New Zealand Employment Relations Authority Decisions

Frost v Cullen (Christchurch) [2012] NZERA 1082; [2012] NZERA Christchurch 82 (4 May 2012)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2012] NZERA Christchurch 82

5345929

BETWEEN SUSAN FROST Applicant

A N D GARY CULLEN First

Respondent and

CULLEN'S FRUIT AND VEG LIMITED Second Respondent

Member of Authority: David Appleton

Representatives: Jessica Herd, Counsel for the Applicant

Mr Gary Cullen, director, for the Respondents

Submissions Received: 10 April 2012 from the Applicant

23 April 2012 from the Respondent

Date of Determination: 4 May 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 9 March 2012 the Authority found that the Applicant's personal grievance for unjustified dismissal had been made out. Costs were reserved and the parties were invited to make written submissions in relation thereto.

[2] The applicant, who is in receipt of legal aid, submits that costs in the vicinity of $3,000 should be awarded. The respondent, which has been unrepresented throughout the proceedings, did not make a formal submission, but produced an unsigned and unsworn statement of financial performance on the headed paper of a firm of chartered accountants for the year ended 31 March 2011, which showed a deficit of $45,606. No statement was available for the financial year ended 31 March

2012 as, according to the respondent, it has not yet been finalised. The respondent states that the financial performance for 2012 was not much better but does not indicate whether another deficit was expected.

[3] The investigation meeting took place on two days because a crucial eye witness for the respondent was not available on the first day. In total, the two investigation meetings lasted around 2.5 hours. The applicant's counsel states that actual costs amount to $5,850, although no breakdown of the detail of how this sum had been incurred was provided.

[4] The leading case relating to the award of costs in the Authority remains *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808. This set out the principles to apply in determining the award of legal costs, which include the following:

a. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although

conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

b. It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.

c. Costs generally follow the event. d. Awards will be modest.

e. Frequently costs are judged against a notional daily rate.

[5] First, although I found that there was a significant contribution by the applicant which resulted in a 75% reduction in the remedies awarded, this does not detract from the principle that costs generally follow the event. I am satisfied that, in this case, an award of costs should be made against the respondent. As counsel for the applicant points out, a finding of contribution in the liability determination should not sound in the amount of costs awarded.

[6] The respondent understandably did not conduct its defence with the same degree of efficiency and rigour as one would expect a professionally represented party to have done. It did produce written evidence which was helpful to a degree, although it was not as comprehensive as it might have been. However, it was because of the respondent's failure to ensure that a crucial eye witness attended on the first day of the investigation meeting that the meeting had to be adjourned and reconvened on another

day. I believe that it should have been obvious to the respondent that this witness should have attended on the first day of the meeting, despite it not being represented.

[7] I believe also that this failure on the respondent's part to ensure that the eye witness was present on the original day of the investigation meeting would have necessitated the applicant' counsel doing further work to refresh her memory and that this should be taken into account when considering what amount to order. However, the reconvened meeting was just 2 weeks later, and so it would not have been necessary for the applicant's counsel to have spent a significant amount of time preparing. The respondent's failure in that regard will not, therefore, be reflected by a significant costs award. The eye witness also wrote a letter after the date of the first day of the investigation meeting which would have required work from the applicant's counsel. However, she would have had to have done this work whenever the letter had been presented, so I do not believe that justifies an increase in the costs award.

[8] The respondent's statement of financial performance was not sworn and it does not attest to the respondent's current financial situation. Although the respondent invited me to make inquiry of his accountant if I needed more information, I had heard evidence under oath from Mr Cullen at the substantive investigation meeting of the respondent's financial situation, although it was in general terms. I accept that the respondent is not doing well financially, although it is still trading. Awarding costs is an exercise of discretion and impecuniosity is a relevant consideration in that regard. However, in view of the fact that a significant award of costs against the respondent is not warranted, I do not believe that the respondent's relative impecuniosity necessitates a reduction in the award from an amount that I consider would otherwise be appropriate. I also do not consider it necessary to order payment by instalments.

[9] Taking all these factors into account, I believe that a just award of costs against the respondent is half a day's costs calculated at a daily tariff of $3,500 a day. The costs award against the respondent is therefore $1,750.

David Appleton

Member of the Employment Relations Authority
