

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 18
5590209

BETWEEN KERI CLIFTON
Applicant

A N D ROB KORACH
Respondent

Member of Authority: Peter van Keulen

Representatives: Robert Thompson, Advocate for Applicant
Anthony Marsh, Advocate for Respondent

Submissions Received: 21 December 2016, from the Applicant
27 January 2017, from the Respondent

Date of Determination: 31 January 2017

COSTS DETERMINATION OF THE AUTHORITY

A. Mr Korach is to pay Ms Clifton \$3,500.00 as a contribution to her costs and \$71.56 for the filing fee for lodging her statement of problem.

[1] In a determination dated 7 December 2016¹ I determined that Ms Clifton had been unjustifiably dismissed and awarded her various remedies.

[2] In my determination, I reserved costs in the hope that the parties would be able to reach agreement on costs. The parties have been unable to do so and Ms Clifton's advocate has filed submissions seeking costs against Mr Korach.

[3] Ms Clifton, through her advocate, says:

a. She was successful with her claim;

¹ [2016] NZERA Christchurch 214

- b. She incurred actual costs in pursuing her claim of \$7,331.52 plus GST and disbursements of \$71.56 being the filing fee on lodging her statement of problem;
- c. I should award costs in line with *PBO Limited (formerly Rush Security Ltd) v Da Cruz*²;
- d. As a result, I should award costs in her favour of \$4,500.00 plus disbursements of \$71.56.

[4] Mr Korach, through his advocate, says:

- a. The principles set out in *Da Cruz* indicate that I should not depart from the starting point of the daily tariff; and
- b. Any increase in the daily tariffs is unique and such an approach should not be readily adopted.

[5] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

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] Both advocates accept that I must follow the principles set out in *Da Cruz*. 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.

² [2005] 1 ERNZ 808

- 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. I should not use costs as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct that 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] Therefore, as a first step, my starting point is that costs should follow the event. There was nothing in the conduct of the parties, such as the refusal to accept a Calderbank offer, or the nature of the case, that warrants departing from this.

[8] In the recent judgement of *Fagotti v Acme & Co Ltd*³ the Full Court reaffirmed the Authority's use of a notional daily tariff and agreed:

...there is a 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

[9] From my starting point, the second step is to apply the daily tariff.

³ [2015] NZEmpC 135

[10] It appears from both advocates' submissions that each believes a different daily tariff applies. The advocate for Ms Clifton seeks an award of \$4,500.00 and the advocate for Mr Korach says I should not depart from the starting point of a daily tariff of \$2,000.00.

[11] The applicable daily tariff for this matter, which was lodged on 29 January 2016, is \$3,500.00.

[12] The third step is for me to consider if the daily tariff should be increased or decreased.

[13] There was no behaviour by Mr Korach that increased the costs in this matter unnecessarily. In my determination, I was critical of Mr Korach changing his position regarding whether he dismissed Ms Clifton having stated initially that he did dismiss Ms Clifton and then subsequently stating that she resigned. However, I do not think that change of position caused an increase in the costs incurred; for either position, an investigation meeting would have been required. To increase the daily tariff based on this would be to punish Mr Korach and *Da Cruz* is clear that costs are not a tool designed to allow this.

[14] I will not adjust the daily tariff.

[15] The investigation meeting lasted one full day. An award of \$3,500.00 is appropriate.

[16] Ms Clifton is also entitled to the filing fee for lodging her statement of problem.

[17] Mr Korach is to pay Ms Clifton \$3,500.00 as a contribution to her costs and \$71.56 for the filing fee for lodging her statement of problem.

Peter van Keulen
Member of the Employment Relations Authority