

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 78
5335696

BETWEEN PAT BIDOIS
 Applicant

A N D ST GEORGE
 INTERNATIONAL GROUP
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Mike Treen, Advocate for Applicant
 May Moncur, Advocate for Respondent

Submissions Received: 10 February 2012 from Applicant
 18 February 2012 from Respondent
 23 February 2012 from Applicant

Date of Determination: 29 February 2012

COSTS DETERMINATION OF THE AUTHORITY

- A. St George International Group Limited (“St George”) is ordered to pay Ms Pat Bidois;**
- (i) \$3,000 towards her legal costs;**
 - (ii) \$613.32 to reimburse the hearing fees incurred;**
 - (iii) \$71.56 to reimburse her filing fee.**

[1] In a substantive determination dated 15 December 2011¹ the Authority found that Ms Bidois had been unjustifiably dismissed and unjustifiably disadvantaged in her employment by St George. It stated that if Ms Bidois had actually incurred legal costs then, as the successful party, she would be entitled to a contribution towards her legal costs.

¹ [2011] NZERA Auckland 533

[2] If costs had been incurred, the parties were encouraged to resolve costs by agreement and failing that a timetable was set for costs to be addressed by exchange of memoranda. The applicant was put on notice that if she sought a costs order she would have to satisfy the Authority that she had actually incurred legal costs.

[3] Mr Treen sought and was granted an extension to the original timetable to take account of the intervening Christmas period. The respondent was also given leave to file its costs submissions two days late because the Authority accepted it had a sufficient explanation for doing so.

[4] Costs were not agreed so the applicant now seeks a costs order from the Authority.

[5] The Authority's power to award costs is conferred by clause 15 of Schedule 2 of the Employment Relations Act 2000. Costs are discretionary, but the normal principle is that costs follow the event and there is no reason to depart from that in this case.

[6] The general principles relating to costs in the Authority were set out by the Full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*². These principles are so well known that I do not need to set them out here, suffice to say that I have been guided by them when assessing costs in respect of this matter.

[7] The applicant and her union Unite entered into a representation agreement, prior to the Authority's investigation, that she would be required to pay up to \$3,000 towards the costs of the union representing her. Unite duly invoiced Ms Bidois for \$3,000 and I accept she is liable to pay that amount.³

[8] A party cannot be awarded more than their actual legal costs. The arrangement between the applicant and her union meant that her costs were significantly less than the normal costs tariff applied by the Authority. I therefore consider that the Authority's normal tariff based approach to costs is not appropriate because that would result in an award far in excess of the applicant's actual costs.

[9] I have therefore approached costs by assessing what level of costs would be fair and reasonable in the particular circumstances of this case.

² [2005] ERNZ 808

³ A copy of the representation agreement and invoice were presented to the Authority.

[10] This matter involved a three day investigation meeting, which had to be adjourned part heard. I consider that two days of investigation time were directly attributable to the inefficient, unfocused, and unrealistic manner in which the respondent conducted its case. Had I been adopting the Authority's normal tariff based approach to costs, I would have significantly increased the notional daily tariff to reflect that.

[11] To briefly summarise the respondent's main (relevant)⁴ submissions, it submitted that:

- a. An award of \$3,000 should not be made because to do so would result in the applicant receiving solicitor/client costs;
- b. The manner in which the applicant conducted the case increased costs to both parties;
- c. It was "*not financially capable of making any further payment in relation to this case*";
- d. Any costs awarded should be limited to \$900, being 30 % of the applicant's actual costs.

[12] Although an award of \$3,000 would mean that Ms Bidois has recovered all of her own actual costs, I do not consider that would be the same as an actual award of solicitor/client costs because her costs were so modest solely because of the terms of her agreement with her union. I accept that the time and costs to Unite of representing the applicant was far in excess of what it agreed she would have to pay.

[13] It is to the respondent's benefit in relation to this costs application that the applicant obtained representation far below the normal level of costs that would be incurred by a represented applicant. I do not consider that the extremely modest level of the applicant's actual costs should prevent her from recovering all of that amount when that would be significantly less than what the Authority would normally award a successful applicant for a three day investigation meeting.⁵

⁴ Its submissions contained material which had no relevance to costs issues.

⁵ As per the Authority's normal tariff based approach, and assuming there were no facts warranting an adjustment to the notional daily tariff of around \$3,000.

[14] The respondent's submission that the applicant's conduct unnecessarily increased the parties' costs is entirely without merit. The applicant's case was properly prepared and well presented. Unite is entitled to substantial credit for that because the manner in which the respondent pursued its case meant that it was very difficult to be clear about what;

- a. The respondent's specific concerns were;
- b. Evidence or information it had relied on in support of its concerns;
- c. Disciplinary allegations it believed it had raised with the applicant;
- d. Findings it had made in relation to its various disciplinary concerns;
- e. The sanction was⁶ in respect of its first disciplinary process which had resulted in a "warning".

[15] I also note that the respondent pursued arguments that were clearly untenable based on the documents it had generated during the two disciplinary processes.

[16] In support of its primary submission that it was "*not financially capable of making any further payment in relation to this case*", the respondent stated that it had reduced the number of English classes offered from seven to three and had "*made more than half*" of its English teachers redundant "*since the end of last year*". No financial information was provided to support these claims.

[17] The onus is on a party seeking to pursue a claim of undue hardship to provide evidence in support of such a claim. I am not satisfied that the respondent would be unable to pay a modest costs award or that awarding costs would be inappropriate due to the respondent's financial position. The respondent's defence of the applicant's claims was untenable in light of the documents it had generated during its two disciplinary processes. That should be been obvious to the respondent from the outset.

[18] Whilst I recognise that the respondent was entitled to put the applicant to proof of her claims, even the most basic risk assessment⁷ would have established that her personal grievance claims were highly likely to have been successful, so the

⁶ Re the "warning" - obviously not the dismissal.

⁷ Based solely on the respondent's own documentation.

respondent must have it would be at risk of costs, regardless of the nature of any remedies awarded. I find it would be unjust if the respondent was not required to contribute towards the applicant's actual costs.

[19] I do not accept the respondent's submission that, if costs are awarded they should be limited to \$900. An award at that level would be fundamentally inadequate and unfair. I consider an award of costs of \$3,000 is appropriate.

[20] The applicant has also been invoiced \$613.32 by the Department of Labour for hearing fees for this matter. Those fees are only payable after the first day of investigation time, so would not have been incurred by the applicant but for the respondent's conduct which significantly extended the investigation time required. It is appropriate that the applicant be reimbursed for that fee.

[21] The applicant also incurred a \$71.56 filing fee, which the respondent should reimburse.

[22] In summary, I order St George to pay Ms Pat Bidois;

- (i) \$3,000 towards her legal costs;
- (ii) \$613.32 to reimburse her for the hearing fees incurred;
- (iii) \$71.56 to reimburse her for her filing fee.

Rachel Larmer
Member of the Employment Relations Authority