

Background

[5] SCL employed Mr Jogia as a quantity surveyor/estimator, commencing on or about 3 December 2007. On 3 December 2007 both parties signed a written employment agreement. According to the position description Mr Jogia had responsibilities: in aspects of the financial management of the projects; to ensure suitable and cost effective subcontractors were engaged; to assist in managing the administration of the projects; in client liaison; and in ensuring compliance with health and safety requirements.

Incidents underlying disadvantage grievance

[6] The allegations of verbal attack and being unfairly blamed, as well as new allegations of assault and unlawful instruction raised in association with the investigation of the substantive matters, concerned the following:

- (a) assault during a Christmas function;
- (b) AVR Ltd - unlawful instruction;
- (c) IDC Electrical progress claim - abusive conduct;
- (d) Metro Frameless Glass Ltd - unlawful instruction;
- (e) Aorere College project meeting - abusive conduct;
- (f) refusal to pay wages when they fell due; and
- (g) Fersa Lighting - abusive conduct.

1. The alleged assault

[7] Mr Jogia alleged that he was assaulted during a company Christmas function held on 21 December 2007. He said he was talking to two other people when the managing director, Chris Dixon, joined them and told him to join a group near a stage towards the other end of the room. Mr Dixon gave him a shove in the direction of the stage, which propelled him much of the length of the room.

[8] Both Mr Dixon and a project manager employed by SCL, Bill McGarry, who was also part of the group Mr Dixon joined, gave evidence that the conversation was convivial. They denied an incident of the kind Mr Jogia described.

[9] For reasons to be discussed in more detail in the rest of this determination, I did not find Mr Jogia a credible witness. Where his account differed from that of other witnesses, I have preferred their accounts.

[10] Accordingly I do not accept that Mr Jogia was assaulted as he said he was during the Christmas function.

2. AVR Limited

[11] Mr Jogia said that in February 2008 he obtained a quote from a subcontractor on an SCL apartment project at Ventnor Rd, AVR Limited, for 5 extractor units. According to a document dated 5 February 2008 the quote was \$1,900 for 5 units, and the work quoted for was the supply, installation and electrical wiring of the units.

[12] Mr Jogia alleged that Mr Dixon instructed him unlawfully to have AVR increase the quote, so SCL could make some extra money. Acting on that instruction Mr Jogia obtained a revised quote for \$4,500 dated 26 February 2008, which was forwarded to the client's quantity surveyors for approval. The approval was granted.

[13] Mr Jogia alleged SCL was to keep the difference between the two quotes. During the investigation meeting he made new allegations that the difference between the two quotes was to offset a disputed payment in respect of another site.

[14] Further to the amount in the revised quote the provisional cost which Grant Philips, Mr Jogia's predecessor at SCL, had estimated for the purposes of SCL's tender document was \$5,000. There was no reasonably-founded suggestion that Mr Philips was not competent or not honest, and no evidence of any variation affecting the quote. Any difficulty or error is more likely to centre on the 5 February quote.

[15] Moreover the revised quote was approved by the client's own quantity surveyor, who was described as careful. In addition to impugning the honesty of Messrs Dixon and Philips, Mr Jogia's accusation suggests either that the client's surveyor did not properly check the quote on behalf of the client or that he, too, did something dishonest. There was nothing to support either of those alternatives.

[16] Finally, the \$4,500 in the revised quote was for the supply, installation and wiring of units to the laundries complete with fans, grille and run on timers. There was debate in the evidence about whether the additional items mentioned corresponded with the increase in the sum quoted. The evidence did not permit a finding about whether the difference could be accounted for in that way, or otherwise why there was a difference between the original and the revised quote.

[17] It was not in any event necessary to establish the reason for the difference. The question is whether Mr Dixon instructed Mr Jogia to inflate the quote for SCL's benefit. I find Mr Jogia's account implausible, and there was no evidence to support it beyond his assertions. I do not accept them.

3. IDC Electrical progress payment

[18] IDC Electrical was a subcontractor on SCL's Aorere College site. Mr Jogia alleged that on an occasion on or about 22 July 2008 Mr Dixon was guilty of abusive conduct in that he was aggressive and insulted Mr Jogia about an IDC Electrical progress payment. Mr Jogia said this was done in front of Mr Philips, who had been re-engaged on a short term contract basis and was in the office at the time.

[19] IDC Electrical had been working on the site since January or February 2008. In March 2008 Mr Jogia authorised payment certificates for invoices submitted in February and March 2008. In June 2008 he authorised a further payment certificate for some \$24,000, in respect of a claim submitted on 28 June 2008. However the certificate was not for payment in full. In an undated email message to Mr Jogia an IDC Electrical representative identified a failure to pay the balance of some \$25,000 in respect of items which were listed. The failure to pay meant IDC Electrical stopped work on the site, and made an angry phone call to Mr Dixon.

[20] According to Mr Jogia, Mr Dixon expressed his views by slamming his hand down on Mr Jogia's desk, saying 'where the f- are the IDC subcontractor payments and subcontracts' and 'get this f- IDC payment done ASAP.' Mr Dixon denied slamming his hand down on the desk but accepted he was angry and may have sworn.

[21] Mr Jogia said in his written and oral evidence that he had not completed the subcontract or made the payment because the head contract had not been signed. Indeed no head contract was ever signed. The subcontract had not been signed because Mr Jogia had not sent it to IDC Electrical for signature. He attended to this on 24 July 2008.

[22] Mr Jogia added in his oral evidence that the unpaid items concerned variations which were not adequately supported by the documentation. He said he telephoned to ask for the documents, but did not give a direct answer when asked at the investigation meeting whether he told IDC Electrical it would not be paid until the documentation was provided. It is likely he did not raise that matter with it.

[23] I find Mr Jogia's dissatisfaction with the supporting documentation - whether well-founded or not - is a more likely explanation for the refusal to make payment in full than the opportunistic allegation regarding the signing of the head contract. This was not the only occasion in which Mr Jogia had difficulties with the documentation of variations in particular. I consider it likely that here, rather than acknowledging and addressing any problem in an effective way, he sought to hide it.

[24] As for the concern about Mr Dixon's behaviour towards him, Mr Dixon had reason to be angry. While it could have been more restrained I do not regard his reaction as amounting either on its own or cumulatively to an actionable breach of his obligations to Mr Jogia.

[25] Finally, Mr Jogia said he heard Mr Dixon laughing with Mr Philips after the exchange, saying he had given Mr Jogia 'the bullet'. Mr Dixon's evidence about his response to Mr Jogia's resignation - delivered a few days later - leads me to consider it likely Mr Jogia overheard a comment made on its receipt and in the context Mr Dixon described. Mr Dixon said the receipt of Mr Jogia's resignation was a golden

bullet. He said he meant that, such was his lack of confidence in Mr Jogia by then, the resignation was a cause for celebration.

4. Metro Frameless Glass Limited

[26] Metro Frameless Glass Limited (MFG) was also a subcontractor on the Ventnor Rd site. There are several aspects to Mr Jogia's allegations involving it.

[27] The first concerns another allegation that a quote was falsely inflated.

[28] In July 2008 the architects on the Ventnor Rd site made a change involving a new channelling system for some glass panel fixings on balustrades, in turn requiring a new quote from MFG. Mr Jogia duly provided MFG with details including relevant linear measurements, obtained the quote, and noted it was low in comparison with the amount originally in the tender. The new quote was for \$63,151 and was contained in a document dated 16 July 2008.

[29] Mr Jogia alleged that Mr Dixon instructed him unlawfully to obtain a higher quote, again intending for SCL to pocket the difference. He duly obtained a revised quote for \$89,790 dated 12 August 2008, saying he told MFG the price would be a dummy price. The linear measurements and other information in the 16 July and 12 August documents were the same. It was not apparent from the face of the documents why the price had increased.

[30] Both the 16 July and the 12 August documents were sent to the client's surveyor. The surveyor questioned the financial discrepancy in an email message dated 21 September 2008. He also reported being told by MFG that Mr Jogia had instructed it not to discuss pricing with the surveyors. The surveyor asked what was going on. The message went on to instruct Mr Jogia to provide a consolidated written quote for the balustrades rather than a series of piecemeal quotes.

[31] Meanwhile Mr Dixon had become so concerned about aspects of Mr Jogia's work that he asked Mr McGarry to keep an eye on Mr Jogia. When questions were raised about the two quotes Mr McGarry decided to obtain another quote, and began

by visiting the site with MFG. A physical measurement was taken, from which it became apparent that the measurements Mr Jogia had provided in seeking the earlier quotes were not accurate. Mr McGarry ascertained that the error in the measurements arose out of an error in reading the plans. On 24 September 2008 the quote was re-submitted with the correct measurements. The quote was for \$87,598.

[32] Moreover, it was Mr Dixon's evidence that Mr Jogia knew the measuring error was his, and that the correct price should have been in the order of \$90,000. When Mr Jogia advised Mr Dixon of the error, Mr Dixon became angry and instructed him to fix it.

[33] This leads me to the second aspect. It concerns Mr Jogia's allegation that Mr Dixon instructed him to draft a confidentiality agreement to prevent subcontractors from disclosing SCL's price-altering behaviour. Mr Jogia alleged further that Mr Dixon instructed him not to keep a paper trail. I observe that such an instruction would be inconsistent with the alleged instruction to draft a confidentiality agreement.

[34] Mr Jogia did draft a confidentiality agreement and gave it to MFG. He produced an email message from him to Mr Dixon dated 17 July 2008 purporting to attach a confidentiality agreement for Mr Dixon's approval, although there was no record of any reply or any approval being given. Someone apparently from MFG signed the agreement on or about 21 July 2008 and it was returned to Mr Jogia by email message of the same date. No-one could identify either of the signatures on the agreement produced at the Authority's investigation meeting. SCL was unable to locate any email message to MFG attaching the agreement for signature and return.

[35] Mr Dixon denied issuing the alleged instruction or knowing anything about the confidentiality agreement. If he had sought to proceed on such a basis he had not only the client's surveyor to contend with, but it was also his evidence that the Ventnor Rd contract was an open book contract. The client was provided with a schedule of prices, with SCL adding margins. I conclude that conduct of the kind Mr Jogia alleged would have been so easy to identify, and pointlessly destructive of SCL's reputation, that it is inherently unlikely. Nothing in the evidence persuaded me otherwise.

[36] Mr Dixon did not behave as Mr Jogia alleged. I consider it more likely that Mr Jogia was seeking to cover up his own error.

[37] Thirdly Mr Jogia alleged that, on 9 September 2008 Messrs Dixon and McGarry came into Mr Jogia's office with Mr Dixon saying Mr Jogia should 'take the blame' for the problems. He alleged that there had been a meeting at the architect's office that day, and after the meeting Mr Dixon also instructed him to get rid of 'all evidence that could implicate us in the forgery that we had committed.'

[38] There was a meeting at the architect's office that day. Its purpose was to discuss the Aorere College site, and I address the meeting in more detail shortly. Because of concerns about him, Mr Jogia was excluded at the client's request. Both Mr McGarry and Mr Dixon gave evidence that Mr Dixon was so upset about other concerns associated with Mr Jogia, and discussed at the meeting, that Mr Dixon did not speak to Mr Jogia at all after it. Their account is the more likely, and I do not accept Mr Jogia's. Further, Mr Dixon was not involved in any forgery did not speak of forgeries to Mr Jogia in the way Mr Jogia alleged.

[39] Overall Mr Jogia's account of the MFG matter is among the most implausible accounts I have ever heard from a witness. I do not accept it. Mr Jogia made errors with the MFG quote, which he sought to hide. He did so in a dishonest and underhand way, aggravating the seriousness of his own conduct by seeking in the Authority to attribute blame for his actions to Mr Dixon and making serious but unfounded allegations about Mr Dixon's conduct.

5. Aorere College meeting

[40] Mr Dixon acknowledged that the Aorere College contract was difficult in that variations to the value of approximately a third of the contract price were required. All of the variations required supporting documentation.

[41] I have already referred to the meeting on 9 September. A follow up meeting went ahead on 22 September. During the 9 September meeting there was a discussion about SCL's receipt of a payment certificate with the amount SCL was to be paid

reduced by some \$60,000. This was because the payment sought concerned a number of variations not properly documented. The other party's surveyor advised that he had asked Mr Jogia for the material several times, with Mr Jogia explaining after the last request that the documentation could not be submitted because the SCL copier had broken down. Mr Jogia did not deny having the conversation.

[42] Mr Dixon said he was livid when he heard this. I have already accepted that he did not speak to Mr Jogia after the meeting. However Mr McGarry did raise the matter of the variations with Mr Jogia, and Mr Jogia gave an explanation. The explanation was that the available material was incomplete.

[43] Mr Dixon spoke to Mr Jogia some time later. He told Mr Jogia he had f-ed up. For his part, Mr Jogia alleged that, before he could explain, Mr Dixon told him to 'shut the f- up'. This was the abusive conduct of which Mr Jogia complained.

[44] Again I find Mr Dixon had reason to be angry. While it could have been more restrained I do not regard his reaction as amounting either on its own or cumulatively to an actionable breach of his obligations to Mr Jogia.

[45] Mr Jogia made additional general allegations that Mr Dixon had tampered with the costings for Aorere College. He alleged further that the contract had been underpriced, and that Mr Dixon instructed him to add as many variations as he could in order to offset the losses. The allegations were not supported by evidence and were denied.

[46] To the extent it is necessary to do so I accept Mr Dixon's evidence that Mr Jogia's allegation that he tampered with the costings probably referred to his agreement to vary the preliminary and general costs of the tender price so there would be a better chance of obtaining the job.

[47] As for the allegation regarding the addition of variations, such an instruction is unlikely. Aorere College was also an open book contract, with a schedule of rates provided to the client.

6. Refusal to pay wages

[48] Mr Dixon acknowledged telling Mr Jogia - probably after the 22 September follow up meeting - that he would not receive the payment due on or about Friday 26 September until SCL was paid for the Aorere College variations. Later he relented, and payment was processed on Monday 29 September. Because of a delay in bank processing procedures the monies were not deposited in Mr Jogia's account until Wednesday 1 October 2008.

[49] While the initial failure to pay on the due date was a breach of obligation, it was quickly remedied. Having been remedied that was the end of the matter. In the circumstances the failure did not continue to amount, on its own or cumulatively, to an actionable breach of obligation to Mr Jogia.

7. Fersa Lighting

[50] Fersa Lighting was another subcontractor on the Ventnor Rd site. Mr Jogia described an incident involving Fersa Lighting payments as another incident in which he said Mr Dixon 'threw a tantrum' at him.

[51] There were two aspects to the Fersa Lighting matter.

[52] The first is that in late September 2008 the client had paid SCL for lighting supplied by Fersa Lighting, but SCL had not paid Fersa Lighting. SCL was asked why payment had not been forwarded to Fersa Lighting.

[53] Mr Dixon asked Mr Jogia for an explanation. The explanation Mr Jogia gave on 30 September was that payment was not forwarded because the goods had not been received on-site as there was no space and no adequate security for them. However the lighting was approved as an off-site payment. That meant payment could be made without the goods being received on-site.

[54] Mr Dixon identified the problem to Mr Jogia as being the receipt of funds not paid out, expressed a further concern that he was not notified funds had been received,

indicated the matter might reflect badly on SCL, and asked for the relevant invoice. He set his concerns out in a moderate and reasonable way. Mr Jogia's response was: "Big deal CHRIS!!!. If one subbie does not get paid especially it's a material off site claim and the paper work is inadequate. Sounds like the world is about to come to an end." This was an unacceptable and uncalled-for response.

[55] Further, I do not consider the exchanges can fairly be described as a 'tantrum' on Mr Dixon's part.

[56] The second aspect was that the Fersa Lighting quote identified the client's trust company as the customer. The quote was dated 29 August 2007. An invoice also dated 29 August 2007 identified SCL as the customer. Mr Jogia said in evidence that he could not make the payment when it was sought because he did not have an invoice directed to SCL, only the quote directed to the trust. A copy of the invoice was faxed to him on 30 September 2008.

[57] Mr Jogia must have been in possession of the invoice before this. Without it, SCL itself would not have been paid. If the invoice was lost or mislaid Mr Jogia should have addressed the matter, rather than allowing the payment to remain in SCL's account undistributed.

The resignation

[58] By letter dated 22 July 2008 Mr Jogia submitted a resignation in the following terms:

"RE: MY RESIGNATION (8 WEEKS NOTICE)

I hereby tender my eight weeks' notice of resignation, effective Monday the 4th of August 2008.

My last day at Sefton shall be 26th September 2008."

[59] Mr Jogia said the letter was prompted by the exchanges over the IDC Electrical progress claim.

[60] On or about 20 July 2008 Mr Jogia had been informed that his mother in Fiji required surgery. He said he reserved tickets for Fiji on or about 24 July and departed on 26 July. When he was asked why the notice of resignation was worded as it was he effectively denied any connection with these events. He said he wished to give himself an opportunity to reconsider his resignation, an opportunity he said he took. The view I have formed of his credibility means I consider it likely he decided at the time simply that his notice period would commence at the end of his absence on leave, rather than the beginning.

[61] By email message to Mr Dixon dated 26 July 2008 Mr Jogia said:

“I just wanted to let you know that I am withdrawing my resignation which was effective from 4th of August.”

[62] The rest of the message suggested that the reason for the decision to withdraw the resignation was a decision to complete his work on the Ventnor Rd and Aorere College sites, and a view that ‘we cannot have 5th quantity surveyor on project now’. Mr Jogia said he came to that decision because he was at home with his family at the time, and was feeling better about his work. That account is plausible and I am prepared to accept it. The message ended with an offer to discuss the matter with Mr Dixon on his return.

[63] There was no reply to the message. Mr Dixon said there was no reply because he did not receive the message. He said that, had he received it, he certainly would not have agreed to the withdrawal of the resignation.

[64] Communication by email on work-related matters is very common, and hard copies of the messages are frequently produced to the Authority during investigations into employment relationship problems. Usually details such as the address of the sender and recipient(s), date and time of sending and receipt, and that the contents of the messages were as set out in the record are not disputed (save for disputes about attachments). For that reason there is no need to test these details and they are accepted. Save for the matter of the MFG confidentiality agreement, such was the case with the remainder of the email messages here.

[65] Regarding the withdrawal of the resignation, however, the apparent recipient has denied receipt of the message. In addressing that denial I note that on its face the message was sent to Mr Dixon at his work email address, and there was no keying error in the address. At the same time I note that the email was sent from Mr Jogia's web-based email address, not his office address. It is conceivable that there was an error in transmitting the message of which neither party was aware, although I do not suggest that was the case. Further, the document produced could easily have been prepared by cutting and pasting the content of the message onto a genuine email header before it was printed (according to its footer) on 22 September 2008. Again I do not suggest that happened but there is no original to which the document can be compared, and no supporting forensic information.

[66] Finally, Mr Jogia did not produce a 'read receipt' record in association with the message, and was unaware of that tool. While such a record would not necessarily have proved Mr Dixon's receipt of the message, it would have assisted.

[67] Accordingly, I am not satisfied that Mr Dixon received the message.

[68] Mr Jogia returned to work on 4 August. He said in a document produced to the Authority that he notified the staff and the account manager that he had withdrawn his resignation, although the document made no mention of any attempt to meet with Mr Dixon. During the investigation meeting Mr Jogia said he spoke only to the account manager. The account manager has apparently accepted that was so although it was also pointed out, correctly, that she did not have authority to deal with the matter.

[69] Mr Jogia also said during the investigation meeting that on his return to work he went to Mr Dixon's office, spoke to Mr Dixon, and mentioned his sending of the message withdrawing his resignation. He said Mr Dixon told him not to worry, and the parties could put the matter behind them. In the circumstances disclosed by the evidence that account could not be true. It was denied, and I do not accept it.

[70] However the termination date of 26 September 2008 was not acted on and there was no discussion about it at the time. Mr Dixon said that in the course of addressing problems such as those described above he overlooked the notified termination date. He did not notice immediately that, from Friday 26 September, Mr Jogia should no longer be working at SCL.

[71] Accordingly Mr Jogia reported for work on 29 and 30 September, and very briefly on 1 October before leaving again. By email message dated later on Wednesday 1 October 2008 he forwarded a medical certificate of that date, stating that as a result of stress he would be unfit for work until 13 October 2008.

[72] SCL did not respond to that information. In particular it did not indicate to Mr Jogia that the certificate was not necessary because his employment had terminated, or that his return on 13 October was not necessary for the same reason.

[73] During Mr Jogia's absence Mr Dixon recalled the notified termination date and treated Mr Jogia's employment as terminated. He did not notify Mr Jogia of this.

[74] On 13 October Mr Jogia reported for work, to find that the locks had been changed and his mobile phone disconnected. His employment did not resume.

Whether there was any unjustified disadvantage

[75] The findings made in the course of addressing the matters Mr Jogia raised in support of his disadvantage grievance mean I do not accept that his employment was affected to his disadvantage by unjustified actions of this employer.

Whether there was a dismissal

[76] Mr Jogia relied on his view of the facts in support of his submission that there was a dismissal. He did not cite any law, although he was not obliged to do so.

[77] In turn, Mr Jogia's principal submission was that the resignation was withdrawn. I accept that Mr Jogia changed his mind about resigning, but am not

satisfied that Mr Dixon received any communication advising of the withdrawal of the resignation. I am satisfied that Mr Dixon did not accept any withdrawal of the resignation.

[78] Mr Jogia went on to say that, since his resignation was no longer effective, his employment was terminated by an unjustified dismissal on 13 October. However since I find the resignation was still effective, and was not addressed on whether Mr Dixon's conduct after 26 September made any difference to this, I find Mr Jogia's employment was not terminated by a dismissal on 13 October.

Holiday pay

[79] Mr Jogia sought payments of 8% of his total gross earnings, plus GST, and four days' statutory holiday pay. As he was an employee no GST attaches to his holiday pay, and that component can be disregarded. If he received payment while on leave for any period, that payment must be deducted from the claim for 8% of his total gross earnings. Records he provided indicate he was paid for the absence in July and early August, so a corresponding amount should be deducted from his claim.

[80] It was common ground that a payment of four days' pay was made in respect of statutory holidays, and subsequently deducted because Mr Dixon believed Mr Jogia was not entitled to the payment. Mr Jogia sought repayment.

[81] The parties' employment agreement contained a schedule specific to Mr Jogia. It provided that he would be paid a salary of \$95,000 per annum, expressed to be inclusive of holiday pay. I accept that the parties reached such an agreement. SCL relied on it in saying it does not owe Mr Jogia any payment in respect of holiday pay.

[82] No-one referred to the Holidays Act 2003.

[83] Section 6 of the Act provides that entitlements under the Act are minimum entitlements, although enhanced entitlements may be provided by agreement. If an agreement excludes, restricts or reduces any entitlement under the Act, it has no effect to the extent that it does so.

[84] Section 27 of the Act obliges employers to make payment for annual holidays before the holiday is taken unless there is agreement that payment be made during the corresponding pay period, or employment has ended. Section 28 allows 'pay as you go' annual holiday pay for employees who are employed on fixed term employment agreements of less than 12 months, and employees employed on arrangements so intermittent or irregular that it is impracticable for the employer to provide the required annual holidays. Mr Jorgia was not such an employee.

[85] Section 55 of the Act requires employers to make payment for statutory holidays in the corresponding pay period.

[86] Since I was not addressed on these matters, and they concern some potentially significant issues, I refer them to the parties to resolve. Leave is reserved to approach the Authority again in respect of these claims for holiday pay if a determination is required, but the parties should consider seeking mediation assistance before further approach is made to the Authority.

Costs

[87] Both parties have addressed costs.

1. The preliminary determination

[88] In a determination dated 20 March 2009 I found the parties were in an employment relationship, and reserved costs pending a determination of the substantive matter or resolution by the parties.¹

[89] Mr Jorgia was the successful party in the preliminary matter, and is entitled to consideration of a contribution to his costs in respect of it.

[90] Mr Carter submitted that, if SCL were the successful party in the substantive matter, it was also entitled to an order for costs in effect as if it were the successful

¹ **Jorgia v Sefton Construction Limited**, AA 82/09.

party in the preliminary matter. I do not agree. Mr Jogia was successful in establishing that his concerns were within the jurisdiction of the Employment Relations Authority, which had been denied. That his grievances were not subsequently upheld is a separate matter, relying on a different set of facts and law, and should be addressed in that way in a costs context.

[91] Relevant parts of Mr Jogia's request for an order for costs cited legal fees to a total of some \$2,600, plus the filing fee. He sought in addition to charge for his own time in the matter at the rate he would have charged as a consulting surveyor.

[92] In his costing Mr Jogia did not separate the preliminary and the substantive investigations. While I would find he was entitled to a contribution to legal fees incurred in assisting with preparation for the preliminary matter, the available material indicates the assistance was relevant to the substantive matter. Accordingly there will be no order for a contribution to legal fees.

[93] Litigants in person are not in general entitled to a contribution to the costs of the time they spent on a matter. There was no reason to depart from this here. There will be no order in that respect.

[94] In that Mr Jogia's substantive claims were ultimately unsuccessful, I do at least accept he should retain responsibility for the Authority's filing fee, and make no order for reimbursement of the filing fee.

[95] The result is that no amount remains to be ordered. Accordingly there will be no order for costs in the preliminary matter.

2. The substantive determination

[96] SCL is the successful party in the substantive matter.

[97] Mr Carter sought what he described as indemnity costs in respect of at least the increased costs to SCL of dealing with Mr Jogia's personal grievances. He submitted that Mr Jogia's argument that he withdrew his resignation was always

bound to fail, and the allegations in support of the disadvantage grievance were untrue, unsubstantiated and unnecessary. The legal costs incurred in respect of those matters totalled \$11,592.55.

[98] It is a little strong to say, in a costs setting, that Mr Jogia's allegations about his resignation were bound to fail. That was so on SCL's view of the evidence but there was a risk the Authority would accept Mr Jogia's evidence to find the withdrawal of the resignation was communicated to and accepted by Mr Dixon.

[99] Mr Jogia's allegations in support of his disadvantage grievance are a different matter. They were serious allegations, and untrue and unfounded. They should not have been made.

[100] Plainly there were underlying difficulties in the parties' relationship, centring on SCL's view of Mr Jogia's performance. In electing to proceed as he did Mr Jogia sought to deny or obscure the performance concerns by making a number of allegations, against Mr Dixon in particular, many of which can only be described as lies. In general he must take the consequences of the significantly adverse effect on his credibility of that approach. In a costs setting he must take the consequences of putting SCL to costs of defending itself and its employees against those allegations, being costs which should not have been necessary.

[101] The personal grievances accounted for almost all of the 1.5 days required for the investigation meeting in the substantive matter, and almost all of the preparation time. I regard the associated legal fees incurred as very reasonable in the light of the extent of the matters SCL was obliged to address in response to Mr Jogia's allegations. I do not impose any notional reduction for the purposes of a calculation of costs.

[102] With reference to **PBO Limited (formerly Rush Security Limited) v da Cruz**², I note the comments regarding the imposing of a notional daily rate for costs in the Authority together with the acknowledgement that flexibility might be required

² [2005] 1 ERNZ 808

in individual cases. If I applied a notional daily rate, a likely costs figure for an employee would be \$3,000.

[103] Returning to the request for indemnity costs, such an order may be made when a case is without merit and taking into account the losing party's conduct overall³. I doubt that the special nature of the Authority's jurisdiction is sufficient to prevent it from taking such matters into account.

[104] Here Mr Jogia was warned of the seriousness of the allegations he was making in support of his disadvantage grievance, but pursued them anyway. They were so lacking in merit, and there was such an element of dishonesty in Mr Jogia's making of them, that SCL is entitled to full reimbursement of the legal costs incurred in defending itself.

[105] The uncertainties about the forwarding of the letter withdrawing Mr Jogia's resignation mean I do not consider Mr Jogia's conduct of the issue in the Authority as being quite so reprehensible. At the same time I have not accepted his assertion that Mr Dixon expressly accepted the withdrawal, so that overall the potential risk to SCL did not materialise.

[106] I conclude that in the circumstances Mr Jogia had some reason to believe his resignation was not being acted on, and to be shocked when he found that it had been. In that respect he was entitled to air a grievance, even though it was weak.

[107] The cost of defending the unjustified disadvantage grievance was not separated from the cost of defending the dismissal grievance. In the light of the conclusions just set out, I apply a small reduction to the amount of costs sought in order to recognise the position in respect of the resignation. I consider \$10,000 to be an appropriate amount.

[108] The final relevant consideration is Mr Jogia's ability to pay. I have limited information about that. Mr Jogia was still unemployed as at the date of the investigation meeting, but I am unaware of his assets and liabilities. My information

³ **Binnie v Pacific Health Limited** [2002] 1 ERNZ 428 (CA)

is only that in or about 2007 he sold a video hire business which had been showing a loss, and that his family home is owned by a trust.

[109] This is not enough to prompt me to reduce the amount I am minded to award. Mr Jogia is therefore ordered to contribute to SCL's costs in the sum of \$10,000.

R A Monaghan

Member of the Employment Relations Authority