

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 155A/10
5157339

BETWEEN MOHAMMED KHAN
 Applicant

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Eska Hartdegen for Applicant
 David France for Respondent

Submissions received: 24 May 2010 from Applicant
 5 May 2010 from Respondent

Determination: 30 July 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] This employment relationship problem concerned allegations of unjustified dismissal and unjustified disadvantage. Mr Khan injured his back in the course of his duties as a loading foreman in Air New Zealand's Ramp Services. Air New Zealand is an Accredited Employer in the ACC Partnership Programme and runs its own injury management programme under contract to ACC. It established in due course that Mr Khan would never be able to return to his former role, but declared him vocationally independent on the basis that he was fit for alternative work (albeit within a very narrow range.) His compensation ceased. He was dismissed when no job could be found for him within that narrow range.

[2] Mr Khan's application for interim reinstatement was declined in a determination dated 18 May 2009. In a determination dated 6 April 2010 I concluded that the dismissal was justified on the basis that there was no available alternative. The disadvantage claims were also dismissed.

[3] The parties have been unable to resolve the issue of costs and the respondent, as successful party, now claims a contribution to costs. Mr France advised in submissions that the respondent incurred costs of \$13,770.00 (excluding GST) in relation to the investigation of the interim matter, which involved a half day investigation meeting. In relation to the investigation of the substantive matters he said the respondent's costs were \$28,036.00 (excluding GST.) Noting that there was a two day meeting followed by written submissions, Mr France reminded the Authority that the case required:

“consideration of the Authority’s jurisdiction to consider the treatment of the applicant during a period his injury was being managed under the ACC legislation and related issues raised by the applicant in his statement of problem. This required more preparation and added to the complexity of the matter in comparison with a standard personal grievance relating to termination of employment on the grounds of medical incapacity.”

[4] Mr France argued that the conduct of the respondent at the hearing assisted with the efficient and effective investigation of the statement of problem. He submitted that a costs award in excess of the minimum tariff for two and a half days is appropriate in this matter.

[5] In submissions for the applicant, Ms Hartdegen noted that Mr Khan:

“remains unemployed with no prospect of future work. This is after all due to what happened to him at work with the respondent.”

[6] Ms Hartdegen argued (relying on *PBO Limited v Da Cruz, AC 2A/05, unreported, 9 December 2005*) that costs awards should be modest and that:

“...even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay...

...This is an instance where the Authority’s discretion should be applied to make no award of costs as the applicant has no ability to pay even a ‘modest’ award.”

Determination

[7] Mr Khan is out of time to challenge what was done under the Injury Management Programme (which is of course outside this jurisdiction.) As I reiterated in concluding the substantive determination:

“this matter has been a great tragedy for Mr Khan. Through no fault of his own, at the age of almost 60, he finds himself effectively unemployable and without an income with which to support himself. His situation seems to be exactly what the no-fault accident compensation scheme was designed to prevent.”

[8] Someone who is unable to return to a pre-injury role may be declared vocationally independent by virtue of being able to take up alternative work, but find that there is no such work within the business where they were previously employed. Such circumstances are not uncommon and will mean employment will have to be pursued elsewhere. Mr Khan however worked for one of the largest employers in the country. If it had no suitable work for Mr Khan it is hard to see who would.

[9] Air New Zealand is also an accredited employer. In its capacity as the provider of its own injury management programme it has declared an employee vocationally independent, stopped his earnings related compensation, and then dismissed him because he could not do any job that was available. It is impossible to reconcile the decision to declare Mr Khan vocationally independent with the conclusion that there was no alternative to dismissal.

[10] Against such a background to award costs to the respondent would be repugnant to equity and good conscience. As well, I accept Ms Hartdegen’s submission that after a lengthy period of unemployment he has limited means to pay an award should one be made.

[11] There will be no order for costs in favour of the respondent. Costs lie where they fall.

Yvonne Oldfield

Member of the Employment Relations Authority