

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination: WA 22/08

File Number: 5085866

BETWEEN David Cooper
 Applicant

AND Mars New Zealand Limited t/a
 Mars Petcare
 Respondent

Member of Authority: Denis Asher

Representatives: Tony Wilton for Mr Cooper
 Katherine Burson for the Company

Submissions received: Submissions dated 4 February 2008 on behalf of the
 applicant and 15 February on behalf of the respondent

Determination: 19 February 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 6 December 2007 I found that the Company acted in error in issuing a misconduct warning against Mr Cooper in respect of his non attendance for reasons of genuine ill health. I declined however to issue any monetary compensation for humiliation, etc.

[2] The parties have been unable to reach agreement on costs.

Applicant's Costs Claim

- [3] The applicant's submissions included the following:
- [4] Costs of the applicant's case have been incurred on his behalf by his union, the Engineering, Printing & Manufacturing Union.
- [5] From the outset the applicant and his union protested the Company's decision to give, and sought to have withdrawn, a disciplinary warning for misconduct for poor time keeping and attendance when there was no suggestion Mr Cooper's absences were other than for genuine illness. Because of the respondent's unbending stance the applicant was required to commence proceedings.
- [6] In the circumstances neither Mr Cooper nor his union on his behalf should have to carry the full costs of bringing this matter to the Authority.
- [7] The costs sought consist not only of the time and disbursements expended by the union on behalf of Mr Cooper but also paid time off work for the applicant, a night shift worker, to be able to participate in the investigation meeting. Mr Cooper sought the shifts off on the nights before and after the investigation meeting: the respondent refused and required him to use his annual holidays. It has refused to reinstate his holiday entitlement. The union therefore paid Mr Cooper for the equivalent of his wages for the two shifts, a total of \$337.60 gross. It is submitted this is a cost properly borne by the employer in the circumstances.
- [8] The investigation meeting was conducted in half a day. A reasonable contribution to costs on that basis would be \$1,500. The union also seeks reimbursement of the filing fees and Mr Cooper's pay, i.e. a total of \$1907.60.

Respondent's Costs Claim

- [9] The respondent's submissions included the following:
- [10] The Company submits an appropriate award would be \$500.
- [11] That is because, amongst other things, the Authority in its substantive determination found, and the applicant accepted, that the respondent was entitled to put Mr Cooper on notice as to the implications of further non-attendance for genuine health reasons.

- [12] In the circumstances the Authority exercised its discretion and declined to grant any compensation to Mr Cooper.
- [13] The principles relating to awards of costs in the Authority were confirmed by the Full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.
- [14] There was considerable evidence before the Authority as to the respondent's genuine attempts to resolve the applicant's concerns over the first warning he received.
- [15] In the circumstances it is submitted the proposal to pay \$500 is fair and reasonable and accords with *Da Cruz*.

Discussion and Findings

- [16] Mr Cooper succeeded with his claim but did not receive any compensation for humiliation, etc.
- [17] The parties clearly agree that costs follow the event and Mr Cooper – in this case his union – is entitled to claim a contribution to his fair and reasonable costs: see *Da Cruz* (above).
- [18] The union does not specify its actual costs but submits that \$1,500 is a reasonable contribution to a half day investigation. It also seeks to recover its payment of wages for annual leave lost to the applicant because of the respondent's refusal to grant the nightshifts before and after the investigation to Mr Cooper as time off on pay.
- [19] The respondent's submissions do not address that claim.
- [20] I am satisfied that, after regard is given to the union's claim and – in particular – the apparently reasonable request that Mr Cooper enjoy paid time off to prepare for and participate in the investigation (a situation typically enjoyed by day-workers in ongoing employment situations, consistent with the actions of a fair and reasonable employer), and after taking *Da Cruz* (above) into account as well as the parties' submissions, a fair and reasonable contribution to Mr Cooper's costs is the sum claimed, i.e. \$1,907.60.

Determination

[21] Mars New Zealand Limited is directed to pay to Mr David Cooper the sum of \$1,907.60 (one thousand, nine hundred and seven dollars and sixty cents) as a fair and reasonable contribution to his legal costs.

Denis Asher

Member of the Employment Relations Authority