



New Zealand Employment Relations Authority Decisions

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Graham v Bank of New Zealand (Christchurch) [2011] NZERA 577; [2011] NZERA Christchurch 125 (19 August 2011)

Last Updated: 2 September 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 125
5151785

BETWEEN JAN GRAHAM

Applicant

AND BANK OF NEW ZEALAND

Respondent

Member of Authority: Representatives:

Submissions received:

Philip Cheyne

Fiona McMillan, Counsel for Applicant Emma Butcher, Counsel for Respondent

2 February 2011 from Applicant 19 January 2011 from Respondent

Determination:

19 August 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 22 December 2010 I rejected Mrs Graham's three personal grievance claims and her breach of contract claim against her former employer, the Bank of New Zealand. Costs were reserved for both parties to lodge and serve memoranda in accordance with a timetable.

[2] Because of the situation in Christchurch I do not have access to the Authority's file but the parties have provided me with copies of their submissions which I take as having been lodged and served in accordance with the timetable. I have also obtained a copy of the substantive determination. These materials are sufficient to determine the question of costs.

[3] The respondent having been successful claims costs. The applicant accepts that there should be an award of costs in the respondent's favour, a position with which I agree. The contest between the parties is whether the Authority should simply apply a daily tariff approach or award a higher amount and whether the applicant should have to contribute to travel and accommodation costs incurred by the respondent's HR manager.

[4] The investigation meeting took one and a half days and the parties also provided comprehensive written submissions after the meeting. For the applicant it is argued that submissions are usually provided in this manner so those costs should not be added to the investigation meeting time for assessing costs on a daily tariff basis. I do not accept this submission. There is no uniform practice about how submissions are dealt with other than to assess what is best for the particular case and the parties. This was a factually and legally complex matter with many issues for resolution. It well deserved careful written submissions and it would be unfair to exclude the extra time required for that work from the assessment of costs at this point.

[5] This is a case where the respondent was subjected to the greater burden of preparation for the investigation meeting. Mrs Graham presented evidence from herself and her husband while the respondent needed to present evidence from five witnesses. There is a submission for Mrs Graham that the costs incurred by the respondent for the preparation of witness statements should be ignored but I do not accept this. It is perfectly regular for counsel to have a role in preparing witness statements. There was a substantial amount of documentation provided by the respondent and some unnecessary time expended by counsel as a result of some issues about the presentation of the applicant's material. This last point aside, Mr Graham handled the unfamiliar role of advocate expeditiously.

[6] To recognise the foregoing points, especially about submissions, the extra preparation burden and the factual and legal complexity, I will treat the matter as having occupied two and a half days meeting time.

[7] In *Chief Executive of Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73 the Employment Court indicated that \$3,000.00 per day is a fair starting point for assessing costs on a daily tariff basis. That position was supported in *Johnson v Gilligan Business School Ltd* 3 April 2009, Travis J, AC14/09. I adopt that starting point here. Given the adjustment to the time indicated above I do not intend to adjust the daily rate. That leads to a costs award of \$7,500.00.

[8] There are some further reasons advanced by the respondent to justify an uplift in the costs award.

[9] There were apparently two mediations. There was one attempt to resolve some of the issues that eventually were determined prior to the termination of the applicant's employment and there was a further mediation after the termination of the employment. In my view this was within the usual expectation that parties should attempt to resolve their differences without any costs so incurred featuring as part of a later costs assessment by the Authority following an investigation.

[10] The respondent also made a *Calderbank* offer. I agree with the applicant's submission that a *Calderbank* offer exposes a successful claimant who recovers less than the *Calderbank* offer to the risk of an adverse award of costs. The principles in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808 more generally permit the Authority to take into account without prejudice offers, meaning offers made without prejudice except as to costs. In this case the respondent is entitled to an award of costs as the successful party and I do not see any reason to increase that award based on its preparedness to make a modest settlement offer.

[11] There is criticism of the wide ranging nature of Mrs Graham's claims, the sums sought by her and the manner in which the claims were pursued. Quite properly, Mrs Graham recognised that the situation she found herself in at the point of her dismissal was connected to the restructuring in 2007, her work tasks before and after then and the history of her health issues. There was nothing improper in her pursuing the separate claims that potentially arose from the full sequence of events. Indeed, on a different view of some of the facts, she could have been successful in some or all those claims. The issues were very serious for Mrs Graham and she cannot properly be criticised for obtaining legal advice or attempting to involve the respondent's chief executive.

[12] For the foregoing reasons I have decided not to increase the sum assessed on a daily tariff basis.

[13] Finally I am asked to make an award to cover 50% of disbursements charged to the respondent by its solicitors and a further award for the flights and accommodation for the respondent's HR manager. Properly, there is no claim for the costs of out of town counsel. I have been provided with invoices that list the disbursements under the heading *Paid Office Expenses (faxes, photocopying, telephones)* but there is no further break down. The impression I am left with is that these charges relate to the routine work done in a solicitor's office. The daily tariff covers such incidental charges so I will not increase the award further. The HR manager attended the investigation meeting and gave evidence. For the applicant it is argued that she should not have to meet the costs arising from the respondent's business decision to have its HR manager based out of her region. Mrs Graham knew prior to this litigation that BNZ would have to involve its HR manager in the Authority's processes and that this would cause some travel and accommodation expenses. Mrs Graham having lost the litigation should be responsible for those reasonable expenses. The relevant amount for present purposes is the GST exclusive amount being \$637.64.

Orders

[14] Mrs Graham is to pay Bank of New Zealand costs of \$7,500.00 and a further \$637.64 in expenses.

Postscript

[15] I prepared this determination in early April 2011 and forwarded it for release at that time. I have just become aware that the determination was not released. The oversight arose because of the difficulties with the Authority's facilities in Christchurch following the February earthquake. I apologise to the parties for the delay in issuing this determination and sincerely regret any inconvenience.

Philip Cheyne
Member of the Employment Relations Authority
