

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 338
5357452

BETWEEN JOHN BOURKE
 Applicant

A N D KOHLER NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Greg Bennett, Advocate for Applicant
 Stephen Langton, Counsel for Respondent

Submissions Received No submission from Applicant
 28 May 2012 from Respondent

Date of Determination: 28 September 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority's determination dated 27 April 2012 dismissed the claims of the applicant (Mr Bourke) in their entirety and reserved costs.

The claim for costs

[2] As the successful party, the respondent (Kohler) seeks a contribution to its costs in the sum of \$7,500 together with actual and reasonable expenses amounting to \$1,390.40, the bulk of which latter amount is the cost of the video conferencing facilities used for the investigation meeting.

[3] The Authority is told that Kohler incurred a total of \$23,562.50 exclusive of GST in the defence of Mr Bourke's application.

[4] Conversely, there is nothing before the Authority from Mr Bourke concerning the imposition of costs. Despite attempts by the Authority's support officer to get Mr Bourke's representative to engage, nothing has been filed. It follows that the Authority has only the submissions of the successful party to consider in making this determination.

The legal principles

[5] The legal principles are well known. The leading case is the decision of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 where Judge Shaw identified the principles to be used by the Authority in a costs setting environment. In particular, Her Honour, writing the decision for the Full Bench, specifically approved the tariff-based approach often adopted by the Authority in costs setting, so long as the particular circumstances of the individual case were taken into account as well.

[6] The Authority has also regularly adopted the principles enunciated in *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004) wherein the present Chief of the Authority, Member Dumbleton, enunciated a three step approach in evaluating applications for costs. The first of those steps was the identification of the actual costs incurred by the successful party; the second was to consider whether, in all the circumstances, the costs incurred were reasonable; and third was the determination of what proportion of those costs ought to be met by the losing party.

Determination

[7] This was a matter which was dealt with by the Authority in a half day's hearing time, but Kohler quite properly reminds the Authority that it had gone to some lengths prior to the investigation meeting to endeavour to point out to the representative for Mr Bourke that the matter was entirely without merit. Further, Kohler points out that if submissions had been heard on the day (and the representative for Mr Bourke was not ready to do that), then it is likely that a full day's hearing time would have been required.

[8] Conversely, the Authority notes that there was an application to strike-out the filing of Kohler's statement in reply on the footing that it was late. Kohler acknowledges the lateness but points out that Mr Bourke was given the opportunity of explaining to the Authority how the delay had prejudiced him and had failed to take

any steps at all in that regard. The Authority took the pragmatic view that it wished the substantive issue to proceed to hearing and it was not minded to grant the relief sought by Mr Bourke unless it could be convinced of the prejudice to him. For the avoidance of doubt, the Authority accepts Kohler's submission in the costs setting that the argument around the consideration or otherwise of Kohler's late statement in reply ought to sound in costs. Put another way, Mr Bourke is entitled to raise the point about the lateness of the Kohler statement in reply but must accept the consequences of that tactic may have costs implications, given that he was unsuccessful.

[9] Applying the principles in *Graham*, the Authority accepts that the costs incurred by Kohler are within an acceptable range.

[10] Looking at the matter from the standpoint of the daily tariff, the starting point must be \$3,500. To that must be added an allowance representing the additional costs incurred by the successful party in defending a claim which, on the Authority's evaluation of it, was completely without merit. In addition, the argument around the lateness of the statement in reply simply added to the costs incurred by the successful party and a further allowance is appropriate in that regard.

[11] In all the circumstances, the Authority thinks it appropriate that Mr Bourke pay to Kohler a contribution to its costs in the sum of \$6,500 together with expenses of \$1,390.40.

James Crichton
Member of the Employment Relations Authority