

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 263
5413562

BETWEEN CHRISTINE ELIZABETH
FRANCIS
Applicant

A N D REAL HEALTH LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Paul Robertson, Counsel for Respondent

Submissions Received: 3 June 2014 from Applicant
7 May 2014 from Respondent

Date of Determination: 25 June 2014

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] I issued the substantive determination in this matter on 14 April 2014 as [2014] NZERA Auckland 145.

[2] In that determination, I found exclusively for Real Health Limited and reserved costs.

The claim for costs

[3] Real Health Limited as the successful party seeks an award of costs in the sum of \$3,000.

[4] The Authority is told that the respondent employer has incurred total costs of nearly \$14,000 in defending the proceedings brought by Ms Francis.

[5] Counsel refers to two recent costs decisions of the Authority where determinations on the substantive matter issued after a consideration exclusively on the papers. The claimed figure of \$3,000 in the instant case is based on an analysis of the earlier determinations just referred to.

[6] As with those earlier decisions, the starting point is lower and the suggestion in the present case is that the starting figure should be \$1,750. This is augmented because of claims that the process was unnecessarily prolonged by Ms Francis' behaviour and her decision to proceed with a claim that was completely without merit.

Submissions for Ms Francis

[7] Submissions for Ms Francis proceed on the basis that she is not financially in a position to make any response to the claim for costs save for a proposal that she says she is able to borrow \$1,370 from her elderly parents (Ms Francis is 68 and her parents are in their 90s) in full and final settlement of the costs issue with Real Health Limited.

[8] Ms Francis also refers again in her submissions to health issues that she has suffered and to the contention that the Authority's administrative processes have somehow contributed to her distress.

[9] In that latter regard, she makes the point correctly that an error was made in the sending out of the Authority's substantive determination which meant that she did not receive it when she should have. That error was undoubtedly made and I unreservedly apologise to Ms Francis for that unsatisfactory state of affairs.

[10] However, Ms Francis' contention that there was material received in the Authority from Real Health Limited which ought to have been provided to her cannot be right. The matter was dealt with by the Authority on the papers. Ms Francis supplied detailed materials which I carefully considered. So did Real Health Limited and I carefully considered them as well. There was no arrangement made by the Authority for the submissions of Real Health Limited to be provided to Ms Francis so that she could provide further submissions; she had already provided extensive submissions and her position was very clear. If I had wanted more information from her based on the submissions of Real Health Limited, I would have asked for it but it was simply not necessary.

Discussion

[11] The principles guiding the fixing of costs in the Authority are well settled. The fundamental principle is that the successful party can look to the unsuccessful party for a contribution to their costs and subject to any claimed inability to pay (as is the case in the present situation), the Authority will often apply a daily tariff approach.

[12] The daily tariff is currently set at \$3,500 and the effect of that is that, in an ordinary hearing in person that takes one day or thereabouts, the unsuccessful party can expect to contribute \$3,500 as a starting figure to the costs incurred by the successful party. Whether that starting figure goes up or down will depend on whether there have been any settlement offers that need to be taken into account, whether the unsuccessful party is impecunious and whether there are any other factors such as the conduct of the parties which the Authority is required by law to consider.

[13] In the present case, there was no hearing in person and the matter was dealt with on the papers. The Authority however does deal with matters on the papers on a regular basis and so there is guidance for dealing with the daily tariff approach in those circumstances. Real Health Limited has provided some examples for the Authority to consider.

[14] Real Health Limited seeks \$3,000 as a contribution to its costs which is based first on the daily tariff figure being set at a starting point of \$1,750 and that figure then being escalated because it is said that Ms Francis' application was completely without merit and her behaviour during the course of the proceedings materially contributed to Real Health Limited's costs.

[15] It is true that Ms Francis' claim was found by the Authority to be completely without merit. Member Moynihan endeavoured to make clear to Ms Francis in the telephone conference she convened when the file was still on her list that the claim was a very difficult one.

[16] In my determination, I referred to a number of insuperable hurdles in Ms Francis' claim. In effect, her claim relied on her succeeding with not one argument but a multiplicity of arguments, any one of which could have invalidated her claim. In fact, standing back and looking at the case, this was a situation where every one of the hurdles Ms Francis faced resulted in a finding against her. In truth

then, the warnings given to her, including by the Authority, that her claim was challenging, simply went unheeded.

[17] As well as the range of arguments around the timeliness of Ms Francis' claim, there was in addition the equally challenging claim of seeking to reopen a matter which had been settled between the parties three years before.

[18] Ms Francis' behaviour is in another category again. The criticisms of her behaviour is not, I think, fairly made. It is quite apparent to me that Ms Francis has not enjoyed good health in the period since the personal grievance, if any, ought to have been raised (that is, within 90 days of the events complained of) and that ill health has impacted on her ability to deal with matters in a timely fashion. Accordingly I reject that submission entirely.

[19] The first submission, however, has force. Ms Francis has persevered with this claim when it, on any proper analysis, would appear to be completely impossible to succeed in given the law that applies. As a consequence of determinedly proceeding with the claim, Ms Francis has put Real Health Limited to very significant cost.

[20] It is a truism that the Authority finds itself repeating time and again that parties who insist on bringing claims in the Authority which have doubtful legal force or effect must bear the consequences by assisting in the funding of the costs of the successful party. Litigation is not a risk-free process and where parties are put to great cost to defend claims that have no legal merit at all, they will inevitably look to the unsuccessful party to contribute to their costs.

[21] All that said, however, I am required by the law to consider Ms Francis' personal circumstances. It is apparent that she is impecunious. She is now 68 years old and her source of income is derived exclusively from Guaranteed Retirement Income. The budget supplied to me from the Nelson Budget Service Inc discloses a weekly deficit. There is nothing in that budget which suggests behaviour inappropriate to a person of limited means.

[22] Ms Francis' settlement proposal (because that is what it is), is that she borrow from her very elderly parents the sum of \$1,370 and pay that to Real Health Limited in full and final settlement of the matter.

[23] Given her circumstances, that is a handsome proposal but it is not one that I think Ms Francis should be required to make. Presumably if her parents offer this sum, she will have to either pay it back or at least account to her parents for that sum in some other way by, for instance, foregoing an equivalent entitlement provided by will.

[24] Moreover, the very amount suggested to settle this debt suggests to me that this money is all that her parents have.

Determination

[25] In the normal course of events, costs of the successful party ought to be contributed to by the unsuccessful party. Here Real Health Limited was completely successful against Ms Francis and as I have been at pains to try to make clear, Ms Francis was always going to have very considerable difficulty in getting her current claim heard because of the succession of legal hurdles that she would have to successfully surmount in order to have her case succeed.

[26] In the result, Ms Francis has been completely unsuccessful and in the normal course ought to be required to make a contribution to the successful party's costs. But in the present circumstances, I am satisfied that Ms Francis is impecunious, that the budget that she has helpfully provided makes clear that she has a significant weekly deficit on normal living expenses and on that basis, I think the law requires me to decide that, in the particular circumstances of this case, costs should lie where they fall. That is to say, that Ms Francis should not have to make any contribution to Real Health Limited's costs because of her financial predicament.

James Crichton
Member of the Employment Relations Authority