

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 509
5404639

BETWEEN TODD HAYTER
 Applicant

A N D WESTBURY
 THOROUGHBREDS
 LIMITED t/a WESTBURY
 STUD
 Respondent

Member of Authority: James Crichton

Representatives: Stan Austin, Advocate for Applicant
 Dean Organ, Advocate for Respondent

Submissions Received: 9 October 2013 from Applicant
 29 August 2013 from Respondent

Date of Determination: 12 November 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The substantive determination issued as [2013] NZERA Auckland 328 on 1 August 2013, disposed of Mr Hayter's claim by determining that he had no personal grievance.

[2] Costs were reserved.

The claim for costs

[3] Westbury Thoroughbreds Limited seeks an award of costs of \$5,500 plus GST. The Authority notes for the sake of completeness that its practice is normally to exclude GST from consideration in a costs setting environment.

[4] The submissions for the successful party indicate that the actual costs amounted to \$8,114.40 inclusive of GST and it is suggested that the daily tariff approach often used by the Authority in costs fixing is currently at about \$3,000 to be adjusted up or down depending on the circumstances. Again, the Authority notes that the daily tariff is presently \$3,500.

[5] The Authority is also directed to correspondence between the representatives prior to the investigation meeting which indicated that if Mr Hayter persevered with his claim, full indemnity costs would be sought.

[6] Further, Westbury Thoroughbreds Limited maintain that Mr Hayter's adviser adopted a confrontational and personal approach which did not assist in resolving matters and that Mr Hayter advanced a new basis on which he said the complained of words (namely that he was kicked in the head by a horse) at the investigation meeting, when he had not raised that issue with the employer during the disciplinary process.

The response

[7] Mr Hayter's primary submission is that costs should lie where they fall but in the alternative, he responds to and disagrees with the various bases on which an uplift is sought by the successful party and in the alternative again, argues that if the Authority is not minded to allow costs to lie where they fall, then the suggestion is that the daily tariff be reduced rather than augmented.

[8] The Authority is advised that Mr Hayter is now a mature student and accordingly has no regular income and it follows from that information that a costs award would be a significant impost on him.

Discussion

[9] The law relating to costs setting in the Authority is well settled and need not be restated here.

[10] The Authority is not persuaded that this is a case where costs should lie where they fall. The particular circumstances of this case are unremarkable and while Westbury Thoroughbreds seek to interest the Authority in the proposition that Mr Hayter's claim was completely unmeritorious, he was doing no more than

exercising his statutory right to have the basis of his dismissal reviewed by the Authority.

[11] Of course, such a process carried with it attendant risk and one of the risks is that the unsuccessful party must typically bear some of the costs of the successful party in defending its position. That is one of the normal incidents of litigation and it applies every bit as much in the Authority as it does in other civil jurisdictions.

[12] The fact that Mr Hayter is a mature student and therefore, by definition impecunious, does not obviate his obligation to contribute to Westbury's costs although it may influence the Authority in respect to the quantum of that contribution.

[13] The argument advanced by both parties about the behaviour of the other is really a tit for tat argument which the Authority is not much interested in. Both parties have an obligation to assist the Authority to investigate employment relationship problems and squabbling between advocates no matter what the provocation makes no such contribution.

[14] Given the poor working relationship between the advocates, it is probably not a surprise that they were unable to agree on a basis for mediation in a timely fashion and the matter was made more challenging by some early arguments about drug use which rather fell away when the drug testing regime failed to show the appropriate evidence. Notwithstanding that, as Mr Hayter points out in his submissions, Westbury advanced evidence about the drug allegations despite the fact that they form no part of the decision to dismiss. It is difficult to see how that can be justified either in terms of time or in terms of cost.

[15] That aside, the Authority must observe that the total fees charged to Westbury Thoroughbreds is a very modest and reasonable one in all the circumstances and compares favourably with fees charged for similar matters before the Authority.

Determination

[16] The Authority has concluded that Mr Hayter should make a contribution to the costs incurred by Westbury Thoroughbreds in successfully defending Mr Hayter's claim. The use of the daily tariff approach is appropriate. The current tariff is \$3,500 for a full days hearing. This matter was disposed of in 2/3rds to 3/4 of a normal hearing day.

[17] The Authority is not attracted by the arguments advanced on behalf of Westbury Thoroughbreds to gain an uplift on the daily tariff.

[18] On general principles then, the total amount that would typically be awarded in a matter such as this given the elapsed time involved would be perhaps \$2,300.

[19] Because of Mr Hayter's circumstances, a lesser sum is appropriate. Mr Hayter is directed to pay the sum of \$1,500 as a contribution to the costs of Westbury Thoroughbreds Limited. Time to pay is specifically granted but leave reserved for Westbury Thoroughbreds Limited to seek a compliance order if there is no proper arrangement made for regular repayments over time.

James Crichton
Member of the Employment Relations Authority