

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 40
5289770

BETWEEN

PEOLAINA FAITAU
Applicant

AND

ARMOURGUARD SECURITY
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Mohammed Shahadat, Advocate for Applicant
Linda Ryder, Counsel for Respondent

Submissions received: From both parties

Determination: 22 March 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 30 November 2010 I dismissed Mrs Faitaua's personal grievance claim of unjustified constructive dismissal and reserved costs for both parties to provide written submissions. The respondent and the applicant both lodged and served their submissions. This determination resolves the question of costs.

[2] The Authority's physical file is in the Authority's Christchurch office along with my hearing notes. The situation in Christchurch means that I cannot get access to that material and it is uncertain when that might change. Helpfully, the parties both provided the Authority with another copy of their submissions and I have been able to access a copy of the determination. This material is sufficient for me to issue this determination.

[3] Both parties refer me to the principles in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 which I accept are applicable.

[4] The main submission for the respondent is that the applicant's case was so unmeritorious from the outset that there should be an increase beyond the usual daily tariff level of costs. The applicant says that she honestly believed that she had been dismissed because she was asked to provide a letter of resignation. As a result of the Authority's investigation the applicant's view was rejected but that does not mean that it was so lacking in merit that there should be a departure from a standard daily tariff approach to costs.

[5] Having seen and heard the applicant I understand why she thought that being asked to put her resignation in writing meant that she was effectively being dismissed. Viewed objectively though there was no constructive dismissal. To increase the daily tariff because of this finding would amount to a punishment or an expression of disapproval of the applicant's conduct in progressing her claim. That would be an improper approach to the assessment of costs. I will deal with the matter as one where the respondent is entitled to no more than costs assessed on a daily tariff basis.

[6] The respondent's second submission is that it pointed out to the applicant after the exchange of statements of evidence but before the investigation meeting that her claim lacked merit; and that she risked an award of costs against her if she did proceed. Also, despite its view about the merits, the respondent attended mediation to try and resolve the matter. I accept that the respondent acted properly by taking these steps but I do not agree that they justify increasing the level of costs. These are steps that would be taken by many if not all respondents who believe that an applicant's claims lack merit.

[7] The third submission for the respondent is that, despite the investigation meeting taking only about half a day, it nonetheless was put to considerable cost preparing a full defence to the claim including briefing the evidence of six witnesses. The investigation meeting took less time than usual for that number of witnesses because, in the end, the Authority did not need to resolve any credibility issues. Nonetheless the respondent incurred most of the costs of a full day meeting. I agree with this point. In the context of the respondent's overall costs there was only a small saving due to the limited time required for the investigation meeting. I consider that

the proper course, subject to what follows, is to treat the matter as if it took a full day for an investigation meeting.

[8] The submission for the applicant not already dealt with is that she has limited financial resources and will suffer severe financial hardship if there is an award of costs against her. There is no evidence nor any greater detail of this assertion. In the absence of a proper foundation I cannot give the assertion any weight in this assessment of costs.

[9] In *Chief Executive of the Department of Corrections v. Tawhiwhirangi (No 2)* [2008] ERNZ 73 the Employment Court considered that \$3,000.00 was an appropriate starting point for assessing costs on a daily tariff basis. I will adopt that approach. For the reasons expressed above I consider that I should award that sum in full without any adjustment either up or down.

Orders

[10] The applicant is to pay the respondent costs of \$3,000.00.

Philip Cheyne
Member of the Employment Relations Authority