

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 93
5414431

BETWEEN KEVIN HODGSON
Applicant

AND DOWNEY'S CITY BUTCHERY
LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Satchie Govender, Counsel for the Applicant
Gary Taylor, Advocate for the Respondent

Submissions received: On 6 March 2014 and 1 August 2014 from the Applicant
On 25 June 2014 from the Respondent

Determination: 23 September 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 22 January 2014 the applicant's personal grievance claim was upheld. The respondent was required to pay \$3,000 as compensation for distress. No remedy for loss of wages was awarded because the position he previously held was found to be genuinely redundant.

[2] The parties have been unable to resolve costs and have filed submissions.

[3] Counsel for the applicant seeks an order for actual costs of \$5,300 although no invoices were furnished to support how that sum was accrued. Counsel says the sum comprises \$3,500 for preparation and attendance at the Authority's investigation meeting, \$2,000 for attendance at two mediations (one of which was directed by the Authority), and \$300 for the cost of this application.

[4] The respondent's advocate rejects any claim for costs associated with mediation. He says costs should lie where they fall in circumstances where each party enjoyed partial success. Alternatively, he says if the Authority applies its tariff based

approach he asks it to given consideration to the applicant's conduct and reduce any award accordingly.

[5] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act. With respect to the particular characteristics of this case I intend to apply the principles set out by the Employment Court in *PBO Ltd (formerly Rush Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[6] In that judgement the Court acknowledged the unique nature of the Authority and recognised that costs principles are not necessarily as comprehensive or as prescriptive as those that may be applied in Employment Court judgments. The principles set out in *Da Cruz*¹ are now so well established I have not restated them in full. Relevant to this matter:

- costs awards are discretionary but generally follow the event
- the Authority's usual approach is to assess costs using a notional daily tariff
- the tariff is currently set at \$3,500 per day of investigation
- if a party's conduct has increased costs unnecessarily then this is a factor that can be taken into account by increasing or decreasing an award

[7] An application of the Authority's daily tariff together with an assessment of arguments advanced by each of the parties as to upscaling or reduction of the tariff is appropriate for this matter.

Issues

[8] The Authority needs to consider what matters should be regarded in an assessment for costs. The following issues need to be examined:

- i. should costs associated with mediation be awarded?
- ii. are there any other factors present which would warrant an uplifting or scaling back of costs?

¹ Ibid

Should costs associated with mediation be awarded

[9] The applicant lodged his statement of problem on 29 April 2013. The Authority received the respondent's statement in reply on 7 May 2013. At that time the representatives were involved in another matter and disagreed about the extent s.148 of the Employment Relations Act may ensure confidentiality in a later costs application. The conflict resulted in reluctance on the part of the respondent's advocate to attend mediation with counsel for the applicant. In a telephone conference the parties were directed to attend mediation within 6 weeks'. The representatives complied with the direction to attend Mediation Services but the dispute remained extant and mediation was abandoned. It appears the representatives reached an accord relatively soon after and attended mediation with their clients. They were unable to settle the employment relationship problem.

[10] In *RHB Accountants, Kenneth Brown and Steven Wilkins v Rawcliffe*² Judge Inglis observed that while historically there had been a "*discernible reluctance [by the institutions] to award mediation costs*", she noted costs had been allowed in situations where parties had failed to attend mediation despite being directed³. Her Honour later went on to state that the mediation costs "*should be neither automatically awarded nor withheld. Much will turn on the individual case*"⁴.

[11] I am not prepared to make orders in respect to either of the scheduled mediations for the following reasons:

- Firstly, it is increasingly accepted that parties will attempt to resolve matters at mediation before intervention by the Authority (or the Court) will be sought. The parties should bear their own costs attached to the event.
- Secondly, the conflict which hampered the parties' initial engagement in mediation was based on reasons separate to the employment relationship problem the Authority was required to determine. I am unwilling to award costs in those circumstances.

² [2012] NZEmpC 31

³ At [30]

⁴ At [34]

- Finally, it is clear that the parties were unable to resolve the matter when mediation was ultimately undertaken however I have no means by which to assess which of the parties (if either) impeded a resolution of the matter such that I could fairly make an award of costs⁵.

Are there any other factors present which would warrant an uplifting or scaling back of costs

[12] The respondent submits that both parties enjoyed partial success and in these circumstances costs should lie where they fall. I accept the applicant was unsuccessful with his claim for reimbursement of wages however he was substantially successful with his primary claim of an unjustifiable dismissal and I consider an award of costs should follow that event.

[13] The respondent made a Calderbank offer⁶ but the applicant received a proportionally much greater award in his favour following the Authority's investigation and I take the matter of the respondent's offer no further.

[14] As noted, counsel for the applicant did not provide financial information to support the sum of costs he says were accrued but in any event, with respect to costs connected to preparation and attendance of the investigation meeting he is not requesting an amount above the daily tariff.

[15] I am unwilling to award costs associated with an application for costs as requested by counsel for the applicant. The Authority's use of the daily tariff allows parties to anticipate the level of a costs award that may be made as a contribution to either its own or another's costs. I was not supplied with any grounds to depart from that approach and parties should not expect the Authority to make orders which, in effect, indemnify their costs.

[16] The respondent referred (albeit obliquely) to the changing nature of the applicant's claims compared to the personal grievance first raised and the first statement of problem. This resulted in two additional telephone conferences and corresponding amendments to the statement of problem and replies on behalf of the respondent. I agree that these actions caused a degree of unnecessary cost for the respondent and should be reflected by a modest reduction to an award.

⁵ *Quan Enterprises Ltd v Fair* [2012] NZEmpC 62 at [10]

⁶ An offer made without prejudice save as to costs

[17] The Authority's investigation lasted a day. Having considered and applied the principles set out in *Da Cruz* I consider an award of \$3,250 is appropriate in the circumstances of this matter.

Order

[18] Pursuant to Section 15 of Schedule 2 of the Employment Relations Act I order the respondent to pay the applicant the sum of \$3,250 as a contribution towards the applicant's costs.

Michele Ryan
Member of the Employment Relations Authority