence was expected from Mr Haqiqzai in support of the date of determination and 90 day issue.

[48] Following the telephone conference Mr Haqiqzai filed witness statements on 28 September 2012. Despite the information that had been conveyed to Mr Coyle during the telephone conference, Mr Haqiqzai's witness statement did not contain the information he had been directed to provide regarding the 90 day issue. That was surprising given this information having been sought from him on numerous occasions, and most recently during the lengthy TC held on 21 September 2012.

[49] Mr Haqiqzai was informed by the Authority that the information provided still did not identify when to who and how he claimed he had raised his dismissal grievance.

[50] When Mr Haqiqzai filed another Statement of Problem (which had not been called for by the Authority) on 17 October 2012 the Authority decided to schedule the jurisdiction investigation meeting to give Mr Haqiqzai an opportunity to provide

information in person about the date his employment ended and what he did to raise his grievance.

[51] The parties were offered dates between 24 October 2012 and 30 January 2013, but Mr Haqiqzai advised he was not available until after 31 January 2013. The jurisdiction issue was heard on 21 March 2013.

[52] The sheer volume of unnecessary correspondence and pleadings in this matter has resulted in significant costs to the NZ Muslim Association, which in my view should not have been incurred had Mr Haqiqzai provided the information which was requested of him by the Authority at the outset. This information should have been available to the initial jurisdiction investigation meeting scheduled for 23 August 2012.

[53] When we got to the hearing Mr Haqiqzai's own evidence on the date of termination meant that even if the Authority accepted his evidence (and it did not) about the date of termination it was still outside the 90 day time limit when his dismissal grievance was raised because he had not done anything himself to raise it or to have it raised on his behalf.

[54] The costs awarded need to reflect that Mr Haqiqzai pursued proceedings which on his own evidence had no prospect of success.

[55] For these reasons I consider it is necessary and appropriate to double the notional daily tariff and award costs of \$7,000. Accordingly, Mr Haqiqzai is ordered to pay New Zealand Muslim Association \$7,000 costs.

Rachel Larmer
Member of the Employment Relations Authority