

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 214A/08  
5087353

BETWEEN                      HUNTER DOLAN  
   Applicant  
  
AND                              FILTA VACUUM PRODUCTS  
   LIMITED  
   Respondent

Member of Authority:      R A Monaghan  
  
Representatives:            R Harrison, Counsel for Applicant  
   L Campbell, Counsel for Respondent  
  
Submissions received:      16 July 2008 from Applicant  
   8 August 2008 from Respondent  
  
Determination:              1 September 2008

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      In a determination dated 19 June 2008 I found that Mr Dolan was dismissed unjustifiably, and made orders in respect of remedies flowing from the dismissal as well as for the payment of a bonus in respect of the year ending March 2007. I also made orders that Mr Dolan repay bonuses overpaid to him in the years ending March 2005 and March 2006.

[2]      The determination followed a 3-day investigation meeting.

[3]      Costs were reserved and the parties have filed memoranda on the matter.

1. Mr Dolan's position

[4]      Mr Harrison sought a contribution to Mr Dolan's costs in the sum of \$13,000, being 75% of the costs associated with the investigation in the Authority.

[5] In support Mr Harrison referred to a series of difficulties in arranging a date for mediation. There were various reasons for that, and I am not prepared to visit them on FVPL in a costs setting.

[6] It seems, too, that there were difficulties with a mediation meeting that went ahead, in that FVPL did not have available the calculations necessary to make the mediation meaningful. Information in support was provided in the form of correspondence between counsel addressing the availability of the calculations. However I cannot say what difference that made to the overall ability of the parties to settle the matter, and the cost of the time wasted at mediation was not identified.

[7] Next, Mr Harrison referred to a letter dated 1 February 2008 and marked 'without prejudice save as to costs'. In the letter, FVPL set out figures on which it relied (without giving a detailed calculation of the kind provided at the investigation meeting) to say Mr Dolan owed it \$27,000 in respect of overpaid bonuses. It claimed Mr Dolan owed it a further \$35,000 in respect of alleged overpayments to the sales manager. It also made a very small allowance for a bonus owed to Mr Dolan for the year ended March 2007. Accordingly it said it would accept \$62,000 from Mr Dolan in full and final settlement of 'the litigation'. Mr Harrison said the offer was not only unrealistic but aggravated the situation when a more realistic approach could have avoided the need for a hearing.

[8] Finally, Mr Harrison submitted that the length of the investigation meeting itself was unnecessary. He referred to the time taken in dealing with grounds of dismissal for which there was no basis.

## 2. FVPL's position

[9] Mr Campbell proposed that both parties bear their own costs, on the basis that both parties were successful in their proceedings. The emphasis in the rest of the submissions was on the findings which were adverse to Mr Dolan.

[10] Regarding any possibility of settlement, Mr Campbell referred to Mr Dolan's refusal to abandon his position regarding his entitlement to a bonus.

## Determination

[11] Overall both parties achieved success in parts of their respective claims, but equally there were serious flaws in the unsuccessful parts. Taking into account all matters associated with the conduct of the investigation, and the outcome, I would have concluded that relevant considerations were in such balance as to warrant an order that costs lie where they fall.

[12] There remains the matter of the attempts to settle. If FVPL's written offer of settlement was intended to address all matters arising out of both parties' claims, as it appears to have been, then there was no hope of its being accepted. It made no mention of the personal grievance. It also required payment by Mr Dolan of a significant sum in respect of the sales manager's bonus, a requirement for which there was no legal basis. Finally, the offer in respect of the unpaid bonus was not realistic. If the written offer is an accurate reflection of the stance taken in the attempts to settle, then the stance was not reasonable.

[13] Regarding Mr Campbell's submissions, I commented in the determination on Mr Dolan's failure to acknowledge that his method of calculating bonuses was flawed. The evidence indicated he made no such acknowledgement when the matter was first brought to his attention, and his approach was the same during the investigation meeting. If that was the stance he maintained during attempts at settlement, then it, too, impeded any prospect of settlement. If admissible evidence on the point were available to establish that stance was taken, again I would have found costs should lie where they fall. However I have no information on the point and cannot take it any further.

[14] The principles in **PBO Limited (formerly Rush Security Limited) v Da Cruz**<sup>1</sup> inform the Authority's approach to costs. Accordingly I take into account the without prejudice offer of settlement. Not only was it unrealistic, it also differed very substantially from the result in the determination. The overall outcome was a balance of \$14,290.33 (not counting interest) in favour of Mr Dolan.

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

[15] This factor should be reflected in an order for costs against FVPL. However while I accept that the costs cited were actually and reasonably incurred, a contribution of 75% of the costs of the investigation is too high. At the same time a tariff based approach is not suitable for a matter having a degree of factual complexity, and requiring significant preparation by counsel for both parties.

[16] Mr Harrison said costs were incurred in the sum of \$17,626. FVPL is ordered to make a contribution of 66% to those costs, in the sum of \$11,633.

R A Monaghan

Member of the Employment Relations Authority