

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2013] NZERA Auckland 488  
5404524**

BETWEEN HASHEEM KAMAL  
Applicant

AND HORIZON RADIOLOGY  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Bill Manning, Counsel for Applicant  
Emma Butcher, Counsel for Respondent

Submissions received: 11 October 2013 from Applicant  
10 October 2013 from Respondent

Determination: 23 October 2013

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**SUPPLEMENTARY AND COSTS DETERMINATION OF THE AUTHORITY**

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[1] By determination [2013] NZERA Auckland 404 the Authority found that the Applicant, Mr Hasheem Kamal, had been unjustifiably dismissed by the Respondent, Horizon Radiology Limited (Horizon).

**Lost Wages Award**

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[2] The Authority's substantive decision dealt in principle with the employment relationship problem raised by Mr Kamal, but left the question of compensation for lost wages to be quantified by the parties.

[3] The parties have been unable to resolve matters between them and the matter of quantification for lost wages has devolved to the Authority for determination.

[4] The Authority's determination of 6 September 2013 held that Mr Kamal was to be reimbursed lost wages for a period of 3 months. Any monies earned by Mr Kamal during this period were to be deducted from this amount.

[5] I find that Mr Kamal was provided with notice of termination on 24 October 2013; and had been advised that an amount in respect of the one month contractual notice period would be paid in lieu of notice.

[6] The one month payment in lieu of notice is to be deducted from the 3 months lost wages award pursuant to s 128 (2) of the Employment Relations Act 2000 (the Act).

[7] I order that Horizon pay Mr Kamal the sum of \$5,381.40 gross in respect of lost wages (calculated as 2 x \$8,960.04 – 70%)

### **Costs Award**

[8] Mr Kamal was successful and as costs follow the event, he is entitled to a contribution towards his actual costs. Costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[9] This matter involved two and a half days of an investigation meeting. Mr Kamal is seeking a contribution towards costs of \$8,750.00.

[10] Horizon submits that the Authority should exercise its discretion by making no order for costs on the basis that:

- (a.) Mr Kamal who had made four distinct claims was successful in only one of these, which resulted in time at the Investigation Meeting being occupied by evidence relating to the remaining unsuccessful claims.
- (b.) Mr Kamal had been seeking reinstatement, which remedy was only withdrawn at the conclusion of the first day of the Investigation Meeting. This had put Horizon to additional cost incurred in the preparation of evidence and submissions to counter reinstatement arguments.
- (c.) The level of Mr Kamal's actual awarded remedies fell far short of those claimed.
- (d.) Mr Kamal had called two witnesses whose evidence was not required (being Mr Cormack and Ms Shanta) which had put Horizon to additional cost required by having to review, prepare for, hear and deal with this evidence in the investigation.

- (e.) If Mr Cormack and Ms Shanta had not been called as witnesses the Investigation Meeting would have taken the two day period initially set down for it.
- (f.) Mr Kamal has not provided any evidence of his actual costs, and had been supported throughout Horizon’s investigation by APEX, the union to which he belonged.

### *Principles*

[11] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

#### ***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

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

[13] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup>.

[14] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>4</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[15] It is also a principle that: “Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful parties conduct, although conduct which has

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<sup>1</sup> [1996] 2 ERNZ 622

<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> [2005] 1 ERNZ 808

<sup>4</sup> [2001] ERNZ 305

*increased costs unnecessarily*” can be taken into consideration and thereby increase the notional daily tariff rate.

## **Determination**

[16] A party is entitled to bring claims to the Authority and to have these claims investigated unless the claims are deemed to be frivolous or vexatious and dismissed pursuant to s 12A of Schedule 2 of the Act.

[17] A party may be unsuccessful in the claims which have been brought before the Authority, and this will impact on the level of remedies awarded.

[18] Even if successful in the claims brought before the Authority, the Authority may take into consideration contributing conduct by the Applicant which has had the effect of contributing to the situation which gave rise to the personal grievance pursuant to s 124 of the Act, which will have the effect of reducing the level of remedies awarded.

[19] The claims brought by Mr Kamal were not deemed to be frivolous and vexatious, and contributing behaviour on the part of Mr Kamal was recognised and taken into consideration when determining the level of remedies in determination [2013] NZERA Auckland 404.

[20] Costs in the Authority are determined according to a notional daily rate. I am not persuaded that costs incurred prior to the Investigation Meeting are pertinent to the determination of costs at a notional daily rate in accordance with time spent at an Authority investigation meeting. I also note in this respect the Employment Court decision in *O’Malley v Vision Aluminium Ltd (No 3)*<sup>5</sup>.

[21] I am persuaded by the Respondent’s submission that had Mr Cormack not been called as a witness, noting that I had queried the relevance of his evidence prior to the Investigation Meeting, Horizon may not have incurred additional costs and there would have been a reduction in time taken during the Investigation Meeting.

[22] I further accept that Horizon was successful in three of the four claims before the Authority, and that the late withdrawal of the claim for reinstatement impacted upon its costs.

[23] Having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, and the conduct of the parties, I consider that a contributory award towards the Applicant’s actual costs is reasonable.

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<sup>5</sup> [1992] 2 ERNZ 1043

[24] Adopting the notional daily tariff rate of the Authority as \$3,500.00, I take that as the starting point for costs. From that point I take into consideration the following observation by the Employment Court:<sup>6</sup>

*The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.*

[25] The Investigation Meeting involved two and a half days, which at the notional daily rate equates to a sum of \$8,750.00. From this starting point, I consider it appropriate to take the factors identified by the Respondent into consideration and reduce this amount by \$1,750.00. I order Horizon to contribute \$7,000.00 towards Mr Kamal's costs.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>6</sup> Ibid at para [46]