

Issues

[3] Is this a matter for costs? If so is the applicant entitled to costs or should costs lie where they fall? How much should be awarded?

The facts

[4] The applicant was successful in her claims. She defended a counter claim. Her costs have been \$4,554 for representation and preparation.

[5] The applicant met the Authority's timetable for written statements to be filed and exchanged. The respondent produced a written supplementary statement (and relied on the statement in reply) and an affidavit at the investigation meeting instead of filing and exchanging them in accordance with the Authority's timetable.

[6] The respondent filed a statement in reply with a counter claim. The continuation of this claim was left to be confirmed by a set date. There also was some indication that the sums in the counter claim could be increased. The counter claim was not articulated properly until the Authority's investigation meeting.

[7] The first scheduled investigation meeting was vacated to accommodate the respondent and the availability of one of its witnesses; to enable that witness to attend on another more suitable date. This was arranged and another date agreed to for an investigation meeting. At the rearranged investigation meeting that witness was not called and an affidavit was produced instead. There was no advance notice of this arrangement given by Mr Feist.

[8] The Authority considered mediation and decided not to direct the parties to mediation for reasons given at the time, which reflected both parties' representatives' views on the entrenched nature of the matter. Later the Authority made a direction for the parties to attend an appropriate mediation service to be provided by the Department of Labour with its free service and array of arrangements that can be called on. I have no knowledge of any initiatives taken other than an attempt by the Department to contact EDS for a mediation meeting. This direction was made upon a request from the respondent's representative on 13 September 2010 for urgent

mediation. I hold that this was nothing more than the respondent jockeying for position and to be seen in the best possible light. The fact is that despite making such a direction the respondent did not comply with the direction to attend mediation. No other arrangements have been identified occurring.

Determination

[9] At the outset of these proceedings EDS's legal representative was contactable and communicated with the Authority. A statement in reply was filed. Later the respondent's representative was not able to get the written statements from the respondent in on time due to Mr Feist's unavailability. Then the representative could not get any instructions from Mr Feist to whom the representative said he had handed all the documents to; and the communication dried up.

[10] The first direct contact the Authority had with Mr Feist was at the Authority's investigation meeting when Mr Feist tabled his supplementary written statement and the affidavit. The tabling of these documents required an adjournment for the applicant to read them. This was an unsatisfactory delay caused by Mr Feist's failure to be communicative beforehand. Fortunately there was not much new material added.

[11] The Authority's file indicates that the applicant's written statement of evidence was probably sent to the respondent's representative (email 2 August 2010), despite an earlier request by Mr Tayler to withhold that evidence from the respondent until the respondent's statements had been received. The respondent's representative and Mr Feist must take responsibility for their own internal communications. For that reason it is reasonable to conclude that the statement was received on behalf of the respondent before the Authority's investigation meeting. I have no idea what happened to it inside EDS.

[12] The parties did not go to mediation when attempts were made by the Department of Labour to make arrangements for a mediation following the Authority's timetable and directions. Despite the applicant's misgivings that mediation would be of any assistance the applicant was prepared to comply as

directed and was left waiting on a response from EDS, I hold. Despite attempts to contact Mr Feist this proved not to be possible.

[13] EDS has not been responsive and communicative. It failed to try and settle the differences by not attending mediation with the Department of Labour's services as directed. EDS was indulged with an investigation meeting date being vacated to fit in with a witness's availability to support the respondent. Then that witness was not called and an affidavit was filed instead. Given the content of that affidavit there really was no necessity to vacate the first date. I hold that this was a delaying tactic, but there are no identifiable costs relating to this.

[14] Mr Feist's failure to file his supplementary written statement and the affidavit in advance of the Authority's investigation meeting meant there had to be a delay during the Authority's investigation meeting to enable the applicant and her representative time to read the documents. Also, for whatever reason Mr Feist claimed he had not received the applicant's statement, but as I have already stated he has to take responsibility for that since it was sent to EDS by the applicant's representative (from the email received in the Authority; 2 August 2010). Mr Feist needed time to read the written statement at the investigation meeting too. The delay caused more time than necessary for the investigation meeting. The time was also extended by the opportunity that the parties were given to try and settle the matter during the investigation meeting and where the attempt to settle should have happened in mediation.

[15] Costs do follow the event. Ms Cuthill-Coutts was successful in her claims, and she defended a misconceived counter claim. Indeed Mr Feist's failure to co-operate with the Department of Labour and his failure to comply with the Authority's timetable have hindered the Authority's investigation process. Mediation which would have been useful to save costs did not occur and the failure to produce documents in advance such as the supplementary statement and the affidavit caused time delays and prevented an assessment of the information before the Authority's investigation meeting. Also the Authority's investigation was hindered by EDS dangling the potential damages claim before the claim was formalised and properly articulated.

[16] The applicant's costs are modest. Given that there was no mediation the actual costs I accept relate to Ms Cuthill-Coutts' representation and preparation for the Authority's investigation meeting; and such costs included covering off the counter claim. The meeting was scheduled for a day but lasted less time than a full day. I have decided to apply the tariff and reject Mr Feist's submission for costs to lie where they fall. Sensibly the applicant's request for costs has been on the tariff basis to reflect a claim for a contribution.

[17] It is my assessment that costs should be at the higher end of the range and award Ms Cuthill-Coutts the sum of \$3,000.

Orders of the Authority

[18] Employment Dispute Services Limited is to pay Antonette Cuthill-Coutts \$3,000 contribution to her costs, plus the \$70 filing fee.

P R Stapp
Member of the Employment Relations Authority