

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 35A/09
5123124

BETWEEN GEOFFREY GWILT
 Applicant

AND BRIGGS & STRATTON
 LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Rodger Pool for Applicant
 Martin Round for Respondent

Submissions received: 1 May 2009 from Applicant
 12 March 2009 from Respondent

Determination: 25 May 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] This matter was the subject of a determination dated 9 February 2009. Mr Gwilt was successful in his personal grievance claim of unjustified dismissal but had remedies reduced for contributory conduct. At the conclusion of that determination I reserved the issue of costs and set a timetable of 28 days from the date of the determination for the lodging of any claim for costs and submissions in support of it.

[2] I am now aware that Mr Pool provided the applicant's costs submission electronically on 2 March, well within the timetable set in my determination. Unfortunately they were quarantined as an oversize email and did not come to my attention until 1 May when a further copy was faxed to the Authority by Mr Pool. It transpires that Dr Round did receive the applicant's submissions back in March and furnished a reply on 12 March 2009. Nothing arises out of the delay in receipt of submissions therefore.

[3] Mr Gwilt's employment relationship problem was also the subject of an unsuccessful claim for interim reinstatement in which costs were reserved pending the determination of the substantive issues. Both parties have addressed costs on the interim as well as substantive proceedings and this costs determination therefore disposes of all outstanding costs issues.

Applicant's submissions

[4] In relation to the application for interim reinstatement it is submitted for the applicant that:

- when the parties attended mediation prior to the Investigation Meeting in relation to the interim matter, the respondent's representatives had no authority to settle the matter, even on a conditional basis;
- the investigation meeting held in respect of the interim application was delayed for approximately half an hour because of the late arrival of the respondent's general manager;
- the meeting lasted approximately an hour and a half so the tariff for a full day should be adjusted accordingly, and
- for all these reasons, costs in relation to the interim matter should lie where they fall or, if an award is made against the applicant, it should be significantly reduced.

[5] In relation to the costs of the substantive investigation, Mr Pool made the following points:

- the applicant's actual costs in relation to the substantive investigation were \$11,000.00 plus GST;
- the normal range of costs in relation to a meeting which took place over two days (as this did) would be \$5,000.00;
- the respondent failed to attend mediation as directed by the Authority;
- the applicant was therefore deprived of the opportunity to resolve the matter before proceeding to an investigation, and
- on that basis, the applicant seeks a significantly increased award of costs.

Respondent's submissions

[6] On the respondent's behalf, Dr Round makes the following submissions in reply.

[7] In relation to the mediation on the application for interim relief, the respondent simply says that mediation was attempted without success and the matter proceeded to a determination.

[8] In relation to the substantive matter, the respondent denies any breach of the Authority's direction to mediation. Dr Round submits that, prior to mediation, he informed the mediation service that he had full authority to attend and negotiate on the respondent's behalf and was advised that this would be acceptable. However on the appointed day (when he attended without his client) the mediator requested to see written confirmation of his authority to act. When this could not be provided the mediator was not prepared to proceed.

[9] Dr Round asserts that this did not amount to a default by the respondent which would justify a punitive award or which provides a basis for indemnity costs. It says that the respondent did nothing in the procedural sense to increase costs and there are no exceptional circumstances which would justify full solicitor client costs.

[10] The respondent's overall position is that costs should lie where they fall or:

"if costs are awarded they should be applied on a tariff approach and should be no more than \$2,000.00 for the one and a half days of the Investigation Meeting and which would take into account the applicant being unsuccessful in the application for re-instatement."

Determination

[11] Essentially, what the applicant has said here amounts to a submission that costs have been unnecessarily increased by the respondent undermining the mediation process (and the possibilities for resolution of the matter) on two occasions.

[12] The respondent has not made any specific reply to what Mr Pool has said about the first mediation in relation to the interim matter. I take it that it is accepted that the respondent's representatives did not have full authority to settle. Given that the applicant was ultimately unsuccessful in that claim, however, it is difficult to see how this lack of authority increased the applicant's costs.

[13] As for the mediation in respect of the substantive matter, I accept that the respondent's representative presented himself inadequately prepared and that this led to the cancellation of the mediation. It was entirely appropriate for the mediator to decline to proceed without written confirmation of Dr Round's authority to act. However, Dr Round was (in fact) in attendance on the respondent's instructions. I have no basis for concluding that there was any deliberate breach of any direction or of good faith. I also note that it was almost three months between the cancelled mediation (in September) and the substantive investigation meeting in December. The time and the opportunity therefore remained for the parties to attempt to negotiate a settlement, or even to convene a further mediation.

[14] In short, I am not satisfied that the respondent's conduct has caused the applicant's costs to be increased. I consider the costs in this matter should be determined along the usual principles.

[15] There was nothing particularly remarkable about this employment relationship problem and certainly no novel or difficult legal issues. The first investigation meeting (in respect of the interim application) took a little under half a day, with the respondent successful. The second took a day and a half, with the applicant successful although with remedies reduced for contributory conduct. In all these circumstances, I see no reason why the usual "tariff" approach should not be applied, with the costs of the two meetings being offset against each other.

[16] **Briggs and Stratton Limited is therefore ordered to pay to Mr Gwilt the sum of \$3,000.00 contribution to his costs.**

Yvonne Oldfield

Member of the Employment Relations Authority