

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 357
5406633

BETWEEN DUANE BISHOP
 Applicant

AND ROTORUA REALTY
 SERVICES LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: W Lawson, counsel for applicant
 M Forsyth, advocate for respondent

Memoranda received: 16 July 2013 from applicant
 29 July 2013 from respondent

Determination: 12 August 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 19 June 2013 I found Mr Bishop was suspended and then dismissed unjustifiably.

[2] Costs were reserved, and the parties have filed memoranda on the matter.

[3] Counsel for Mr Bishop sought an award of costs in the vicinity of \$10,500. He relied on the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*¹ and the notional daily rate in the Authority of \$3,500. He calculated the amount sought with reference to: the notional daily rate; the meeting time of 1.5 days; and additional preparation time of 1 – 1.5 days.

¹ [2005] 1 ERNZ 808

[4] Counsel pointed in addition to offers of settlement made without prejudice save as to costs, and made before the investigation meeting. A further offer was made to settle costs after the determination was issued.

[5] Rotorua Realty Services Ltd (RRSL) said costs should lie where they fall. Mr Forsyth pointed to the Authority's finding of contributory conduct by Mr Bishop, and said further that RRSL is not in a financial position to bear any additional costs.

Offers of settlement

[6] The offers of settlement made before the investigation meeting were set out in letters dated 1 and 7 March 2013 respectively. The offer dated 1 March was that Mr Bishop would accept a payment of \$13,000, including legal costs, in full and final settlement. The offer dated 7 March was that Mr Bishop would accept \$10,000 as a full and final settlement. Mediation had occurred in the interim.

[7] Both offers were made before the first date for filing witness' statements in the Authority.

[8] Mr Bishop was awarded \$5,400 in the determination. Thus while attempts were made to settle the matter, the total award in favour of Mr Bishop will be less than he sought in the offers of settlement. I do not give weight to the offers.

Finding of contributory conduct

[9] The law is clear that, where an employee's contributory conduct has been taken into account in reducing the remedies available for a personal grievance, it is not appropriate to take that conduct into account again in assessing costs.²

Ability to pay

[10] RRSL's ability to meet an order for costs is relevant in assessing costs. However any alleged inability must be a real inability, and information supporting the

² *White v Auckland District Health Board* [2008] NZCA 451

financial position causing the inability is required. Here no such information was provided.

Order for costs

[11] Mr Bishop was the successful party and is entitled to a contribution to his costs.

[12] I set the amount with reference to the hearing time in the Authority. RRSL is ordered to contribute to Mr Bishop's costs in the sum of $1.5 \times \$3,500 = \$5,250$.

R A Monaghan

Member of the Employment Relations Authority