

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 118
5515245

BETWEEN DAVID BRINE
 Applicant

A N D SOUTH PACIFIC MEATS
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Karina Coulston, Counsel for the Applicant
 Rachel Webster, Counsel for the Respondent

Submissions Received: 17 July and 4 August 2015 from the Applicant
 31 July 2015 from the Respondent

Date of Determination: 12 August 2015

COSTS DETERMINATION OF THE AUTHORITY

The respondent is ordered to make a contribution towards Mr Brine's costs in the sum of \$5,250, plus \$224.89 in respect of the Authority's lodgement fee and hearing fee.

[1] By way of its determination dated 8 June 2015¹ the Authority found that Mr Brine had been unjustifiably disadvantaged in his employment and was awarded the sum of \$6,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[2] Costs were reserved by the Authority and the parties invited to agree costs. However, they have been unable to do so and counsel for the respective parties have served and lodged memoranda of costs as directed. This determination addresses those submissions.

¹ [2015] NZERA Christchurch 74

[3] Ms Coulston on behalf of the applicant seeks a contribution of \$15,000 towards the total costs incurred of \$23,000 plus GST, together with \$65 office disbursements. Ms Coulston makes the following submissions (which I summarise):

- a. The case was complex involving 12 witnesses, which required substantial preparation;
- b. The respondent provided scant evidence which added to the length of the investigation meeting;
- c. The applicant was required to contact a number of chemists and the poison centre to gain an understanding of the chemicals and processes referred to in the evidence;
- d. The applicant was required to provide a detailed analysis of the respondent's 137 page Health and Safety Policy;
- e. The applicant was required to spend an excessive amount of time in respect of potentially hostile witnesses who had been interfered with by the respondent;
- f. The Authority should consider awarding costs in relation to mediation as the respondent had refused to attend mediation until it was directed by the Authority; and
- g. The Authority should consider raising the daily tariff.

[4] Ms Webster, in response, makes the following submissions:

- a. The case was not complex but the applicant made it so by focussing on proving a breach of the Health and Safety in Employment Act 1992, and including a claim for breach of a statutory duty, which the Authority had no jurisdiction to consider;
- b. The respondent's evidence focussed on the relevant issues;
- c. There was no requirement to contact a number of chemists and the poison centre;

- d. There is no requirement to provide a detailed analysis of the respondent's Health and Safety Policy;
- e. No interference with witnesses was proven;
- f. The Authority was not required to direct the parties to mediation; and
- g. The costs incurred are not reasonable, and the applicant has adopted a *gold plated* approach.

Discussion

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[6] The Authority is bound by the principles set out in *Da Cruz* when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[7] First, I accept that costs should follow the event.

[8] It is difficult to assess with any accuracy whether the costs incurred by the applicant are reasonable, as no costs breakdown has been provided by Ms Coulston. However, it does not strike me that \$23,000 is unreasonable per se, as I can appreciate that this case may have required more preparation than is usual in light of the technical aspect of it, which would have required some investigation into the chemicals involved in the process which resulted in Mr Brine falling ill. Having said that, I do not accept that this factor in itself justifies increasing the daily tariff. I address Ms Coulston's submissions in more details as follows;

- a. The case was not legally complex and, whilst it was not completely straightforward factually, it was not so complex so as to justify an uplift in the daily tariff as many of the witnesses' evidence was reasonably straightforward;
- b. I have some sympathy with the submission of Ms Webster. The respondent's evidence did focus on the aspects of the matter for which the Authority had jurisdiction. Whilst not as fulsome as the applicant's evidence, the evidence relied upon by the respondent was by no means meagre;
- c. I have some sympathy, in turn, for Ms Coulston's position in contacting chemists and the poison centre to help her understand the

nature of the chemicals that were used by the respondent in its fogging process, both singly and in combination. However, Ms Coulston did not adduce any of this evidence and has not broken down the costs incurred in this work. Therefore, I am simply unable to judge how much the exercise has added to the costs;

- d. Whilst it was necessary to analyse the Health and Safety Policy, much of it was obviously not relevant, and it would not have taken Ms Coulston too long, in my view, to have established that. Again, no costs breakdown has been provided, and so I cannot accept that this exercise can be justified in increasing the daily tariff;
- e. I declined during the substantive investigation meeting to make any findings about whether the respondent had attempted to interfere with the applicant's witnesses because I considered that it would not have assisted the Authority's investigation to have done so. Accordingly, almost no time was taken up in the investigation meeting in respect of this allegation. Whilst I accept that Ms Coulston would have prepared questions in anticipation that I would have allowed her to pursue the allegation, again she has provided no breakdown of her costs in any event and so I cannot assess them;
- f. I do not accept that this matter is in any way different from the vast majority of matters that are investigated by the Authority in which mediation has first been attempted. I cannot know why the mediation was unsuccessful and so I cannot decide whether it would be just to take the applicant's costs into account in relation to his attendance in that mediation. Therefore, I do not accept that it is appropriate to take into account the costs of mediation; and
- g. Having considered all these factors, I do not see any cogent reason to uplift the Authority's daily tariff.

[9] I would mention the very recent Employment Court case of *Fagotti v Acme & C Limited*² in which the full court examined whether it is still appropriate to utilise a daily tariff in Authority cases. I cite the following passage at [108]

As to the question of the utility and value of a “notional daily rate” for costs, we agree that there is significant value in a commonly applied and well publicised notional daily rate for costs in the Authority. This enables parties and their representatives to assess more accurately from the outset what may be a very important element of the litigation (costs) when undertaking the regular economic analyses that parties and their representatives should undertake during that process. This was put succinctly and recently in the costs judgment in Booth v Big Kahuna Holdings Ltd³ where it was said that parties who elect to incur costs that are likely to exceed the Authority’s notional daily rate are “entitled to do so but cannot confidently expect to recoup any additional sums”

[10] I believe that this comment applies neatly to the current case. If Ms Coulston had provided a breakdown of the costs incurred in understanding the chemical issues, I may have been persuaded to increase the costs awarded in this determination to reflect the work carried out in undertaking that research. However, that apart, I see no reason to justify uplifting the usual daily tariff or to depart from it.

Determination

[11] The investigation meeting lasted between 9.30am and 4.30pm on day one and between 9.30am and 1.15pm on day two. Adopting the daily tariff approach, this would entitle the applicant to a contribution of \$5,250, which is what Ms Webster suggests is appropriate. I agree.

[12] The applicant is also entitled to recovery of the lodgement fee and the hearing fee for the second half-day. These total \$224.89. I do not agree that *office costs* should be recovered, except where actual out of pocket third party costs have been disbursed, as I would expect these to be part of the normal costs incurred.

Order

[13] I order the respondent to make the following contribution to the applicant’s costs:

- a. The sum of \$5,250 in respect of legal costs; and

² [2015] NZEmpC 135

³ [2015] NZEmpC 4 at [51]

- b. The further sum of \$224.89 in respect of the Authority's lodgement fee and second day hearing fee.

David Appleton
Member of the Employment Relations Authority