

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 148  
5294873

BETWEEN                      KATHRYN DONNA BAYNES  
   Applicant  
  
A N D                              RADIUS RESIDENTIAL CARE  
   LIMITED  
   Respondent

Member of Authority:      Helen Doyle  
  
Representatives:              Dr Martin Round, Advocate for Applicant  
   Sally Leftley, Advocate for Respondent  
  
Investigation Meeting      12 May 2011 at Christchurch  
  
Submissions Received:      18 August 2011 from Applicants  
   21 July 2011 from Respondent  
  
Date of Determination:      5 October 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      There have been two determinations in this matter. The first determined a preliminary issue as to whether the applicant's grievance was raised within 90 days and, if not, whether leave should be granted to raise a personal grievance after the expiration of that period. Leave was granted in that determination for the applicant to raise her personal grievance after expiration of the 90 day period. Costs were reserved until after the substantive matter had been concluded.

[2]      The second determined the substantive problems of unjustified disadvantage and dismissal. The Authority found in favour of the respondent and reserved costs. Submissions have now been received from both the advocates.

**Submissions on behalf of the respondent**

[3]      Ms Leftley submits that although the investigation meeting was not a full day costs should be awarded as a full day matter because the respondent and advocate

were additionally required to travel from Auckland/Whangarei. The Authority recorded the investigation meeting started at 9.30am and finished at 12.55pm.

[4] Ms Leftley submits that the respondent made a *Calderbank* offer on 9 May 2011 of \$1,000.00 under s.123(1)(c)(i) of the Employment Relations Act 2000 and had that offer been accepted it would have saved further costs for the parties. Ms Leftley submits that the actual costs of preparation and advocacy at the Authority investigation were \$4,112.00 and the Authority should award costs in the *higher regions* for the reasons set out above.

### **Submissions on behalf of the applicant**

[5] Dr Round submits that the applicant's costs in respect of the preliminary issue were \$4,025.00 and that the conduct of the respondent in relation to a particular submission was such it was offensive and defamatory and there should be a higher award of costs than the usual 66%.

[6] In respect of the substantive matter Dr Round submits that costs should lie where they fall. Dr Round submits that had the Authority heard the evidence of the particular witness then their determination would have been in the applicant's favour. That submission is not a persuasive one in the costs arena. The person referred to was not in attendance at the investigation meeting. Notwithstanding that the Authority made several unsuccessful attempts to contact her by telephone.

[7] Dr Round also submits that the *Calderbank* offer was only open for a very short time. It was made in a letter of 9 May 2011 and expired the next day on 10 May 2011 at 5pm. There is strength in that submission.

### **Determination**

[8] The leading case on costs in the Authority is the judgment of the Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. The Court in *PBO* sets out the basic principles that are appropriate to the Authority in the exercise of its discretion as to costs.

[9] Dr Round was critical of the respondent's submissions but in exercising my discretion as to whether costs should awarded and, in what amount, I am guided by the principle that costs are not to be used as a punishment or an expression of

disapproval of the unsuccessful party's conduct, unless of course such conduct increases the costs of a party. The conduct Dr Round complains of did not increase the costs in this matter.

[10] Dr Round suggested costs lie where they fall in the substantive matter. There is no sound reason in this case to depart from the usual principle that costs generally follow the event. In this case the respondent was ultimately successful. The outcome of the preliminary matter I accept is a matter to be taken into account and if necessary there can be an adjustment to any award made.

[11] Costs in the Authority are frequently modest and in exercise of the Authority's discretion as to costs regard is often had to a notional daily rate which is now recognised at about \$3,000 per day.

[12] I am of the view that this a case where it is appropriate to assess costs against the notional daily rate and making the adjustment where required.

[13] I accept that it was necessary for travel to be undertaken by the respondent and its advocate that led to the length of the working day beyond simply the investigation meeting. I am not satisfied the applicant should bear the costs of such travel on this occasion.

[14] A suitable starting figure in assessing costs when the meeting is less than one day but did involve the preparation of two statements of evidence and submissions as \$2,000.00. From that sum I make a minor adjustment downward to recognise the success of the applicant at least in relation to the preliminary matter of \$300.00. That was a matter that was determined by the Authority on the papers with the benefit of some limited affidavit evidence and submissions. It was straightforward and had little, if any, complexity. The Authority accepted the respondent had not received the letter raising the personal grievance from Dr Round that he said was posted. The question of leave to raise the grievance out of time was then addressed

[15] Aside from acknowledging the parties appropriately attempted to resolve the matter, I do not take the attempts to settle into account in terms of my discretion. I agree with Dr Round's submission in regard to the *Calderbank* offer that the timeframe within which to consider, accept or decline the offer, was too short and came just days before the investigation meeting when most preparation would have been undertaken. I make no other adjustment.

[16] In all the circumstances a fair and reasonable award of costs is \$1,700.

[17] I order Kathryn Donna Baynes to pay to Radius Residential Care Limited the sum of \$1,700 being costs. I am sure if there are difficulties in paying that sum the respondent would enter into a sensible arrangement with Ms Baynes.

Helen Doyle  
Member of the Employment Relations Authority