

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 66
5402552

BETWEEN TRAVIS DANIEL COLLIER
Applicant

A N D TAMA RAKAU LOGGING
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: S Austin, Advocate for Applicant
M Insley, Counsel for Respondent

Submissions Received: 10 December 2013 from Applicant
10 February 2014 from Respondent

Date of Determination: 26 February 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] By a determination issued on 15 November 2013¹, the Authority found that Mr Collier had been unjustifiably dismissed. But it was assessed that he had contributed to the circumstances giving rise to the personal grievance; warranting a 30% reduction to the remedy of compensation awarded, pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), from \$4,000 to \$2,800. The parties were requested to resolve the matter of costs and while there is evidence of a constructive attempt to do so, this has not been possible. The Authority has now received costs submissions from both parties in anticipation of the Authority determining the matter.

¹ [2013] NZERA Auckland 525

The submissions for Mr Collier

[2] The submissions for Mr Collier inform that costs of \$8,526.10 (inclusive of GST) were incurred in preparing for and representation at the investigation meeting. While acknowledging the daily tariff approach (currently \$3,500 per day), the submissions for Mr Collier urge that the Authority should award 60% of actual costs incurred. The rationale behind this proposition is that because Mr Collier only received the sum of \$2,800, as an outcome of the substantive proceedings, and if the Authority were to now award costs in the sum of \$3,500; the total amount received by Mr Collier would be \$6,300. And given that Mr Collier's costs (post-mediation) amounted to \$8,526.10, the potential outcome is that he will be \$2,226 "out of pocket" so to speak; not to mention that other costs, i.e. mediation attendance, would, presumably, have been incurred.

[3] But that is not a good reason to depart from the usual daily tariff approach usually adopted by the Authority. Mr Collier's advocate is most familiar with the usual practice of the Authority in a costs setting; and he must be aware that for a one day hearing, an award of costs for a successful party would not usually exceed \$3,500. From time to time, some criticism of the tariff based costs approach is levelled at the Authority, but as recognised recently by the Employment Court, the daily tariff approach has a number of advantages, "including simplicity and predictability".² Therefore, a representative appearing before the Authority can, in the majority of cases, accurately assess the parameters of the costs implications for their clients pertaining to what can be recovered if they are successful, or indeed, what may have to be paid to the other party if they are not.

[4] It also must be said that any reasonable analysis of Mr Collier's circumstances should have logically reached a conclusion that because he was required to be admitted to hospital, due to the consequences of a work accident, and was receiving accident compensation for some time, there was no loss of wages to be remedied. Therefore, the sole remedy available was always only going to be compensation under s.123 (1)(c)(i) of the Act. And given that, in the view of the Authority, it was patently obvious that contribution on the part of Mr Collier would be a factor, the parameters of the financial outcome for him were reasonably predictable.

² *Mattingly v Strata Title Management Limited* [2014] NZEmpC 237

[5] Therefore, in addition to the well established tariff based approach of the Authority, regarding the likely recovery of costs, all of the above factors should have been considered by Mr Collier and his advocate before committing financial resources to the extent involved. It seems timely to remind the representatives of some parties appearing in the Authority, of the caution issued by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*:³

[47] Finally, in accord with the Court of Appeal in *Binnie*⁴ and this Court in *Harwood*⁵ we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

[6] The investigation meeting occupied the better part of a day, including some time spent in without prejudice discussions, whereby the parties attempted to reach a settlement. Therefore, in normal circumstances an award of \$3,500 would be made. However, given that the remedy awarded to Mr Collier was \$2,800, and exercising the equity and good conscience role available to the Authority,⁶ it would not be fair and equitable that he is awarded costs in excess of that figure and hence an award of costs in the sum of \$2,500 is more appropriate.

The submissions for the respondent

[7] The submissions for Tama Rakau Logging Limited (TRL) refer to the principles established by *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,⁷ in particular, that costs awards should be reasonable and modest. It is submitted that due to the fact that TRL is a newly established forestry contracting business, with substantial commitments regarding equipment and liabilities to its bank, it is only “willing” to make a payment of \$500, plus the application fee of \$71.56 paid to the Authority, as a contribution to the costs incurred by Mr Collier. The Authority is informed that because of its financial position, TRL were able to obtain assistance from the Tairāwhiti Community Law Centre, Gisborne,⁸ as it was deemed to be

³ [2005] ERNZ 808

⁴ [2002] 1 ERNZ 438

⁵ [2003] 2 ERNZ 433

⁶ Section 157(3) of the Employment Relations Act 2000 and *Da Cruz* at para [44].

⁷ *Ibid*

⁸ Counsel for TRL, Ms Insley, is a solicitor with the Community Law Centre.

necessary to have appropriate representation, but TRL could not afford to engage a private law firm.

[8] The submissions for TRL refer to s.123(2) of the Act and the discretion of the Authority to order payment to an employee by instalments. But this provision of the Act applies to remedies that may be awarded where a personal grievance has been proven; such as reimbursement of wages and/or compensation under s.123(1). Nonetheless, in appropriate circumstances, and upon tangible evidence of hardship and/or impecunious circumstances being produced, it is possible for the Authority to order payment by instalments in a costs setting, but that would usually also involve receiving evidence and submissions from the parties relevant to an appropriate payment schedule, in order to give the Authority some guidance about realistic and practical arrangements.

Determination

[9] While the Authority notes the submissions for the respondent pertaining to the company's ability to pay any costs awarded, and it is accepted that this is a factor that could be taken into account, there has been no evidence produced to support the submissions made by counsel for the respondent. As was held in *Metallic Sweeping (1998) Limited v Ford*⁹ and reinforced more recently in *Gunning v Bankrupt Vehicle Sales and Finance Limited*,¹⁰ what is required is a full statement of the party's financial position, including assets, liabilities, income and outgoings.

[10] Pursuant to clause 15 of Schedule 2 of the Act, Tama Rakau Logging Limited is ordered to pay to Mr Collier the sum of \$2,500.00, plus the application fee paid to the Authority of \$71.56, as a contribution to the costs incurred by him.

K J Anderson
Member of the Employment Relations Authority

⁹ [2010] ERNZ 433 at [53]

¹⁰ [2014] NZEmpC 9