



# New Zealand Employment Relations Authority Decisions

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## Rathnayaka v Lab Tests Auckland Limited [2011] NZERA 24; [2011] NZERA Auckland 22 (18 January 2011)

Last Updated: 8 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 22 5310474

BETWEEN

AND

DENEPITIYAGE SRIYANI STELLA RATHNAYAKA Applicant

LAB TESTS AUCKLAND LIMITED

Respondent

Member of Authority: Representatives:

Submissions received:

M B Loftus

Nil for the Applicant

Katherine Burson, Counsel for the Respondent

Nil from the Applicant

17 September 2010 from the Respondent

Determination:

18 January 2011

### COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 26 August 2010 I dismissed Ms Rathnayaka's claim of unjustified dismissal. Costs were reserved for each party to lodge and serve a memorandum if necessary and a time set within which that was to be completed.

[2] In an earlier determination (26 July 2010) I dismissed Ms Rathnayaka's claim for interim reinstatement. A significant reason behind that decision was that the substantive hearing was then imminent. For the same reason it was decided that the question of costs for that investigation meeting be consolidated with any costs consideration that may flow from the substantive hearing.

[3] The parties were unable to resolve the issue of costs and the successful respondent (Labtests) sought a contribution toward costs incurred on 17 September. There has been no response from Ms Rathnayaka and her previous solicitor no longer represents her.

[4] Labtests costs totalled \$35,294.78 (including GST) plus disbursements of \$734.13.

[5] Often the Authority will assess costs on a daily tariff basis: see *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [\[2005\] NZEmpC 144](#); [\[2005\] ERNZ 808](#). In assessing that tariff a common starting point is \$3,000 per day: see *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [\[2008\] ERNZ 73](#). From that point adjustment may be made either up or down depending on the circumstances.

[6] Labtests argues that an increased tariff (\$6,000 per day) should apply in this instance and seeks a contribution of \$18,000. Given the absence of submission from the applicant, there is no argument or justification for applying a reduced tariff.

[7] In support of the view there can be a higher daily rate Labtests refers to *Whitten v Ogilvy New Zealand Ltd* (Employment Relations Authority, AA200A/10, 21 June 2010) and they cite the following as circumstances justifying the claim:

- i. *The applicant was offered an early substantive hearing but decided to proceed with an interim hearing first. This meant that three hearing days were required instead of two.*
- ii. *This also left the respondent in a position where it had to prepare for two cases. The interim hearing involved submissions as to the principles in relation to interim orders and interim reinstatement. The substantive hearing required submissions on the s103A test, and remedies, and additional evidence.*
- iii. *The applicant's case failed on a preliminary issue, namely she did not submit her grievance with [sic] the 90 day period set out in the s114 of the Employment Relations Act. However, the respondent was required to deal with all substantive issues in addition to this preliminary point.*
- iv. *The entire process of preparing and attending both Authority hearings occurred under considerable time pressure and with urgency.*

[8] I am not persuaded by Labtests arguments.

[9] While there is some merit in the view that the interim was unnecessary given the close proximity of the substantive investigation, I do not accept that arguments tendered in [7]1 and [7]2. A lot of the evidential material presented in the interim was merely repeated for the substantive meeting. Beyond the preparation of legal submission, which for an interim is relatively simple, there was little additional effort or duplication. The legal work referred to in the last sentence of [7]2 above was required anyway. In these circumstances I consider the generally accepted tariff of \$3,000 is adequate compensation for the extra days hearing.

[10] It is also true that the applicant's case failed on a preliminary issue but I note comments in the interim determination. Even at that time it was apparent that such an outcome was possible but the matter was such that a full examination of the evidence was necessary before confirmation occurred. That examination could only occur through the substantive investigation and I must also observe that had the technicality not existed, and having had the ability to examine all the evidence, I am left with a feeling that the successful respondent could well have found itself on the wrong end of a considerably different outcome. They should be thankful and not using this to advantage.

[11] The point in [7]4 is also correct, especially in respect to the interim investigation, but that in itself does not justify an increased tariff. It is the very nature of interim applications.

[12] I also note the reference to *Whitten*. The justification for that outcome lay in six points involving extreme behaviours such as "reprehensible", "discourteous, disruptive, and uncooperative" conduct. Such behaviour did not occur here.

[13] Finally I note the respondent's written offer to Ms Rathnayaka in respect to costs and their willingness to accept \$9,000 calculated in accordance with the principles outlined in 5 above. The only thing that has changed since is that they have been required to make a formal application for costs. I consider that irrelevant given information proffered by Labtests, which leads me to conclude that this is because Ms Rathnayaka has left the country and it is highly probable she is unaware of the offer.

[14] Therefore, and applying the principle that costs follow the event along with the generally accepted guideline of \$3,000 per day (see 5 above), I conclude that \$9,000 is an appropriate contribution toward Labtests costs.

## **Conclusion**

[15] Ms Rathnayaka is to pay Lab Tests Auckland Limited the sum of \$9,000 (nine thousand dollars) as a contribution toward costs.

Mike Loftus

Member of the Employment Relations Authority