

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 8
5341840

BETWEEN TYLER HURLEY
Applicant
AND ELECTRONET SERVICES LTD
Respondent

Member of Authority: David Appleton
Representatives: Jo Birney, Advocate for the Applicant
Neil McPhail, Advocate for the Respondent
Submissions received: 12 December 2011 from the Respondent
22 December 2011 from the Applicant
Determination: 12 January 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 1 December 2011 the Authority found that the applicant's personal grievance for unjustified dismissal had not been made out. Costs were reserved and the parties were invited to make submissions in relation thereto. The respondent, being successful, claims its costs. The applicant asks that costs should lie where they fall.

[2] As both dismissals arose from the same set of facts, the Authority investigated Mr Hurley's personal grievance complaint in conjunction with the application by Mr Hurley's former colleague Mr Kurtis Bell, whose personal grievance complaint for unjustified dismissal had been lodged under case number 5352171. The evidence in relation to both claims was heard on 24 November 2011 and oral and written submissions were presented by the advocate for the two applicants, and by the respondent's advocate, on a joint basis respectively on 25 November.

[3] The respondent seeks a contribution to its costs based on a daily tariff of \$3,000 in respect of 3 days of preparation time and one and a half days' hearing, amounting to four and a half days. This totals \$13,500, to be split between Mr Hurley and Mr Bell. In the absence of arguments from either side as to the basis of the split between Mr Hurley and Mr Bell, there appears to be no reason why any costs awarded should not be split equally between the two applicants. On this basis, Mr Hurley's contribution based on the respondent's application for costs should not exceed the sum of \$6,750.

[4] The respondent also seeks expenses in relation to its advocate's travel to Greymouth from Christchurch and his accommodation costs, in the total sum of \$627.97 plus GST. On the same basis as above, this application should also be split equally between Mr Hurley and Mr Bell, so that Mr Hurley's contribution based on the respondent's application for expenses should not exceed the sum of \$313.98 plus GST.

[5] Addressing first Mr Hurley's argument that costs should lie where they fall, I see no reason in this case to depart from the usual principle that costs generally follow the event. Whilst I accept his advocate's submission that Mr Hurley had no malicious intent in bringing his complaint, a lack of malicious intent is not a principle that automatically protects an unsuccessful applicant from a costs order. I therefore accept the respondent's submission that costs should be awarded, and apply the usual principles of *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808. (The advocate for Mr Hurley submitted that this case was heard in the Employment Court, not the Authority, but it was, of course, addressing the principles to be applied in deciding costs in the Authority).

[6] I now turn to the issue of how much should be awarded in terms of costs. The respondent claims for preparation time of three days and relies on the case of *The Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73 in which Judge Shaw allowed for preparation time in the award of costs. The advocate for the respondent argues that, as in *Tawhiwhirangi*, the current case was of relative complexity, requiring the preparation of a bundle of documents exceeding 40 exhibits.

[7] I do not agree that the present case was of similar complexity in terms of preparation time as *Tawhiwhirangi*. In *Tawhiwhirangi*, the case required *detailed analysis of closed circuit video footage*. Whilst some photographic evidence was provided by the respondent which had necessitated some analysis, it was not large in volume, and was not directly material to the issues in question in any event because the photographic evidence had not been available at the time of the dismissal. The other work that would have needed to have been done in preparation was not, in my view, any greater than that which most competent advocates would do in a fairly standard dismissal case.

[8] I do not accept either the respondent's submission that additional preparation time had been involved because two, as opposed to one personal grievance had been defended. As submitted by the applicant's advocate, that should have reduced costs, rather than increased them. In any event, it would not be right to penalise Mr Hurley by a higher costs order simply because Mr Bell had also submitted a personal grievance. If the two claims had been heard separately, that would have increased costs for all parties considerably.

[9] Finally, in view of the role of the Authority as an investigative body, where the Member takes on some of the functions of the representative and plays an active role in resolving the employment relationship problem, it is not appropriate to award preparation costs where the issues are of ordinary complexity, as I consider this case to have been.

[10] In light of this, I believe that it is appropriate to award one and a half days' costs to the respondent at the daily tariff of \$3,000, divided by two, so that Mr Hurley's share is \$2,250.

[11] Turning to the issue of the respondent's travel and accommodation expenses, whilst the respondent is at liberty to use whatever representation it wishes, it was its choice to appoint an advocate from out of town. When it did so, it would have known that expenses would have been incurred by its advocate travelling to Greymouth and staying in accommodation. I do not believe that it is just for Mr Hurley to have to bear any proportion of those expenses.

Orders

[12] Mr Hurley is to pay Electronet Services Limited costs in the sum of \$2,250.

David Appleton
Member of the Employment Relations Authority