

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 136
3004257

BETWEEN MICHAEL CLARK
 Applicant

AND CANTERBURY BUTYNOL
 FIXERS LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Michael McDonald, Advocate for Applicant
 James Dawson, Advocate for Respondent

Investigation Meeting: Determined on the papers

Submissions received: 20 July 2017, from the Applicant
 3 August 2017, from the Respondent

Determination: 4 August 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 6 July 2017¹ the Authority found that Mr Clark had been unjustifiably dismissed and awarded remedies to him totalling \$10,570.76. Costs were reserved. The parties were invited to try to agree costs between them, but have evidently not been able to do so. The parties have consequently lodged written submissions as to costs.

[2] Mr McDonald seeks a contribution towards Mr Clark's costs in the sum of \$2,710. This sum comprises half the Authority's daily tariff of \$4,500 (\$2,250) as the investigation lasted half a day, plus an uplift of \$400 plus GST. The uplift has been sought "to reflect the application and submissions for a penalty, which was granted".

¹ [2017] NZERA Christchurch 119

[3] Mr McDonald also seeks a further \$400 plus GST for the preparation of the costs application, on the grounds that Mr Dawson did not respond to Mr McDonald's email seeking agreement on costs.

[4] Mr Dawson's response to Mr McDonald's submissions was that the respondent should not be ordered to pay Mr Clark's costs as it has incurred its own costs, and because the Authority found that it was likely that Mr Clark would have been justifiably dismissed within three months.

Legal principles

[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] It is well established that the Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*² when setting costs awards³. 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.

² [2005] ERNZ 808

³ Confirmed as still applicable law by the full Employment Court in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

- 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.

Discussion

[7] The general principle is that "costs follow the event". That is to say, the successful party recovers a contribution towards its legal costs from the unsuccessful party. This principle applies even if the unsuccessful party has incurred its own costs.

[8] Mr Clark was the successful party. I see no reason not to follow the general principle in this case. Therefore, I am satisfied that Mr Clark should be awarded a contribution towards his legal costs. I am also satisfied that the starting point should be the daily tariff, which is the standard approach to awarding costs in the Authority. The investigation meeting lasted half a day, so \$2,250 is the starting point.

[9] Should there be an uplift? Although the uplift sought is modest, I see no reason for awarding an uplift on the basis that a penalty was successfully sought. Costs are not generally awarded in the Authority on a piecemeal basis by reference to heads of claim successfully won. Furthermore, the penalty application was a very simple one; pursued and awarded because of the failure to issue Mr Clark with an employment agreement. I therefore decline to uplift the award for this reason.

[10] I also decline to award costs for preparing the costs submissions. Although a contribution is sometimes awarded to cover the cost of preparing submissions on costs, that is where the costs submissions are complex, because of a complex procedural history. That is certainly not the case here.

[11] The award of \$2,250 as a contribution towards Mr Clark's legal costs is therefore warranted, but no more.

Order

[12] I order the respondent to pay to Mr Clark the sum of \$2,250 as a contribution towards his legal costs. This sum is to be paid within 14 days of the date of this determination.

David Appleton
Member of the Employment Relations Authority