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Hall v Genesis Energy Limited (Auckland) [2018] NZERA 343; [2018] NZERA Auckland 343 (7 November 2018)

Last Updated: 13 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 343

3024412

BETWEEN Charles Daniel Hall Applicant

AND Genesis Energy Limited Respondent

Member of Authority: T G Tetitaha Representatives: Applicant in person

R Upton, Counsel for Respondent

Submissions received: 8 October 2018 from Applicant

21 September and 8 October 2018 from Respondent

Determination: 7 November 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Costs are to lie where they fall.

[1] Genesis Energy Limited (Genesis) seeks costs following the dismissal of Mr Hall's personal grievance application.¹ The costs sought are \$5,307.25 comprising

\$4,500 plus an uplift of \$750 and disbursements \$57.25. Mr Hall resists any application for costs.

Determination

[2] The starting point for costs awards against an unsuccessful party in the Authority is its daily notional tariff of \$4,500 for the first hearing day and \$3,500 for each successive hearing day.

¹ *Hall v Genesis Energy Ltd* [2018] NZERA Auckland 274.

[3] This matter took $\frac{3}{4}$ of a hearing day. The starting point for a costs award is \$3,000.

Are there any factors warranting uplifting costs?

[4] Genesis seeks increased costs because:

- There never were any prospects of success
- A costs settlement proposal seeking \$4,500 and disbursements \$57.25 was unreasonably refused.

[5] I do not accept there were no prospects of success at the date of filing this proceeding. There was little corroborating documentary evidence filed in advance. The evidence of the redundancy process and the creation of the new role relied upon oral testimony. The differences between the new role and Mr Halls were only revealed by Mr Hicks and Ms Wilkinson at hearing. The evidence of the new role including the job description and employment contract offered were directed by the Authority to be filed the day prior to hearing. There was insufficient evidence filed in advance of hearing for Mr Hall to reasonably assess his prospects of success.

[6] The costs settlement proposal was not less than what Mr Hall is likely to be awarded by the Authority. It is not a matter that shall be taken into account in assessing costs.

Are there factors warranting a decrease in costs?

[7] Mr Hall submits no award of costs is justified because:

- Genesis' resistance to mediation;
- Genesis' raising of arguments of jurisdiction then abandoning the same;
- Failure to comply with timetables for filing evidence and costs submissions;
- Delaying tactics resulting in hearings having to be abandoned; and
- Financial hardship due to his redundancy resulting in debt repayment.

[8] Genesis' statement in reply resisted attending mediation on the basis it believed there was no jurisdiction for the Authority to direct it. This should not have prevented the parties from seeking to resolve this matter especially given there are

free alternative dispute resolution services or mediation available. It was an unnecessarily litigious approach to take.

[9] The refusal to attend mediation was unreasonable because there was no issue of jurisdiction. Mr Hall's personal grievance alleged a role established after his dismissal was the same as the one he had been made redundant from. He became aware of the new role when it was advertised well after his dismissal for redundancy. He then raised a personal grievance within the statutory time limitation. There was no need to seek leave to raise a grievance out of time. There is merit in Mr Hall's complaints about resistance to mediation.

[10] At the first telephone conference was held with the parties both were self- represented. The matter was directed to mediation on 16 March 2018. The parties were also directed that if the matter remained unresolved, an investigation meeting was set down on 17 May 2018 and there was a timetable for the filing evidence by both parties. At this stage neither party had incurred any legal costs.

[11] The matter did not resolve in mediation. By 27 April 2018 Genesis instructed Counsel. Genesis wrote (again) alleging leave was required for Mr Hall to raise his grievance. I referred Genesis to my Minute dated 16 March 2018 and that it was self- explanatory.

[12] Mr Hall filed a witness statement and his evidence as directed by my Minute. Genesis did not.

[13] Genesis then sent a further letter dated 9 May 2018 (again) requiring I deal with the issue of leave for the applicants grievance then direct it back to mediation. Given the imminent hearing and lack of evidence from Genesis, I directed a telephone conference be held on 15 May. A Minute was issued setting out both parties views as to why leave was or was not required. I directed the parties to file submissions about leave and would determine this at a hearing conducted by telephone on 17 May. Mr Hall filed his evidence on 15 May 2018 in respect of leave. Genesis did not.

[14] On 16 May 2018 following receipt of my Minute Genesis advised it no longer wished to pursue the issue of leave. The hearing on 17 May was vacated. The Registry set down a hearing for 24 July 2018 which was changed to

25 July to accommodate respondent counsel. The respondent was directed to file its evidence by 11 July 2018. Mr Hall was to file any evidence in reply by 18 July.

[15] On 12 July Genesis sought an extension to file its evidence but none was granted. It was not filed until 16 July 2018 and not processed and served by the Authority Officer upon Mr Hall until 18 July 2018.

[16] On 24 July 2018 the Authority was notified Mr Hicks, the respondents principal witness was unavailable on 25 July. Genesis sought the giving of his evidence by telephone on 26 July instead.

[17] The matter was adjourned to start 26 July 2018 starting at 11 am. The respondent was directed to file further evidence including a job description and the employment agreement for the new role.

[18] Following the hearing Genesis sought an extension to file its costs submissions by 7 days due to oversight by its Counsel regarding filing dates. This was granted on the basis the non-compliance would be reflected in any costs award.

[19] All of these matters Mr Hall complains have created unnecessary delays and legal costs that he should not be responsible for.

[20] There is reference to financial hardship for Mr Hall but no details supplied showing he could not meet any costs award.

[21] However this must be balanced against the above chronology that evidences wasted time and costs on a withdrawn interlocutory application regarding leave and non-compliance with timetabling including submissions for costs. I also note the respondent was not legally represented until the month prior to hearing in May.

[22] In my view both parties have contributed equally to the costs of this proceeding. Costs are to lie where they fall.

TG Tetitaha

Member of the Employment Relations Authority

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