

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 14/07
CRC 4/06**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GERRY KOSTIC Plaintiff
AND	GRAHAM DODD AND GRANT MILLIGAN T/A ALLAN MILLIGAN CARS AND/OR MOTOWORLD SYSTEMS LIMITED T/A ALLAN MILLIGAN CARS Defendants

Hearing: 21, 22, 24 and 29 August 2006
(Heard at Christchurch)

Appearances: Plaintiff in person
R J Davidson, Counsel for Defendant

Judgment: 11 July 2007

JUDGMENT OF JUDGE A A COUCH

[1] Mr Kostic was employed as a used car salesman. On 8 March 2005, there was an altercation between Mr Kostic and his employer. As a result, Mr Kostic's employment came to an end. Mr Kostic said he was dismissed. The employer said he resigned.

[2] Mr Kostic pursued a personal grievance alleging that he had been unjustifiably dismissed. He also alleged that, in the course of his employment, the employer's actions amounted to discrimination and harassment. These issues were investigated by the Employment Relations Authority. In a determination dated 30 January 2006 (CA12/06) the Authority concluded firstly that Mr Kostic had not established either

discrimination or harassment. The Authority then found that Mr Kostic had been unjustifiably dismissed but that he had contributed so greatly to the situation giving rise to his dismissal that he should receive no remedies. In a subsequent determination (CA12A/06), the Authority awarded Mr Kostic \$3,000 by way of costs.

[3] Mr Kostic challenged the Authority's determination. As filed, that challenge focussed on the assessment of contribution and the Authority's refusal to award any remedies. A hearing was sought only in respect of selected issues. In the statement of defence, the employer made a cross-challenge to the Authority's determination as to costs.

[4] At that stage of the matter, Mr Kostic was represented by counsel. In a telephone conference with counsel on 5 May 2006, it was agreed that the selected findings of fact Mr Kostic sought to challenge were so intertwined with the Authority's findings of fact on other issues that the only practical way to proceed was by way of a hearing de novo. The scope of the hearing, however, was limited to Mr Kostic's claim that he had been unjustifiably dismissed and the award of costs in relation to the proceedings before the Authority. There was no challenge to the Authority's determination dismissing Mr Kostic's claims of discrimination and harassment.

Identity of the defendant

[5] Before the Authority, there was initially an issue as to the identity of Mr Kostic's employer. The Authority found that, during the course of Mr Kostic's employment, his employer changed from a partnership of Graham Dodd and Grant Milligan trading as Allan Milligan Cars to a company, Motoworld Systems Ltd, and that there was some doubt as to whether Mr Kostic was aware of the change. The parties agreed that there was no need to resolve this issue and that, if any orders were made against Mr Kostic's employer, such orders could be made jointly and severally against both the partnership and the company. The matter proceeded before the Court on the same basis. In this judgment, I shall refer to "the partnership" or "the company" when the difference is significant but will otherwise simply refer to "the employer" as comprising both entities.

Background and outline

[6] Mr Kostic is about 60 years of age. He was born in Yugoslavia and emigrated to New Zealand more than 30 years ago. After working at a variety of jobs, he became a car salesman. For the last 20 years or so, he has worked successfully in that role for several employers.

[7] Mr Dodd and Mr Milligan also have extensive experience in the retail motor vehicle industry. For many years they have operated the business known as Allan Milligan Cars. Initially they did so in partnership. More recently, they have done so through a company, Motoworld Systems Limited, of which they are both directors.

[8] In 1992, Mr Dodd and Mr Milligan first employed Mr Kostic through the partnership. He remained with them for a period of 3 years. During that time, they came to know him well, both as an employee and socially. They saw that Mr Kostic was passionately committed to his role as a salesman and successful in that role. They also experienced Mr Kostic's flamboyant and, at times, volatile nature.

[9] Mr Kostic moved to another job in 1995. He left Mr Dodd and Mr Milligan on friendly terms and remained in contact with them subsequently. From time to time, Mr Kostic would have a drink with them and their staff after work and they were guests at his wedding. Mr Dodd also engaged Mr Kostic to assist in training sales staff and in preparing a sales manual.

[10] In April 2003, Mr Dodd and Mr Milligan asked Mr Kostic to come and work for them again. After some discussion, he accepted the offer and began work later that month.

[11] Mr Kostic was the principal salesman for the business. Mr Milligan was also involved in sales to an extent but, as the day to day manager of the business, he had many other responsibilities as well. When Mr Kostic began in April 2003, there was another salesman there, Maurice Wilson, but he left in February 2004.

[12] During the period of nearly 2 years until his employment ended in March 2005, Mr Kostic was an effective and successful salesman.

[13] Mr Milligan was involved in the business on a full time basis and present at the premises during normal business hours Monday to Friday. Mr Dodd was the dealer principal for the business but his day to day involvement was significantly less than Mr Milligan. He estimated that he spent one-third of his time at the premises. In addition to Mr Kostic and Mr Wilson, the other staff employed at the premises were Jeanette Brant who was the office administrator, Shawn Alston who was a mechanic, Nathan Friend who was also a mechanic, and Sam Graham who was a car groomer. In late 2004, Mr Wilson was re-employed but not as a salesman. He described his work as that of a general hand.

[14] After Mr Kostic returned to the business in April 2003, some of the other staff had difficulty relating to him. This came to a head in about September 2003 when Mr Dodd counselled Ms Brant and Mr Wilson about their attitude towards Mr Kostic. He told them and Mr Kostic that the three of them needed to work together constructively. While these discussions appear to have led to an improvement in the relationship between Mr Kostic and Ms Brant, Mr Wilson continued to find it difficult to work alongside Mr Kostic and, as noted earlier, he left in February 2004.

[15] The principal source of friction between Mr Kostic and other staff was Mr Kostic's personality and method of working. Compared to other staff, Mr Kostic was flamboyant and outspoken. He spoke his mind, often in expansive terms. He was a passionate salesman and his desire to complete sales and to please customers led to his making demands on support staff which they considered unreasonable. Mr Kostic also paid insufficient attention at times to the paperwork associated with sales, to the annoyance and frustration of Ms Brant.

[16] A particular aspect of Mr Kostic's personality was his rapid changes of mood. Although he was generally cheerful and positive, he had a quick temper and could be harshly critical of others over relatively small matters. It was equally apparent, however, that Mr Kostic did not hold grudges and that, once he had spoken his mind, he would move on.

[17] Although these aspects of Mr Kostic's personality made some staff cautious in their relationship with him, he got on well with Mr Milligan and with Mr Graham. He also had a good relationship with Mr Dodd.

[18] There is no doubt that Mr Milligan and Mr Dodd were well aware of Mr Kostic's personality. Both spoke of occasions when Mr Kostic's temper had flared over an issue but, after a cooling down period, harmony had quickly been restored.

[19] The premises of Allan Milligan Cars had a frontage on Moorhouse Avenue, a major inner city street in Christchurch. To the south of the property, immediately adjacent to the road, there was a yard in which some of the cars for sale were displayed. Behind that front yard there was a building, referred to as the showroom, which extended the full width of the property. In the south west corner of the showroom there was a reception desk where Ms Brant worked. At the rear of the showroom were three offices. The office on the western side, nearest the reception desk, was occupied by Mr Kostic. The office on the other side of the showroom was used by Mr Milligan and Mr Dodd. The office in the middle was used for meetings with customers or other visitors. The showroom had windows to the front and rear.

[20] Immediately behind the showroom there was a second yard also containing cars for sale. Access to this area from the showroom was through a door at the eastern end of the building. Behind this rear display yard there was a fence with a relatively large gate at the eastern end which was open during business hours. That connected to a further yard at the rear of the premises used for servicing and preparing cars. On the west side of this service yard, in order from front to rear, there was a grooming bay, a store-room and a steam cleaning area. At the back of the premises on the eastern side, opposite the steam cleaning bay, there was a driveway giving access to a small street called Waller Terrace. There was no vehicle access from the front yard to the display area and servicing area in the rear. To get from one to the other, cars had to be driven on the road via Waller Terrace.

Events leading to termination of employment

[21] Tuesday 8 March 2005 was a normal business day. A potential customer came in and Mr Kostic attended to him. The man expressed interest in a BMW car on the front yard and said that he would be interested in trading in his Toyota Caldina which he had parked at the front of the premises. Mr Kostic invited the customer to take the BMW for a test drive which he did. What happened from that point on was, to a greater or lesser degree, the subject of conflicting evidence. The following summary, however, sets out common aspects of that evidence and

summarises the parties' positions on the matters in dispute. I return later to a more detailed discussion of the key matters in dispute.

[22] The established practice in the business was that Mr Milligan assessed the trade-in value of vehicles. If Mr Milligan was not available, Mr Dodd would do it but this was a relatively unusual occurrence. If neither man was available, the standing instruction was to consult Mr Milligan by telephone. Having a trade-in valuation available when a customer returns from a test drive is important to the process of securing a sale. When the customer went off in the BMW on 8 March 2005, therefore, Mr Kostic was anxious to have the Caldina appraised before the customer returned.

[23] At that moment, Mr Milligan was engaged in a meeting in the middle office with a woman about the company's website. Mr Dodd was in the office next door working alone on the computer so Mr Kostic approached him. Mr Dodd asked how long the customer would be away and Mr Kostic replied about 30 minutes. Mr Dodd did not want to do the appraisal himself as he had other matters to attend to but he was also aware that Mr Milligan was in a meeting. Mr Dodd told Mr Kostic to wait until Mr Milligan was free and to then ask him to do the appraisal but added that, if Mr Milligan was not available within 10 minutes, he would do it himself.

[24] Exactly what Mr Kostic and Mr Dodd did immediately after that was the subject of some dispute. Mr Dodd said that Mr Kostic immediately went to the service yard where he had already taken the Caldina. Mr Kostic said he went out the front and drove the Caldina around to the service yard where he waited. It was agreed, however, that Mr Kostic ended up in the service yard with the Caldina where he waited, having a cigarette. After a few minutes, another customer came into the front yard. Mr Kostic did not see her and therefore did not attend to her. Noticing the woman in the front yard unattended, Mr Milligan left his meeting to go and speak with her. Mr Dodd said that, while Mr Milligan was in the front yard, he went to the service area and told Mr Kostic it would have been better for him to wait in the front yard so that he could attend to any new customers. Mr Dodd said that this was a brief but amicable discussion in which Mr Kostic was quite normal.

[25] After some discussion with the customer about the vehicles in the front yard, Mr Milligan took her through to the back yard to show her the vehicles there. After further discussion with Mr Milligan about those vehicles, the woman customer left. At that point, Mr Milligan saw the Caldina parked in the service yard and spoke with Mr Kostic about it. Exactly what was said in that discussion was the subject of some dispute. Mr Kostic said that, seeing Mr Milligan apparently free and expressing interest in the Caldina, he asked him to appraise it and that Mr Milligan did so readily. Mr Milligan suggested that Mr Kostic demanded that the appraisal be carried out immediately and that he did so reluctantly. In any event, the outcome was that Mr Milligan then carried out a trade-in appraisal of the vehicle. This involved an inspection, taking it for a test drive and some further inspection when he returned.

[26] At that point, Mr Dodd left the office and came to the rear of the property where Mr Milligan and Mr Kostic were beside the Caldina. Mr Dodd discovered that Mr Milligan had appraised the car and accused Mr Kostic of not following his instructions. There followed a verbal exchange between Mr Dodd and Mr Kostic. The case for the employer was that Mr Dodd spoke in a mild voice to Mr Kostic who immediately became enraged and launched a torrent of abuse and threats directed at Mr Dodd. Mr Kostic agreed that he had become angry and swore but said that he did so only in response to Mr Dodd remonstrating with him unjustifiably and swearing at him.

[27] The case for the employer was that, in the course of this exchange, Mr Kostic resigned his employment. Mr Kostic denied this.

[28] Following this exchange near the Caldina, Mr Dodd turned and began to walk back towards the showroom. Mr Kostic followed him. Mr Milligan followed Mr Kostic. They went towards the back door of the showroom. To get there, the three men had to go through a passage between the vehicles in the rear sales yard and then down a passage between those vehicles and the showroom to the door at the eastern end. At a point relatively near the showroom, Mr Kostic collided with Mr Dodd from behind. The force with which this occurred and whether or not it was deliberate were in dispute. The case for the employer was that Mr Kostic deliberately assaulted Mr Dodd. Mr Kostic said that it was an accident. It was

agreed, however, that when this happened, Mr Dodd turned round and told Mr Kostic not to push him and that Mr Kostic immediately replied that he had slipped.

[29] All three men then went into the building. Mr Kostic went to his office where he collected some of his belongings, put them in his briefcase and then left the building. He went to the back yard where he arranged with Mr Graham to drive him home.

[30] Later that day Mr Kostic telephoned Mr Milligan. He was unavailable so Mr Kostic left a message asking Mr Milligan to call him. Mr Milligan did so that evening. Certain aspects of what was said in this telephone conversation were in dispute but it was common ground that Mr Kostic wanted to discuss with Mr Milligan and Mr Dodd what had happened earlier that day and the future of his employment. Mr Milligan said he would need to discuss that with Mr Dodd.

[31] The following day, Wednesday 9 March 2005, Mr Kostic telephoned Mr Milligan again. Mr Milligan took this call while he was in his office with Mr Dodd. After some initial discussion with Mr Milligan, Mr Kostic spoke with Mr Dodd. There was a dispute about exactly what was said but the effect of it was that Mr Dodd made it clear he was unwilling to have any further discussion with Mr Kostic and that he would not have him back as an employee.

[32] Before this telephone discussion took place, Mr Dodd had instructed Ms Brant to make up Mr Kostic's final pay. She did this and Mr Kostic came to the premises on Friday 11 March 2005 to collect it. He had a brief discussion with Mr Milligan in which it was agreed that Mr Kostic would repay a loan which had been made to him by the business. Mr Milligan then offered to lend Mr Kostic a car. Mr Kostic accepted the offer.

[33] On 14 March 2005, Mr Kostic's solicitor wrote to Mr Dodd seeking a statement in writing of the reasons for Mr Kostic's dismissal. Immediately after Mr Dodd received that letter, Mr Kostic was required to return the loan vehicle. From that point on, the parties communicated largely through their representatives.

Issues

[34] The first issue must be whether Mr Kostic resigned. If he resigned freely and in circumstances which required no investigation, that is an end to the matter. If not, the next question must be whether Mr Kostic was dismissed.

[35] If Mr Kostic was dismissed, the broad issue is whether dismissal was an action a fair and reasonable employer would have taken in the circumstances.

[36] These broad issues necessarily involve a number of specific issues:

- a) whether Mr Kostic disobeyed the instruction given to him by Mr Dodd
- b) whether Mr Kostic resigned
- c) whether Mr Kostic assaulted Mr Dodd
- d) whether Mr Kostic was dismissed
- e) if Mr Kostic was dismissed, whether that dismissal was justifiable.

[37] If I conclude that Mr Kostic was unjustifiably dismissed, two further issues arise:

- a) what remedies are appropriate
- b) the extent to which Mr Kostic contributed to the situation giving rise to his dismissal.

Credibility and reliability

[38] There was a conflict of evidence about each of the key issues. It is therefore necessary for me to assess the credibility and reliability of the witnesses.

[39] The case for the employer was presented through nine witnesses. The principal witnesses were Mr Dodd and Mr Milligan. Evidence was also given by the five employees referred to earlier: Ms Brant, Mr Wilson, Mr Graham, Mr Friend and Mr Alston.

[40] The eighth witness was Russell Lange, the dealer principal of Team Hutchinson Ford where Mr Kostic was employed from 1987 to 1989 and who

provided a reference for Mr Kostic in 2005. The ninth witness was an employee of the Accident Compensation Corporation, Ms Paul. The evidence these two witnesses gave was peripheral. I accept what they said and exclude them from what I now say about the evidence of other witnesses for the employer.

[41] A factor common to all of the key witnesses for the employer was that their evidence-in-chief was exaggerated and phrased in very similar language. I formed a clear view that this evidence was largely in the words of the employer's advisers rather than of the witnesses themselves. A striking indication of this was that all of the briefs of evidence of the employer's witnesses referred to the key events occurring on Monday 7 March 2005 rather than the following day when they actually occurred. When challenged about this, several witnesses conceded that they did not recall the date at all. Others acknowledged the error and its importance but could not explain why it had occurred. A further striking aspect of the evidence was that many of the witnesses who read briefs of evidence highly critical of Mr Kostic gave oral evidence in very much milder tones and were willing to acknowledge Mr Kostic's strengths as well as his weaknesses. I have treated the briefs of evidence of these witnesses with caution and placed relatively little reliance on them.

[42] In forming this view, I am not being universally critical of the witnesses in question. It was apparent that those witnesses who remained employees of the company had difficulty reconciling loyalty to their employer with the obligation to give their evidence candidly. This is understandable.

[43] The evidence of many of the employer's witnesses was contradictory. This was starkly evident in relation to the events which took place in the back yard and the service area of the employer's premises on 8 March 2005. The case for the employer with respect to those issues was advanced through Mr Dodd, Mr Milligan, Mr Alston and Mr Wilson, each of whom claimed to have witnessed the altercation between Mr Kostic and Mr Dodd. Each placed those events in a different part of the premises. Mr Alston said it was in the driveway leading to Waller Terrace. Mr Dodd said it was at the rear of the service area near the steam cleaning bay. Mr Milligan said it was opposite the store-room. Mr Wilson said it was next to a vehicle actually in the steam cleaning bay.

[44] A similar inconsistency was evident regarding the place at which it was said Mr Kostic assaulted Mr Dodd. Mr Milligan said this occurred when they were moving east immediately adjacent to the showroom. Mr Dodd said this occurred while they were moving south between the two rows of cars in the back yard.

[45] Another striking conflict between the witnesses for the employer was the extent of the conversation between Mr Kostic and Mr Dodd in the back yard and service area. Mr Dodd and Mr Milligan said that Mr Kostic continued to harangue Mr Dodd from the place where the conversation had begun beside the Caldina vehicle all the way back to the showroom. Mr Alston supported this. Mr Wilson said that he was close to the grooming bay at the time and was adamant that he could hear everything which was said. Despite that, he said that he heard nothing after Mr Dodd and Mr Kostic passed through the gate between the service area and the back yard.

[46] A further inexplicable difference between the employer's witnesses was that Mr Wilson said that, at the time the altercation occurred, he was working on a car parked immediately outside the grooming bay. If this was correct, Mr Dodd, Mr Milligan and Mr Kostic would have had to go right past the vehicle on their way back to the showroom. Neither Mr Dodd, Mr Milligan nor Mr Alston mentioned in their evidence seeing either the vehicle or Mr Wilson.

[47] Equally inexplicable was the conflict between Mr Wilson and other witnesses for the employer about the sequence of events at the time the altercation started. Mr Wilson said that Mr Kostic was standing alone in the service area when Mr Dodd came out to speak with him and that Mr Milligan came from the driveway to join them subsequently. According to Mr Wilson, all three men then stood beside a vehicle in the steam cleaning bay. This was entirely inconsistent with the evidence of Mr Dodd and Mr Milligan who said that Mr Kostic was talking to Mr Milligan beside the Caldina in the yard when Mr Dodd came out to join them.

[48] Yet another conflict of evidence related to the position of Mr Alston. He said he was in the steam cleaning bay using the steam cleaning equipment on a vehicle there. Mr Wilson said that Mr Kostic, Mr Dodd and later Mr Milligan were beside that vehicle and that Mr Alston was near the workshop.

[49] There was also inconsistent evidence about the level of noise in the service area at the time of the altercation. Mr Alston said that he was unable to hear the initial part of the conversation between Mr Dodd and Mr Kostic because he was operating noisy steam cleaning equipment. Mr Wilson said that he did hear the initial part of the conversation but that he then started up a noisy heat gun. No other witnesses mentioned either of these noises and Mr Milligan said that he was able to hear Mr Dodd speaking quietly throughout.

[50] There were also internal inconsistencies in the evidence of key witnesses for the employer. A striking example was that, in paragraph 5 of his brief of evidence, Mr Dodd said that, prior to the events of 8 March 2005, he was unaware of how Mr Kostic's behaviour had affected other staff. In paragraph 35 of the same brief, he said that he had been made aware that Mr Kostic had "*intimidated and threatened staff in the past*".

[51] Mr Kostic relied almost entirely on his own evidence to establish his case. Parts of his evidence were also exaggerated, particularly his estimates of the number of cars he had sold. His evidence did not, however, display the internal contradictions and inconsistencies evident in the case for the employer. In the course of a gruelling cross-examination lasting nearly a day and half, Mr Kostic made a number of concessions and gave inconsistent answers relating to peripheral issues but his evidence on the key aspects of his case remained unaltered.

[52] Both parties strongly challenged the credibility of the other's witnesses in the course of evidence. One particular issue on which the employer focussed was Mr Kostic's assertion that he had suffered a fall on 22 February 2005 which had significantly reduced his mobility. It was part of his case that, because of this reduced mobility, it was inherently unlikely that he would have aggressively assaulted Mr Dodd on 8 March 2005 as claimed by the employer. In support of this assertion, Mr Kostic called his general practitioner, Dr Sharr, as a witness. He gave evidence of examining Mr Kostic on 21 March 2005 and then diagnosing an injury consistent with such a fall. The employer's case was that the fall said to have occurred on 22 February 2005 was simply something Mr Kostic had invented to assist his case and that he had deceived Dr Sharr regarding it. In support of this position, Mr Davidson led evidence from six of the employer's witnesses to the

effect that they had not seen any signs of reduced mobility on Mr Kostic's part at the time. He also cross-examined Mr Kostic forcefully and at length on the issue. The employer's case on this point effectively collapsed, however, when the second to last of the employer's witnesses, Mr Graham, confirmed that Mr Kostic had told him about the fall at the time it occurred in late February 2005. That was some 2 weeks prior to the events of 8 March 2005 and at a time when Mr Kostic could have had no reason to invent such an occurrence.

[53] In his submissions, Mr Davidson referred me to the decision of the Labour Court in *NZ Distribution Union v Hutchinson Motors Ltd* [1990] 3 NZILR 921. That case arose out of Mr Kostic's employment by Hutchinson Motors Ltd from which he was dismissed in March 1989. The Court concluded that Mr Kostic had persistently lied to his employer about the sale of a car, that this amounted to serious misconduct and that his explanation that he did so out a sense of loyalty to a colleague did not excuse his behaviour. The Court also found that, to the extent that the evidence of Mr Kostic and another witness called by the union were at odds with the evidence of the employer's witnesses, it preferred the evidence of the latter. Mr Davidson submitted that I should be influenced by these conclusions in assessing the credibility and reliability of Mr Kostic's evidence in this case.

[54] In my view, it would be wrong to take that previous case into account and I decline to do so for four reasons. Firstly, there is inevitably a danger in attempting to generalise from the specific. The earlier case arose out of a specific sequence of events which were very different to those in this case. Secondly, it is a substantial leap of logic to infer from the finding in that case that Mr Kostic had lied to his employer, that he would deliberately deceive the Court in this case. There was no indication that Mr Kostic took his oath in this case lightly. Thirdly, that case concerned events which occurred 16 years prior to the events in question in this case. People can learn from their mistakes. The inference is equally open that, having had to deal with the Court's adverse conclusion in the earlier case, Mr Kostic would be scrupulous in giving his evidence in this case. Finally, Mr Davidson's submission that this earlier decision shows that Mr Kostic is of bad character and untrustworthy is entirely inconsistent with what has been said by a key witness for the employer. In a reference dated 16 May 2002, Mr Milligan described Mr Kostic as being

“reliable, always willing to help, hard working, and of good character, completely trustworthy, and extremely good dealing with people.” Consistent with this reference, it is notable that it was Mr Milligan and Mr Dodd who approached Mr Kostic in April 2003 and persuaded him to work for them again.

[55] The specific issues I have described in detail above are examples of the issues affecting the evidence of the witnesses which arose in the course of the evidence. In forming views on the matter, I have had regard to all of the evidence and to the documents produced. I have also taken into account the inherent likelihood or probability of what different witnesses said being correct. This is a factor I comment on further in relation to specific issues.

[56] In addition to the evidence itself, I have also had regard to the manner in which the witnesses gave their evidence. In doing so, I have been mindful of the limited value of demeanour in making findings of fact but note that some of the behaviour of witnesses was at times revealing. In particular, I noted the extent to which witnesses still employed by the company looked to Mr Dodd and/or Mr Milligan for their reaction when giving answers to questions in cross-examination which might assist Mr Kostic. I also noted the evasiveness and rationalisation of some witnesses when asked questions which clearly made them uncomfortable.

[57] Overall, I formed the view that much of the evidence advanced in support of the case for the employer was problematic and less reliable than that given by Mr Kostic, particularly in relation to the key events.

Did Mr Kostic disobey Mr Dodd’s instruction?

[58] Mr Dodd’s evidence of his instruction to Mr Kostic was:

12. *I did not want to appraise the car myself as I had other matters to attend to. I was also aware that Grant was occupied with other matters. As a result I instructed Gerry to wait 10 minutes for Grant to be free and for him to ask Grant to do the appraisal. I also added that if Grant was not available within the 10 minutes that he was to come back to me and I would then carry out the appraisal.*

[59] In the course of cross-examination, Mr Dodd was asked what specific aspect of his instruction he believed Mr Kostic had not followed. He replied initially that Mr Kostic had not waited 10 minutes. Later Mr Dodd expanded this by saying that

Mr Kostic had not waited 10 minutes for him to carry out the appraisal if Mr Milligan was not free.

[60] A good deal of evidence was given about the time which elapsed between the time Mr Dodd gave his instruction and when Mr Kostic asked Mr Milligan to appraise the Caldina car. Given that it was Mr Dodd's position that Mr Kostic had disobeyed his instruction by not waiting 10 minutes, it is Mr Dodd's view of the elapsed time which is important. Mr Dodd's initial estimate was 6 to 7 minutes which, in the course of cross-examination, he extended to 8 minutes. It is apparent from this time estimate that Mr Dodd could not reasonably have concluded that Mr Kostic disobeyed his instruction simply by not waiting 10 minutes.

[61] In the context of the other evidence he gave, it may be that what Mr Dodd meant was that he believed Mr Kostic had disobeyed his instruction by interrupting Mr Milligan rather than waiting 10 minutes and then asking Mr Dodd. If that is correct, it was precipitate of Mr Dodd to conclude that Mr Kostic had disobeyed his instruction without first talking to Mr Kostic and Mr Milligan. In answer to questions in cross-examination, Mr Milligan agreed that Mr Kostic did not interrupt him at any stage and that he was apparently free when Mr Kostic did approach him. He also agreed that, when Mr Kostic approached him, he could have said he was busy but chose not to. Indeed, he said that completing the appraisal promptly was a higher priority for him than returning immediately to his meeting. Had Mr Dodd been aware of these facts, he could not reasonably have concluded that Mr Kostic had disobeyed his instruction by interrupting Mr Milligan.

Did Mr Kostic resign?

[62] The case for the employer was that, in the course of the initial conversation between Mr Dodd and Mr Kostic in the service area of the premises on 8 March 2005, Mr Kostic resigned. Evidence to this effect was given by Mr Milligan and Mr Dodd. Mr Kostic denied that he resigned.

[63] When Mr Milligan returned from taking the Caldina for a test drive, he was discussing his appraisal of it with Mr Kostic in the service area. Up to this point, it was common ground that Mr Kostic's behaviour was perfectly normal and acceptable. Mr Dodd then joined the other two men beside the car. According to Mr

Dodd and Mr Milligan, Mr Dodd asked Mr Kostic in a mild manner why he had not followed his instruction regarding the appraisal. They said that Mr Kostic then immediately became very angry, yelling obscene abuse at Mr Dodd and becoming “*physically intimidating*”. Mr Dodd referred to Mr Kostic “*waving his arms around in a threatening way*” and that he feared Mr Kostic would attack him. Mr Milligan said he believed Mr Kostic was trying to provoke Mr Dodd into a fight. Both Mr Dodd and Mr Milligan went on to say that, in the course of this sudden violent outburst, Mr Kostic said “*stick your fucking job*” and “*sell the fucking cars yourself*”, that he said he was leaving and that he demanded that his final pay be made up.

[64] Mr Kostic’s account of events was that, while he was talking to Mr Milligan about the appraisal, Mr Dodd joined them and immediately told him off for not waiting to have the appraisal done. According to Mr Kostic, Mr Dodd said “*you do what you’ve been told, OK*” and that, when he questioned why Mr Dodd said this, Mr Dodd began swearing at him. Mr Kostic said that, in response, he then swore at Mr Dodd and there followed an angry exchange in which both men were using obscene language. As Mr Kostic put it “*If the boss can swear on me I swear back*”. Mr Kostic said that this exchange ended with Mr Dodd saying “*fuck off, goodbye*” and that Mr Dodd immediately turned away to walk back to the showroom. Mr Kostic agreed that he then suggested in obscene terms to Mr Dodd that he sell his own cars and otherwise berated Mr Dodd for treating him badly. Mr Kostic denied behaving in a physically threatening way.

[65] The case for the employer on this issue relied to an extent on other evidence said to be consistent with the primary evidence given by Mr Milligan and Mr Dodd. Both Mr Alston and Mr Wilson said they heard Mr Kostic swearing and shouting at Mr Dodd and that they believed Mr Dodd was talking quietly. Some reliance was also placed on the evidence of Ms Brant who said in her evidence-in-chief that Mr Kostic was swearing when the three men came into the showroom.

[66] The inconsistencies involving Mr Wilson’s evidence were so profound and his personal animosity towards Mr Kostic so pronounced that I place no weight on his evidence about these events.

[67] As to Mr Alston, his recollection of where the events took place was clearly at odds with the other witnesses. His evidence on key issues also altered significantly in answer to oral questions. An example was that, in his evidence-in-chief, Mr Alston said that he heard Mr Kostic swearing at Mr Dodd. When cross-examined about the apparent conflict between this evidence and what he said in his evidence to the Authority, Mr Alston said that he could not hear what was being said. In re-examination, Mr Alston attempted to return to what he had said in his evidence-in-chief. I place little reliance on Mr Alston's evidence.

[68] In contrast, Ms Brant impressed me as being a relatively reliable witness. She clearly felt uncomfortable giving evidence which might not assist her employer but was able to do so when necessary to observe her obligation to tell the truth. A key proposition put to Ms Brant in cross-examination was that, in her evidence to the Authority, she had said that both Mr Kostic and Mr Dodd were using "*the f word*" when they came into the showroom following the altercation outside. Initially, Ms Brant professed not to remember but eventually accepted that this was what her evidence had been. This is consistent with what the Authority recorded at paragraph [29] of the determination.

[69] Another aspect of the employer's case relied on to support the account of events given by Mr Dodd and Mr Milligan was that several witnesses said in their evidence-in-chief that Mr Dodd was a nice man who always spoke quietly and never swore. This was contradicted by other evidence. Mr Dodd said that he does swear. In addition to the evidence just referred to about Mr Dodd swearing on 8 March 2005, Ms Brant also agreed that Mr Dodd insulted her and told her off "*in an unprofessional and pretty cruel manner*" on another occasion a few months earlier and that this had reduced her to tears. Mr Kostic gave evidence, which I accept, that at this same meeting, Mr Dodd told him to "*fucking shut up*" and remonstrated also with Mr Wilson. In answer to further questions in cross-examination, Ms Brant agreed that Mr Dodd would have been angry when he came into the showroom on 8 March 2005. Again, this is consistent with the Authority's record of Ms Brant's evidence in paragraph [29] of the determination that "*She recalled that they both looked angry and that they both went into their respective offices.*" Ms Brant also

agreed that Mr Kostic did not mention resignation in her presence on the day in question.

[70] On this issue, I have regard not only to the quality and consistency of the evidence but also to the likelihood of what each party alleges to have happened. I find the account given by Mr Kostic to be much more in accord with human nature and inherently much more likely to be correct than the case relied on by the employer. There are numerous factors which lead me to this conclusion. Mr Kostic was a passionate salesman pursuing a sale. Given his commitment to the sales process and the customer, it is unlikely he would simply abandon his job before completing the sale. Mr Kostic had a good income and a large mortgage. He had no other job or business opportunity in prospect. He needed his job with the employer and the income it provided him. All witnesses agreed that Mr Kostic had been acting normally prior to being approached by Mr Dodd. It was also common ground that, although he was often extravagant in his language, Mr Kostic had never offered violence to anyone. In these circumstances, it is highly unlikely that, when spoken to quietly and reasonably as the employer suggested Mr Dodd did, Mr Kostic would fly into a violent rage and resign his job. Put the other way, it is far more likely that Mr Kostic would become angry and abusive in response to something Mr Dodd said or did than to engage in such behaviour unilaterally and without reason.

[71] I find that Mr Kostic did not expressly resign his job as alleged by the employer. Rather, I find that Mr Dodd took the initiative by firmly and unreasonably rebuking Mr Kostic and, when Mr Kostic challenged this, the conversation between the two men escalated into an abusive argument which Mr Dodd tried to end by telling Mr Kostic to leave and walking away himself. In these circumstances, I find that Mr Kostic did tell Mr Dodd in obscene terms to sell his own cars and otherwise berated him. In the context of such an angry exchange, I find that neither man intended to end the employment relationship. Rather, Mr Dodd told Mr Kostic to leave in order to assert his authority and what Mr Kostic said was an angry response to what Mr Dodd said and did.

Did Mr Kostic assault Mr Dodd?

[72] It was common ground that Mr Dodd, Mr Kostic and Mr Milligan went back to the showroom in that order and that, on the way, Mr Kostic collided with Mr Dodd.

[73] Because he was leading the group, Mr Dodd's account was necessarily limited. He said that he was "*violently shoved in the back*" by Mr Kostic and that he turned and told Mr Kostic not to do that. Mr Dodd said that Mr Kostic immediately replied that he had slipped.

[74] Mr Milligan said that Mr Kostic "*careered into the back of Graham with considerable force*" and that he was certain that this was deliberate. Mr Milligan also said that Mr Dodd then told Mr Kostic not to do that and that Mr Kostic replied that he had slipped. It was common ground that Mr Milligan said nothing at the time.

[75] In the course of his evidence, Mr Milligan demonstrated what he said Mr Kostic had done. This involved Mr Kostic using his left shoulder to strike Mr Dodd in the right hand side of his back. Mr Milligan also elaborated on the positions of himself and the other two men immediately prior to the collision taking place. He said that Mr Kostic was about 4 metres behind Mr Dodd but that he then increased his speed, closing the gap until they collided.

[76] Mr Kostic said simply that he was following Mr Dodd and, when Mr Dodd slowed down near the showroom, he slipped and collided with Mr Dodd's back. Mr Kostic firmly denied that this was deliberate.

[77] It was a significant aspect of Mr Kostic's case that, because of the effects of the injury he had suffered on 22 February 2005, he was not physically able to commit the forceful assault alleged by the employer. For the reasons discussed earlier, I accept that Mr Kostic did have an accident on 22 February 2005 and that his mobility was somewhat reduced as a result.

[78] This is another issue on which I take into account the inherent likelihood of what the parties allege. It was common ground that, although there had previously been numerous disagreements in which Mr Kostic had said harsh words, he had

never been violent and had certainly never assaulted anyone. At the time in question, Mr Kostic was 57 years old. Normally he was reasonably agile for a man of his age but his mobility was reduced as a result of the accident 3 weeks previously. Mr Dodd is substantially taller and larger than Mr Kostic. Mr Kostic was following Mr Dodd, anxious to get his briefcase from his office and leave the premises. Mr Kostic had nothing to gain from assaulting Mr Dodd and no particular motive was suggested. In these circumstances, it seems to me relatively unlikely that Mr Kostic would choose to assault Mr Dodd and to do so by shouldering him in the back. It is equally unlikely that, if he believed Mr Kostic had deliberately assaulted Mr Dodd and heard the immediate explanation from Mr Kostic that it was an accident, Mr Milligan would have said and done nothing.

[79] In making a finding of fact on this issue, I have regard to the decision of the Court of Appeal in *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 where, at paragraph [20], they described the standard of proof to be applied in employment proceedings as “*the balance of probabilities flexibly applied according to the gravity of the matter*”.

[80] That description was specifically used in *Lewis* to describe the standard of proof applicable to justification of a dismissal but it is equally applicable to proof in the Employment Court of other facts relating to a personal grievance. In this case, the allegation that Mr Kostic assaulted Mr Dodd is one of considerable gravity. Assault is a crime and regarded as morally reprehensible. To find such an allegation proved, I must be clearly satisfied on the balance of probabilities that it occurred.

[81] Approaching the matter this way, I do not find as a fact that Mr Kostic assaulted Mr Dodd. While there was undoubtedly a collision between the two men, I do not find it proved to the required standard that it was the result of a deliberate act by Mr Kostic.

Dismissal?

[82] Following the exchange between Mr Dodd and Mr Kostic on 8 March 2005, Mr Kostic was taken home by Mr Graham. It is common ground that Mr Kostic then initiated further contact between the parties by telephoning Mr Milligan later in the day. They spoke that evening. Mr Milligan said that Mr Kostic “*asked for his job*

back.” The way Mr Kostic put it was that he suggested to Mr Milligan that he, Mr Milligan and Mr Dodd meet to discuss what had happened and the future of his employment. In any event, Mr Milligan’s reply was that he would need to discuss the matter with Mr Dodd.

[83] The following day, Wednesday 9 March 2005, Mr Kostic telephoned Mr Milligan again to follow up the request he had made for a meeting. After speaking initially with Mr Milligan, Mr Kostic spoke with Mr Dodd. What was said in this conversation and the tone of it were in dispute but the key aspects of it were clear. Mr Kostic was pursuing the initiative he had taken with Mr Milligan to have a meeting to discuss what had happened on 8 March 2005 and the future of his employment. Mr Dodd refused to have such a meeting or to discuss the matter.

[84] I find that this action by Mr Dodd effectively eliminated any prospect of Mr Kostic’s employment continuing. It therefore amounted to a dismissal.

Unjustifiable dismissal?

[85] The employer’s primary case was that Mr Kostic resigned and his employment was terminated by the acceptance of that resignation. In the alternative, Mr Davidson submitted that Mr Kostic was justifiably dismissed. Whether the dismissal of Mr Kostic was justifiable must be determined according to s103A of the Employment Relations Act 2000 which provides:

103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[86] There will be very few circumstances in which a fair and reasonable employer would dismiss an employee without investigation and, in particular, without giving the employee an opportunity to be heard. This is not such a case. Regardless of the understanding Mr Milligan and Mr Dodd may have formed of the events of 8 March 2005, they certainly knew that those events occurred in an atmosphere of anger and other emotions. They also said they believed Mr Kostic, a

man they knew very well, was behaving in a manner they had never seen before. A fair and reasonable employer would not take at face value what was said in such circumstances. Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred.

[87] Even if, contrary to the finding of fact I have made, Mr Kostic did unequivocally say that he was resigning, a fair and reasonable employer would not have rejected his proposal for discussion and simply acted on that resignation. In that regard, I agree with the judgment in *Boobyer v Good Health Wanganui Ltd* unreported, 24 February 1994, WEC 3/94 where Goddard CJ discussed the circumstances in which an employee, against his or her will, may be treated by an employer as having resigned. He described two initial categories of such cases and then continued as follows at p2:

Another type is illustrated by NZ PSA v Land Corporation Ltd [1991] 1 ERNZ 741. That is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so or takes advantage of words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties": Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union [1991] 1 ERNZ 502, 507.

[88] It was common ground in this case that, on 8 March 2005, Mr Kostic was in a normal frame of mind prior to Mr Dodd speaking with him in the presence of Mr Milligan. Whatever Mr Kostic then said in response could only be regarded as the product of anger or emotion. It was therefore not safe or, to use the operative words of s103A, "*the action of a fair and reasonable employer*" to insist on giving effect to what he said.

[89] Mr Davidson went on to submit that, even if a cooling off period had been observed, "*no fair or reasonable and fair employer could and or would have been expected to allow the plaintiff to return to his employment.*" I reject that submission. Its effect is to prejudge what might have been revealed by a proper investigation of

the issues. As there was no investigation undertaken or opportunity for explanation provided, it is impossible to say what a fair and reasonable employer would have done after conducting such a process. As is apparent from the findings of fact I have made based on the evidence adduced in the Court, the initial view taken by Mr Dodd and Mr Milligan was by no means the only view available to a fair and reasonable employer.

[90] I conclude that Mr Kostic was unjustifiably dismissed.

Remedies

[91] In the statement of claim, the remedy sought by Mr Kostic was said to be simply “*a finding that the applicant is entitled to remedies pursuant to Section 123(1) (b) and (c) Employment Relations Act 2000.*” Those two paragraphs refer to loss of earnings and compensation for humiliation, loss of dignity and injury to feelings.

[92] It is fundamental that remedies can only be properly awarded on the basis of evidence or proper inference from evidence.

[93] In his brief of evidence, Mr Kostic said that he commenced alternative employment on 15 August 2005 and that he sought reimbursement of earnings lost between 8 March 2005 and that date. In the course of the evidence, however, it emerged that Mr Kostic was receiving accident compensation for a substantial part of this period. Although the evidence was not entirely clear, I conclude that Mr Kostic was receiving such compensation from 21 March until 17 July 2005. If Mr Kostic was entitled to receive accident compensation during that period, it can only have been on the basis that he was unable to work. His loss of income during that period, therefore, was attributable to his state of health and not to his having been dismissed. I find that Mr Kostic suffered loss of earnings as a result of his dismissal for a period of 6 weeks only.

[94] The evidence about the total value of Mr Kostic’s remuneration package while employed by the employer was unclear but he did produce an extract from his accounts for the year to 31 March 2005 showing that his taxable income from that

employment was \$62,792. Based largely on that figure, I assess Mr Kostic's loss of earnings attributable to his dismissal as \$7,200.

[95] Turning to compensation for distress, Mr Kostic gave evidence that he was severely humiliated and depressed by the loss of his employment. This was confirmed by Dr Sharr who produced a letter he had written in September 2005 describing Mr Kostic's condition and confirmed its contents. In this letter, Dr Sharr referred to having examined Mr Kostic on 21 March 2005 and subsequently. He described Mr Kostic as having become isolated at home and feeling desperate, distraught and upset. Clinically, Dr Sharr diagnosed Mr Kostic as having become quite depressed, lacking in motivation and feeling a loss of control over his life. He attributed Mr Kostic's condition to his having been dismissed and prescribed anti-depressant medication which Mr Kostic took for an extended period to cope with these symptoms.

[96] In answer to questions in cross-examination, Dr Sharr agreed that his conclusions and diagnosis were based to a large degree on what Mr Kostic reported to him. On the basis of this response, Mr Davidson suggested that Dr Sharr's evidence should be given little weight. I disagree. Where a patient presents with emotional or psychological issues, a doctor must rely on what the patient says but experienced doctors like Dr Sharr do not do so unthinkingly. They are trained observers. They use their knowledge and experience to assess whether what the patient says is coherent and consistent with physical symptoms observed. Where, as in this case, the doctor has a long-standing professional relationship with the patient, an experienced practitioner will also be able to make comparisons with previous observations of the patient. I accept the evidence of Dr Sharr.

[97] Having regard to the evidence and to the levels of compensation awarded in other cases, I consider that an appropriate level of compensation for Mr Kostic would be \$8,000.

Contribution

[98] Having found that Mr Kostic was unjustifiably dismissed, I am required by s124 of the Employment Relations Act 2000 to consider the extent to which his actions contributed to the situation giving rise to his dismissal.

[99] The principal reason I have found that Mr Kostic's dismissal was unjustifiable was the employer's refusal to discuss the events of 8 March 2005 with him or to give him an opportunity for explanation. Mr Kostic did not contribute to that aspect of the matter. On the contrary, he sought to initiate such discussion.

[100] As to the events of 8 March 2005 itself, I find that Mr Kostic did contribute to the situation which led to the angry exchange which took place between Mr Kostic and Mr Dodd. As it was that exchange which led to Mr Kostic leaving the premises and his personal grievance was essentially that he was never allowed to return to work, it can properly be said that Mr Kostic also contributed to the situation giving rise to his personal grievance.

[101] Any assessment of contribution must be based on findings of fact made by the Court on the evidence provided to it. I have found that the allegation of assault was not proved to the required standard. Mr Kostic himself accepted, however, that he had sworn at Mr Dodd and berated him in obscene terms. While I have found that the angry exchange between the two men was precipitated by what Mr Dodd said to Mr Kostic, that does not excuse the strength and nature of Mr Kostic's response. He is a mature man with a great deal of experience of life who can properly be expected to show a measure of self restraint in such circumstances. Had he done so, it is unlikely that the matter would have escalated as it did.

[102] Overall, I find that Mr Kostic contributed to the situation giving rise to his personal grievance to the extent of 30 percent and that the remedies awarded to him should be reduced by that amount.

Cross-challenge

[103] In a supplementary determination dated 7 April 2006, the Authority awarded costs of \$3,000 to Mr Kostic. The employer challenged that award on the grounds that, having made a finding that Mr Kostic contributed 100 percent to the situation giving rise to his personal grievance and awarded him no remedies, he should not have received a contribution to his costs.

[104] I agree with the Authority's reasoning that it is wrong in principle to deprive an employee who has been found to have been unjustifiably dismissed of an award

of costs because there has also been a substantial finding of contribution. I repeat in the context of this case what I said recently in *Davis v Harbour Inn Fisheries Ltd* unreported, 15 May 2007, CC 9/07:

[11] ... A declaration that an employer has acted unjustifiably will often play a significant part in resolving an employment relationship problem and be of considerable value to an employee independent of any remedies which may flow from it. That is because the employment relationship is usually more than a purely commercial arrangement. Emotions and feelings are frequently involved, including pride. A declaration that an employee has been unjustifiably dismissed, even when qualified by a finding of substantial contribution, can of itself assuage some of the feelings of humiliation, loss of dignity, and injury to the feelings of the employee arising out of a dismissal. In this way, the declaration itself can address the same feelings of hurt and distress for which compensation may be ordered pursuant to s123(1)(c) of the Employment Relations Act 2000.

[12] By obtaining a declaration that he had been unjustifiably dismissed, Mr Davis therefore acquired something of actual or potential value. To an extent, it offset the Authority's subsequent conclusion that Mr Davis had contributed very substantially to his own dismissal. As Mr Brown aptly submitted, the outcome was that both parties were found to be at fault.

[105] In this case, it seems to me that the Authority applied the correct principles in exercising its discretion as to costs. I therefore dismiss the cross-challenge.

Conclusions

[106] In summary, my judgment is:

- a) The challenge is allowed. The substantive determination of the Authority is set aside and this judgment now stands in its place.
- b) Mr Kostic was unjustifiably dismissed by the employer.
- c) Mr Kostic contributed to the situation giving rise to his personal grievance to the extent of 30 percent.
- d) The employer is to pay Mr Kostic \$5,040 by way of reimbursement of lost earnings, being \$7,200 reduced by 30 percent for contribution.
- e) The employer is to pay Mr Kostic \$5,600 by way of compensation for distress, being \$8,000 reduced by 30 percent for contribution.

- f) The cross-challenge to the supplementary costs determination of the Authority is dismissed and the award of costs of \$3,000 to Mr Kostic confirmed.

Comments

[107] In the course of this judgment, I have referred to aspects of the evidence which I regard as particularly important or as illustrative of general features of the evidence given. A very great deal of evidence was given to which I have not referred. To do so would have greatly increased the size of an already lengthy judgment and obscured the issues. The parties and the witnesses may be assured that, in reaching my decision, I have had regard to all of the evidence given, whether or not I have specifically referred to it in this judgment. Equally, although I have made few specific references to the submissions made by Mr Davidson and Mr Kostic, I have also considered them in full.

[108] In reaching my decision, I have made key findings of fact different to those made by the Authority in its determination. In doing so, I imply no criticism of the Authority. The volume of evidence provided to the Court was very much greater than that available to the Authority. Additional witnesses not heard by the Authority gave evidence to the Court. It was also apparent in the course of the hearing before me that some witnesses had refined or expanded their evidence compared to that presented to the Authority. At the end of the day, the Court is required by s183(1) of the Employment Relations Act 2000 to make its own decision. That is what I have done on the basis of the evidence adduced before me.

Costs

[109] When these proceedings were initiated, Mr Kostic was represented by Mr Twomey as counsel and I understand he did some of the preparation for the hearing. Mr Kostic is entitled to a contribution to the costs incurred for that work. At the hearing, Mr Kostic represented himself. He is not entitled to any contribution to the costs he may have incurred in doing so.

[110] Mr Kostic is to file and serve within 21 days of the date of this judgment a memorandum setting out the legal costs he actually incurred in relation to this

proceeding. That should include sufficient detail to enable the Court and Mr Davidson to assess whether those costs were reasonable.

[111] Mr Davidson is to have 14 days after receipt of Mr Kostic's memorandum to file and serve a memorandum in reply.

[112] Pursuant to a direction recorded in my minute of 19 May 2006, the employer paid the amount of costs awarded by the Authority into Court where it has since been held on interest bearing deposit. That money, including all accrued interest, is now to be paid out to Mr Kostic.

A A Couch
Judge

Judgment signed at 12.30 pm on 11 July 2007