

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 166A/10
5273391

BETWEEN KATRINA THOMSON
 Applicant

A N D MJD HAULAGE LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Shonagh Burnhill, Counsel for Applicant
 Peter Zwart, Representative for Respondent

Submissions: 11 November 2010 from the Respondent
 30 November 2010 from the Applicant

Determination: 1 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 25 August 2010 I dismissed Ms Thomson's personal grievance claim of unjustified dismissal. Costs were reserved subject to a timetable. I now have memoranda from the parties. This determination resolves the question of costs.

[2] Costs were reserved with any application for costs to be made by lodging and serving a memorandum within 28 days of 25 August 2010. The memorandum for the successful respondent was received by the Authority by email more than a month late on 11 November 2010. I am asked to extend time and to rule on costs. Mr Zwart for the respondent was overseas between 16 August and 13 September 2010. On his return he corresponded with counsel for the applicant in an effort to resolve costs. When there was no resolution the memorandum was lodged with the Authority and served on the applicant. For the applicant it is argued that the delay should result in a

reduction of any award and noted that the Authority sometimes refuses applications for extensions.

[3] Here, there is no prejudice to the applicant from the delay. Within time Mr Zwart initiated exchanges seeking an agreement about costs so the applicant knew that costs were being sought. I mean no criticism of either party but the exchanges took some time before it became clear there would be no agreement. Mr Zwart then applied to the Authority. I am also satisfied that there is sufficient explanation for the delay. I enlarge time and will deal with the merits of the application.

[4] I am referred to *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 which sets out relevant principles.

[5] The first issue is whether costs should follow the event. Counsel submits that this was a test case and I am referred to *Vaughan v Canterbury Spinners Limited* CC18A/03, 29 October 2003. I disagree. This matter was a routine personal grievance claim decided on its own facts and of limited application to others. I see no reason why costs should not be awarded in favour of the respondent.

[6] As to the case itself, the respondent argued that no grievance was raised in time but I rejected that argument. I will make a modest reduction in the costs award to reflect that lack of success. Otherwise the respondent was successful in establishing justification for its decision to dismiss Ms Thomson. In particular, there was a clerical error in documentation which the respondent needed to explain by expert evidence in light of Ms Thomson's claim not to have taken any cannabis despite the positive test result. The expert evidence needed to canvass the process for labelling and handling the sample and producing the test results. It also needed to validate the positive test result in light of Ms Thomson's later negative test. The respondent did not follow a perfect procedure in making its decision to dismiss Ms Thomson but it was good enough. The imperfections are irrelevant to the present question because they do not detract from the respondent's success. The facts were uncomplicated aside from the clerical error point. The investigation meeting lasted from 9.30 am until 3.30 pm so I will treat it as about three-quarters of a usual day. I am told that the respondent's costs are in excess of \$8,000.00.

[7] The starting point for assessing a daily tariff approach is \$3,000.00. With a modest allowance for the 90 day point that would produce an award of \$2,000.00. To

account for the added complexity and time required to resolve the point about the efficacy of the test result I will increase that to \$2,500.00.

[8] Ms Thomson is to pay costs of \$2,500.00 to MJD Haulage Limited.

Philip Cheyne
Member of the Employment Relations Authority