



(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.*

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

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

[7] 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.”

[8] It is also a principle of *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>5</sup> that: “...conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award”.

#### *Submissions of the Respondent*

[9] Mr Cain submits on behalf of the Department that costs should be increased in accordance with the principle regarding the conduct of the parties which may have inflated costs unnecessarily on the basis that:

- a. Mr Muthu admitted during the Department’s investigation that:
  - i. he had not done the checks he was required to;
  - ii. he had not recorded two checks he was required to;

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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

<sup>5</sup> [2005] 1 ERNZ 808

- iii. he had signed the HRT (High Risk Tools) Register to indicate he had checked and that all the HRT were accounted for, when in fact he had not checked at all.
  - b. In circumstances in which Mr Muthu and his representative, Mr Bennett, knew that he had deliberately falsified the HRT Register, it should have been obvious that the case was unlikely to succeed in substance.
  - c. Before the lunch break on the first day of the Investigation Meeting Mr Muthu had admitted that:
    - i. he had not done the checks he was required to;
    - ii. he had not recorded the two checks he claims he did do;
    - iii. he had blatantly falsified the HRT Register;
    - iv. that his actions constituted a breach of the Department's Code of Conduct in two respects; and
    - v. that he was the main cause of his own dismissal
  - d. After he had made these submissions, following the lunch break, Mr Cain on behalf of the Department had raised the possibility of the case being dismissed on the grounds that it was frivolous and/or vexatious. Whilst the Authority Member chose to continue with the Investigation Meeting, she did so only after expressing concern as to the strength of Mr Muthu's case, and raising the issue of costs to be considered should he wish to continue.
  - e. Mr Muthu then took a half hour adjournment to decide whether or not to pursue his case. After he confirmed his decision to do so, Mr Cain had warned Mr Bennett that it would seek costs on a higher than usual basis if it was successful. After a further day and a half of an Investigation Meeting the case was dismissed on all fronts.
  - f. The Investigation Meeting was needlessly lengthened by arguments from Mr Bennett, Mr Muthu's Advocate, which seemed to be based on disparity of treatment, including allegations attacking the integrity of Mr Jimmy Byrne, the Principal Instructor of Catering and Laundry at Spring Hill, which were unsupported by details or evidence.

- g. This line of argument was continued despite concern being raised by the Authority Member about the number of generalised allegations being made against Mr Bryne, especially in the light of the apparent absence of supporting evidence.

[10] Mr Cain in summary submits that:

- a. The claim was misconceived and ought not to have been brought at all;
- b. The hearing was unnecessarily pursued after lunch on the first day despite apparently fatal admissions by the Applicant, and in the face of clear warnings expressed by the Authority; and
- c. The Applicant's unfounded allegations unnecessarily lengthened the hearing time.

[11] Further it is submitted by the Respondent that in this case, the Authority would be warranted in considering whether to award full indemnity costs in accordance with the decision of the Court of Appeal in *Bradbury v Westbank Banking Corporation*<sup>6</sup>, especially the contention that indemnity costs may be appropriate in cases in which a case has been unnecessarily prolonged by groundless contentions, or by the making of allegations which ought never to have been made.

[12] However the Respondent is seeking an uplift in the usual tariff level rather than seeking costs on an indemnity basis.

#### *Submissions of the Applicant*

[13] Mr Bennett, on behalf of Mr Muthu, submits that the Investigation Meeting was neither complex nor lengthy. Further that from the invoices presented in support of the Department's costs claim, that these are not detailed and may represent the costs of having two counsel appearances in a matter that was not complex.

[14] Mr Bennett also submits that whilst there was a discussion about the costs issue, the Authority Member failed to put the Applicant on notice to such an extent that his inability to win would see an increase in costs.

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<sup>6</sup> [2009] NZCA 234, [2009] 3 NZLR 400

## **Determination**

[15] The normal rule is that costs follow the event and the Department is entitled to a contribution to its costs.

[1] 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 Department's actual costs is reasonable.

[2] I am satisfied that in the circumstances of this case, most especially the fact that the Applicant, although made aware by both the Respondent and by myself early on the first day of the hearing that there were concerns as to the merits of his claim chose to continue for a further day and a half of the Investigation Meeting; that there are grounds for making an award above the usual tariff rate.

[3] I do not accept that the Applicant would have been unaware of the impact continuing with his claim might have on costs. Mr Bennett is an experienced employment advocate, accustomed to appearing in the Authority and to the basis on which costs in the Authority are made.

[4] There was an adjournment after my indication of the implications for costs continuing with the case might have for Mr Muthu during which Mr Bennett had ample opportunity to advise his client accordingly.

[5] However Mr Muthu chose to continue with the Investigation Meeting which proceeded for a further day and a half. He was wholly unsuccessful in his claim and the Department is entitled to costs which fall to be determined in the light of this decision to continue..

[16] Accordingly taking the notional daily tariff rate of the Authority as \$3,500.00, I take that as the appropriate starting point for costs. I order Mr Muthu contribute \$14,000.00 towards the Department's actual costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

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