

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 244  
5350036

BETWEEN	SIMON BLUE Applicant
A N D	GRAAMANS HEALTH DEVELOPMENT LIMITED Respondent

Member of Authority: Helen Doyle

Representatives: Len Andersen, Counsel for Applicant  
Michael Guest, Advocate for Respondent

Submissions Received: 4 October 2012 for Applicant  
31 October 2012 for Respondent

Date of Determination: 7 November 2012

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**WAGES AND COSTS DETERMINATION OF THE AUTHORITY**

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- A. The respondent is ordered to pay to the applicant \$2,216.80 being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.**
- B. The respondent is ordered to pay the applicant the sum of \$3871.56 being costs and disbursements.**

[1] In my determination dated 13 September 2012 I found that the applicant had a personal grievance that he was unjustifiably dismissed. I reserved leave for Mr Andersen to return to the Authority with respect to the quantum of any lost wages if agreement could not be reached and awarded \$10,500 to the applicant for compensation and a reimbursement amount. I reserved the issue of costs and timetabled for an exchange of submissions if agreement could not be reached about costs.

[2] I have now received submissions from Mr Andersen and Mr Guest.

### **Lost wages**

[3] Mr Andersen set out the basis for the loss of earnings claimed and said the loss sustained was \$2,216.80. He did not indicate whether that was a net or gross figure.

[4] Mr Guest in his submission confirmed that after correspondence between Mr Andersen and himself the figure for lost wages could be set at \$2,216.80. In those circumstances I am confident that the parties have agreed on a figure and whether it is gross or net.

[5] I order that Graamans Health Development Limited pay to Simon Blue the sum of \$2,216.80 being reimbursement of lost wages under section 123(1) (b) of the Employment Relations Act 2000.

### **Costs**

#### **The applicant's submissions**

[6] Mr Andersen submits that the applicant has incurred legal costs excluding disbursements of \$9,372.24 (GST inclusive) up to 29 February 2012 and his final costs will be approximately \$11,200 plus disbursements of \$194.32. The applicant seeks a full reimbursement of the costs incurred.

[7] Of the amount of costs claimed, \$840.65 relates to mediation and \$759 relate to the completion and filing of the costs memorandum. Mr Andersen acknowledges the leading Employment Court judgment on costs in *PBO Limited v Da Cruz* [2005] ERNZ 808 and the tariff approach.

[8] Mr Andersen submits that this case is one which justifies either an indemnity award or an increased level of costs because of the following factors:

- The case has particular features which take it out of the ordinary because there was no misconduct to justify a dismissal.
- That the conduct of the respondent was reprehensible.
- That it must have been clear to the respondent that there was no proper basis for the dismissal.

- That the costs incurred are reasonable for the work involved which was made more difficult because of the respondent's refusal to acknowledge there were no grounds for dismissal.
- If an award of costs is limited to \$3,500 plus disbursements, then the majority of the award received by the applicant will go in costs and that the Authority should recognise the economic reality of the situation when an employer puts his former employee to unnecessary expense.

### **The respondent's submissions**

[9] Mr Guest submits that the sum of \$3,500 for costs would be appropriate for a one day meeting and refers to the importance for the Authority to maintain consistency when applying the rate as to costs.

[10] Mr Guest submitted that there are no adequate grounds for indemnity costs and the defence could not be described as hopeless. Whilst he acknowledged it did not succeed, there were concerns he submitted about the standard of work and attitude of the applicant. He submitted that the respondent co-operated fully with mediation and has already paid the compensation awarded to the applicant.

[11] Whilst acknowledging that the applicant is entitled to costs, Mr Guest submits that there is nothing that allows for *the very serious uplift* suggested by Mr Andersen and that costs for mediation are very rarely ordered by the Authority. Further he submits that the photocopying of 350 pages appears excessive and that GST awards are rare and the sum claimed for preparation of the cost submission is excessive.

### **Determination**

[12] The purpose of a cost award is not to punish an unsuccessful party or express disapproval of their conduct. Much of Mr Andersen's submission properly assessed is to that effect. Disapproval of a defence does not result in an increase to the normal tariff unless there is conduct in advancing that defence or at the investigation meeting which increased costs unnecessarily. In the Authority costs are usually judged against a daily tariff now recognised at \$3,500 but this can be increased or decreased depending on the factors taken into account in the exercise of the discretion as to what amount costs should be awarded in.

[13] This was a straightforward matter and able to be completed within one hearing day including the delivery of submissions. I am not satisfied that the conduct of either party at the investigation meeting increased the time taken for investigation. I am not satisfied that there are factors that take it out of the ordinary types of cases the Authority deals with simply because there was no misconduct found to justify a dismissal.

[14] In the judgment in *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 there was support that the Authority may be able to award costs with respect to mediation. There is not in this matter however factors advanced to support costs incurred for mediation should be taken into account.

[15] Indemnity costs are usually limited to the category of cases where the behaviour is exceptionally bad and they are exceptional – *Bradbury v Westbank Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400. This matter falls well out of that category.

[16] I intend to start with the usual daily tariff of \$3,500 and I make a small uplift of \$300 from the daily tariff as there was some work involved in assessing the lost wages and submissions as to costs.

[17] I limit the claim for disbursements to those involving payment of money to a third party – *Oldco PTI New Zealand Ltd v Houston EmpC* Auckland AC 18A/06, 6 June 2006. In this case that will be the payment of the filing fee of \$71.56.

[18] I order Graamans Health Development Limited to pay to Simon Blue the sum of \$3871.56 being costs and disbursements.

Helen Doyle  
Member of the Employment Relations Authority