

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 257
5425465

BETWEEN DALE FRANKLIN
Applicant

A N D C W LUDWIG LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Greta Keenan, Counsel for Applicant
David Jackson, Counsel for Respondent

Submissions Received: 27 November 2013 from Respondent
4 December 2013 from Applicant

Date of Determination: 18 December 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] On 30 October 2013 I issued a determination rejecting Mr Franklin's claim he had been unjustifiably dismissed by the respondent, C W Ludwig Limited.

[2] I also dismissed a counter claim from Ludwig's for monies allegedly owed by Mr Franklin.

[3] Costs were reserved.

[4] Ludwig's has now applied for a contribution toward its costs which totalled just over \$7,000. It seeks to recover *the lion's share* of that amount but submits *an award of at least \$3,500 would be appropriate having regard to equity and good conscience.*

[5] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[6] In this instance the hearing took approximately half a day, which would see a contribution in the order of \$1,750.

[7] As already said Ludwig's seeks a greater sum and supports its claim with reference to various findings in the original decision about the quality of evidence and my conclusion a finding in Mr Franklin's favour would not have assisted him to any great extent in any event ([2013] NZERA Christchurch 223 at (22)). Ludwig's submits:

...equity and good conscience ought to respond in a situation where an employer fairly and squarely sees off an hopeless personal grievance. If an applicant persists with a personal grievance in the face of firm resistance from an employer on credibility grounds, then to proceed with a weak evidential case must sound in costs against the applicant.

[8] The response is that while Mr Franklin failed, the claim required determination as it was Ludwig's who refused mediation and, in any event, Mr Franklin was successful in respect to the counter claims. It is submitted:

The Applicant has suffered his own costs in respect of the making of his Application and the defending of the counter claims made by the Respondent and it is submitted that costs should therefore lie where they fall.

[9] I am not swayed by the argument I increase the tariff. A costs award is a contribution and not *the lions share* except in exceptional circumstances and where the type of behaviours discussed in *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 are present. That did not occur here. Similarly I am not persuaded by the argument the outcome turned on credibility and Mr Ludwig backed his word over Mr Franklin's. It was my preference for Mr Ludwig's evidence that determined the outcome and to take it into account again would appear punitive. Costs are not to punish.

[10] There is then the argument for a minimum \$3,500. It relies on an assertion *one day is a fair allocation for both preparation and hearing time (which was a half day hearing)* but that ignores the fact the tariff is deemed to cover both hearing and preparation..

[11] Similarly I am not persuaded by Mr Franklin's argument costs should lie where they fall. Costs follow the event and there is no suggestion those incurred by

Ludwig's were unreasonable. I also discount the fact Ludwig's refused to attend mediation as its rationale for doing so was supported by the outcome.

[12] There are then the counter claims. I conclude Mr Franklin's successful rebuttal does not remove his liability to pay some contribution toward Ludwig's costs. It is improper to adopt a scorecard approach where the issues are intrinsically intertwined as they were here (*Bourne v Real Journeys Ltd* [2012] NZEmpC 2). The primary focus was the dismissal claim and Ludwig's was completely successful in that respect. Most of the evidence necessary for the counter claims would have been canvassed in order to consider the claim of dismissal but, in any event, it did not add significantly to the time taken and the additional effort in respect of submissions was minimal.

Conclusion

[13] For the above reasons I conclude it appropriate to apply the normal tariff when determining this application.

[14] I therefore order the unsuccessful applicant, Mr Dale Franklin, pay the respondent, C W Ludwig Limited, the sum of \$1,750 (one thousand, seven hundred and fifty dollars) as a contribution toward costs.

M B Loftus
Member of the Employment Relations Authority