

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 82A/10
5275240

BETWEEN NICHOLAS BELL
 Applicant

AND AUCKLAND CITY COUNCIL
 Respondent

Member of Authority: Robin Arthur

Representatives: Allan Boyle, counsel for Applicant
 Katherine Burson, counsel for Respondent

Submissions received: 19 March 2010 from Respondent
 1 April 2010 from Applicant

Determination: 26 July 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA82/10 (22 February 2010) the Authority dismissed the personal grievance application of Nick Bell. The parties were encouraged to resolve any issue of costs between themselves but have not been able to do so.

[2] Auckland City Council seeks an order requiring Mr Bell to pay \$15,783.90 as full indemnity of its costs incurred after the expiry of a *Calderbank* offer to him. If full indemnity costs are not awarded, the Council alternatively submitted an award of costs should be above the usual tariff based on a notional daily rate.

[3] Mr Bell opposes an indemnity award and submits the “*usual tariff*” for a one day investigation meeting should be used to set any costs order against him.

[4] The Council’s submissions refer to case law on the obligation of the losing party to “*contribute significantly to the post-offer costs*” and the need for a “*more steely*” approach to costs where reasonable settlement proposals have been rejected:

*Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear*¹ citing *Health Waikato Limited v Elmsly*.² Neither case relied on resulted in an award of indemnity costs. Rather the *Watson* case demonstrates the application of the principles and approach confirmed in *PBO Ltd v Da Cruz*.³ The particular circumstances of the case are to be considered, including any factors which require an adjustment up or down of the notional daily rate. Taking account of ‘without prejudice (except as to costs)’ offers is one such factor. In *Watson* the Court considered the particular circumstances of that case required a costs award which more than doubled the notional daily rate but was less than the costs that the successful party actually incurred.

[5] In the present case I take the notional daily rate of \$3000 as the starting point for costs which should be awarded to the Council as the successful party. The following factors suggest that rate should be adjusted upward:

- a. Mr Bell did not accept the without prejudice offer (made more than two months before the Authority investigation meeting) in which the Council proposed he withdraw his claim in return for not being pursued for its costs up to that time; and
- b. Some preparation time was wasted because Mr Bell alleged some documents provided by the Council were forgeries but then accepted in the investigation meeting that writing in those documents was his and not forged; and
- c. Mr Bell was entirely unsuccessful in all claims made.

[6] Factors suggesting the rate should be reduced or remain the same are:

- a. The principle that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party’s conduct; and
- b. Mr Bell’s evidence in the Authority investigation that he was of modest and limited means; and
- c. The principle that costs awards are to be modest and reflect what is reasonably required in preparing for an Authority investigation.

[7] Weighing those factors in the discretionary exercise of awarding costs, I consider the notional daily rate should be increased by \$1000. Accordingly Mr Bell is

¹ (unreported, EC, AC 64/06, 24 November 2006, Colgan CJ).

² [2004] 1 ERNZ 172 (CA) at [53].

³ [2005] 1 ERNZ 808.

ordered to pay the Council \$4000 as a significant contribution to its costs incurred responding to his claim.

[8] An arrangement may need to be made for Mr Bell to pay those costs in instalments over several months. Leave is reserved to revert to the Authority for further orders if such arrangements are sought and cannot be agreed.

Robin Arthur
Member of the Employment Relations Authority