

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 115
5515211

BETWEEN	ALISTER DORAN Applicant
A N D	SOUTH PACIFIC MEATS LIMITED First Respondent
A N D	WAYNE LINDSAY Second Respondent
A N D	DEAN BURGESS Third Respondent

Member of Authority: Helen Doyle

Representatives: Karina Coulston, Counsel for the Applicant
Rachel Webster, Counsel for the Respondents

Submissions Received: 29 June and 14 July 2015, Counsel for the Applicant
13 July 2015, Counsel for the Respondent

Date of Determination: 10 August 2015

COSTS DETERMINATION OF THE AUTHORITY

A I order South Pacific Meats Limited to pay Alister Doran costs in the sum of \$4366.67 and disbursements in the sum of \$71.56.

The substantive determination

[1] The Authority in a determination dated 10 June 2015 found the applicant was disadvantaged in his employment by unjustified actions of the first respondent and orders were made for wages and compensation.

[2] A penalty was awarded against the first respondent for a breach of good faith but other claims for penalties were unsuccessful. Claims for damages for breach of contractual duty and breach of statutory duty were unsuccessful.

[3] Costs were reserved and the Authority has now received submissions from both counsel.

The applicant's submissions

[4] Ms Coulston submits that the matter was reasonably complex necessitating the lodging of detailed statements of evidence, submissions and a detailed analysis of the health and safety policy. She submitted that the respondent only provided scant written evidence which added to the length of the hearing. Ms Coulston set out matters that had to be attended to by way of preparation for the investigation meeting. The investigation took place over one and a half days. One witness's evidence was heard on 10 April as he was going overseas and was unavailable for the other date of the investigation.

[5] Ms Coulston refers to the leading case on costs in the Employment Court of *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹ and the principles that the Authority is to take into consideration in exercising its discretion as to costs.

[6] Ms Coulston recognises that there is a notional daily tariff for costs in the Authority of \$3500 but refers to some cases where an increase was considered appropriate and the Authority may increase or decrease the tariff where it would be appropriate in the exercise of its discretion. Ms Coulston submits that factors that may justify an increase are attempts to resolve the matter and the degree of necessary preparation.

[7] Ms Coulston says that costs should be awarded in relation to mediation because a request to attend mediation was refused by the respondent and an application had to be lodged with the Authority.

[8] The applicant's actual costs in respect of the investigation were in excess of \$20,000 including GST with office disbursements of about \$200 and filing fee and the costs in respect of mediation were \$2,300.

¹ [2005] 1 ERNZ 808

[9] Ms Coulston seeks an award of costs in the matter of \$15,000 being two thirds of actual costs incurred.

The respondents' submissions

[10] Ms Webster in her submissions disagrees that the matter was reasonably complex and submits that it appeared that way because of the number of claims made by the applicant including claims for penalties without legal basis. She submits that this unduly complicated and prolonged the matter.

[11] Ms Webster sets these out as follows:

- (a) The claim against the second and third respondents under s.134 of the Employment Relations Act 2000 when there was no evidence of deliberate intention by either of these respondents;
- (b) The claim against the second and third respondents for breach of good faith obligations was without no legal basis;
- (c) The claim against the second and third respondents for breach of contractual duty where there was no legal basis; and
- (d) The claim for damage for breach of statutory duty which the Authority had no jurisdiction to consider.

[12] Ms Webster submits that there was no conduct on the part of the respondents that increased costs unnecessarily but submits that there was conduct which increased the applicant's costs, namely:

- (a) Amending the statement of problem twice;
- (b) Filing an amended statement of evidence for the applicant;
- (c) Raising a further claim on the day of the investigation meeting about payment for a period of suspension;
- (d) The second day of the investigation regarding no payment while on suspension for failing a second drug test; and

- (e) Lodging 43 pages of written submissions much of which was related to the claim/penalties that were without legal basis or the Authority did not have jurisdiction to deal with.

[13] Ms Webster submits that the evidence submitted on behalf of the respondents focussed on the relevant issues and did not add to the length of the investigation meeting.

[14] In relation to mediation Ms Webster submits that it would have made no difference to the applicant's costs. She records that the Authority did not direct the parties to mediation. It was referred to mediation by an Authority Officer. Ms Webster submits that, as mediation was unsuccessful, the same costs would have been incurred by the applicant. Ms Webster submits that the Employment Court has been reluctant to make awards for attendance at mediation.

[15] Finally, Ms Webster submits that the actual costs incurred by the applicant are not reasonable and that she does not accept that costs should be considered and awarded on the basis of a 1½ day hearing. She submits that Mr Cameron's evidence on 10 April 2015 did not take even a quarter of a day and that if he had been available on 15 April, his evidence could have been heard on that day.

[16] Ms Webster submits that an appropriate award to make would be the sum of \$3,500.

Determination

[17] I have checked the times for both days in my minute book. The meeting on 10 April 2014 to deal with Mr Cameron's evidence took one hour from 10.30am to 11.30am and the investigation meeting on 15 April 2015 was from 9.30am to 5.10pm.

[18] Mr Cameron's evidence may have been able to have been dealt with on 15 April 2015 but that would have lengthened the day. The Authority also received substantial written submissions after the investigation meeting. When I consider those matters the daily tariff is to be assessed on the basis of one full day and one third (two hours) of another day. That is \$3500 for one full day and \$1166.67 for another third of a day.

[19] The starting point therefore for an award of costs is the sum of \$4666.67 together with disbursements. I have then considered whether there should be any adjustments to that figure.

[20] There was no dispute that costs should follow the event and an award be made in favour of the applicant.

[21] The matter did have some factual complexities but would not fall into the range of cases where the facts or law were of a complexity that supported an increase to the daily tariff. Although there was considerable preparation that is usually part of the daily tariff. I do not find the respondent's conduct increased the time for investigation. There is no adjustment upwards on that basis.

[22] The applicant was not entirely successful and I accept Ms Webster's submission that there was time spent on unsuccessful claims and other matters that increased costs. I do not find that they added significantly to the total time because the focus was in the main on the successful claim of unjustified disadvantage. Nevertheless I find that there should be a decrease in costs of \$300 to the daily tariff to reflect that some time was taken to address these matters and claims.

[23] This is not a case where the features that may attract an award of costs in respect of mediation exist.

[24] As was stated in *PBO* costs in the Authority are not to be used as a punishment and will be modest.

[25] Claims for disbursements are limited to payments of money to third parties rather than office costs. There will be no hearing fee charged. There should be reimbursement of the filing fee of \$71.56.

[26] I order South Pacific Meats Limited to pay Alister Doran costs in the sum of \$4366.67 and disbursements in the sum of \$71.56.

Helen Doyle
Member of the Employment Relations Authority