

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 340
5453425**

BETWEEN TE HAU
 Applicant

AND NGATI HINE HEALTH TRUST
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Bryce Quarrie, Counsel for Respondent

Submissions received: 29 October 2015 from Applicant
 19 October 2015 from Respondent

Determination: 04 November 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2015] NZERA Auckland 287 the Authority determined that the Applicant, Te Hau, had not been unjustifiably dismissed by the Respondent, Ngati Hine Health Trust (the Trust).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and Mr Quarrie, on behalf of the Trust, has filed submissions in respect of costs.

[3] This matter involved a two day of an Investigation Meeting. Mr Quarrie, citing actual costs of \$14,490.00 is seeking a contributory award of \$7,000.00 towards the actual costs.

[4] In support of the level of claim, Mr Quarrie submits that Te Hau filed a large number of documents which required a significant amount of time to be spent by counsel and the Trust perusing them to ascertain which were relevant in order to prepare the evidence for the hearing..

[5] Te Hau submits that he is currently financially constrained from making a lump sum payment, and has provided bank statements in support of this statement. He also states that I found fault on both sides in the determination, and notes that a challenge to my determination has been filed in the Employment Court.

Costs

Principles

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[7] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*².

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

Determination

[10] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. The tariff is

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

currently set at \$3,500.00 per day. For a 2 day investigation meeting, this would equate to a costs award of \$7,000.00.

[11] Te Hau has appealed determination [2015] NZERA Auckland 287 and elected to have his challenge heard by the Employment Court. However an election does not operate as an automatic stay on proceedings, unless it is determined appropriate to do so in accordance with s.180 of the Act which states:

The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the Court, or the Authority, so orders.

[12] In this case costs have not been agreed and have been sought by the Trust. The normal rule is that costs follow the event, and the Trust was successful in defending Te Hau's unjustifiable dismissal claim.

[13] As regards the application by Te Hau for a stay on proceedings in respect of costs, I observe that it is normal for the Authority to set its own costs, and I see no justification in the circumstances of this case for not doing so in this case.

[14] I order Te Hau to contribute \$7,000.00 towards the Trust's actual costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[15] Te Hau submits that he is in some financially difficult circumstances which constrain him from making a lump sum payment at this time. Te Hau was representing himself in the Investigation process. In *Scarborough v Micron Security Products Limited*⁵ Judge Inglis addressed the issue of financial difficulty stating:⁶

... I have also considered Miss Scarborough's position as a litigant in person. While some latitude may generally be expected in such circumstances, it does not provide an impenetrable shield in relation to costs, or a licence to pursue hopeless claims or scandalous allegations with impunity. If it were otherwise it would place the opposing party and the administration of justice generally, in an invidious position.

[16] However I consider that Te Hau in his submission is not seeking immunity from costs, rather he is addressing his inability to make a costs payment in a lump sum payment.

⁵ [2015] NZEmpC 105

⁶ Ibid at [31]

[17] In these circumstances the Trust may wish to consider entering into a discussion on the payment of costs with Te Hau. If such an arrangement is agreed between the parties, leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority