

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 51
5361377

BETWEEN ROBYN HUTCHISON
 Applicant

AND NELSON CITY COUNCIL
 Respondent

Member of Authority: Christine Hickey

Representatives: Robyn Hutchison, in person
 Maree Kirk, Counsel for the respondent

Costs submissions
received: 25 January 2013, from the respondent
 21 February 2013 from the applicant

Determination: 8 March 2013

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] On 25 September 2012 the Authority issued a determination that Ms Hutchison had not raised her personal grievance within 90 days and therefore the Authority had no jurisdiction to investigate and determine her claim¹. Ms Hutchison applied for leave to raise the personal grievance out of time under s. 114(3) of the Employment Relations Act 2000. On 19 December 2012 the Authority issued a determination denying leave to Ms Hutchison to raise the personal grievance out of time². Costs were reserved in both determinations.

[2] Ms Hutchison wishes to challenge the second determination to the Employment Court. She attempted to file a statement of claim in the Court on 24 January 2013. She was told that her challenge was out of time and that she would need to seek and obtain an extension of time before the challenge could proceed. Ms Hutchison duly made such an application to the Court.

¹ [2012] NZERA Christchurch 208

² [2012] NZERA Christchurch 280

[3] On 25 January 2013 Ms Hutchison filed a Request for Costs to be Stayed in the Employment Court.

[4] On 8 February 2013 Judge Couch issued a judgment³ extending the time for Ms Hutchison to commence the challenge to 22 February 2013. Ms Hutchison's challenge to my second determination has now been filed in the Employment Court.

[5] As part of his 8 February 2013 decision Judge Couch stated that:

Costs relating to this application are reserved pending resolution of the substantive challenge.

Costs for Authority matters

[6] On 25 January 2013 Ms Kirk provided submissions to the Authority seeking costs for the NCC in respect of the two matters determined by the Authority on 25 September 2012 and 19 December 2012.

[7] After receiving Ms Kirk's submissions Ms Hutchison referred the Authority to her request to the Employment Court for costs to be stayed. On 27 January 2013 Ms Hutchison asked what the Authority required from her:

....to ensure that costs are held in abeyance at this stage.

[8] By email dated 28 January 2013 the Authority's Support Officer informed Ms Hutchison:

The Authority's usual practice is to determine costs even where a party has challenged the Authority's determination. They then become part of the mix before the Court. In this case you seem to be applying to the Employment Court for a stay in the matter before the Authority.

[9] Judge Couch's decision reserves costs in the matter in the Employment Court only. That decision does not limit the Authority's jurisdiction to determine costs which is based on clause 15 of the Schedule 2 of the Employment Relations Act 2000:

(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.*

³ [2013] NZEmpC 10

- (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.*

[10] The Authority has received written submissions on costs from both parties and therefore I proceed to determine costs for the determinations I have issued. However, I note that Ms Hutchison's challenge in the Employment Court means the Court is likely to stay the payment of costs in the Authority pending a resolution of the matter before the Court. In the meantime I will consider and determine the NCC's application for costs for the two matters determined by the Authority.

Nelson City Council's submissions

[11] The NCC submits that Ms Hutchison should pay costs of \$7,000 based on its actual time recorded costs of \$9,750 incurred by the NCC to date, subsequent to Ms Hutchison filing a statement of problem with the Authority. That does not include costs incurred in preparing the submission on costs.

[12] The NCC submits that its costs are reasonable and were necessary because:

- *the applicant elected to pursue this matter despite the 25 September 2012 outcome being no different to the advice to the applicant in a letter of 5 March 2012;*
- *the applicant chose to proceed without counsel;*
- *the applicant has not herself incurred any other costs for these proceedings;*
- *the respondent had to deal with the applicant's conduct in each of these matters;*
- *the conduct of the applicant increased the costs;*
- *this was an important case for the respondent because the wild allegations of the applicant posed a threat to the respondent's good reputation in the Nelson community;*
- *the applicant refused to accept a reasonable and timely offer to settle that would have prevented the respondent incurring these costs.*

[13] The NCC submits that Ms Hutchison's behaviour generally:

... greatly increased the respondent's costs, should be taken into consideration and says that this case is one where full costs can be considered.

[14] The respondent also seeks interests on the costs contribution for the period of 19 December 2012 until payment of costs.

Ms Hutchison's submission

[15] Ms Hutchison submits that based on Judge Couch's reservation of costs in the Employment Court she:

... respectfully requests that all costs in relation to this and all related matters be stayed until resolution is effected.

[16] I have already decided that Judge Couch's decision does not fetter my authority to make a costs order. However, I do take into account the current state of the litigation in this decision.

The law on costs

[17] Clause 15 of Schedule 2 of the Act confers a wide discretion on the Authority to award costs and expenses.

[18] The leading case on costs in the Authority is the Full Employment Court's decision in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*⁴. The following well established principles apply to costs in the Authority:

- (a) The Authority has a discretion on whether to award costs and if so what amount.
- (b) The discretion must be exercised in accordance with principle and not arbitrarily.
- (c) The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- (d) Equity and good conscience must be considered on a case by case basis.

⁴ [2005] 1 ERNZ 808

- (e) Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- (f) It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.
- (g) Without prejudice offers can be taken into account.
- (h) Awards of costs will be modest.
- (i) Frequently costs are judged against a notional daily rate, which is currently \$3,500.
- (j) Costs generally follow the event; that is, that a successful party's costs are likely to be ordered paid by the unsuccessful party.
- (k) The nature of the case can also influence costs. This means that the Authority orders that costs lie where they fall in certain circumstances.

[19] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party. Ms Hutchison was unsuccessful in her claims.

[20] I do not consider that Ms Hutchison's submissions and approach to the two preliminary matters would have put Ms Kirk to any unnecessary work and time. Ms Hutchison did not raise any novel legal arguments or refer to any cases that Ms Kirk would have been unfamiliar with. The submissions were mostly a recitation of the facts many of which Ms Kirk would have been already aware of. Although the application for leave to raise a personal grievance out of time had a number of appendices attached Ms Kirk was familiar with much of the correspondence attached and the other letters and e-mails appended were brief. However, I acknowledge that the submissions on the exceptional circumstances application were necessarily longer and a little more complex than those on the 90-day issue.

[21] I consider that the charge rate of \$250 per hour for Ms Kirk's work is reasonable.

[22] It is not appropriate for me to consider the matter of a *Calderbank* offer at this stage of the litigation. That is because the Employment Court may decide that the matter should be sent back to the Authority for a substantive hearing. It is only once the Employment Court has determined the challenge⁵ or the Authority has determined the substantive matter⁶ that it will be known which party is the successful party.

[23] I do not consider that this case is one in which the other factors listed by the NCC as raising the usual approach to costs should increase costs awarded against Ms Hutchison.

[24] I have considered all the circumstances related to these proceedings and the costs principles I need to take into account in exercising my discretion, including that the award of costs will usually be modest. I have also taken into account that costs have been saved by the parties agreeing that the two matters could be dealt with on the papers.

[25] I consider that it is reasonable that Ms Hutchison compensate the NCC for seven hours of Ms Kirk's time. Therefore, Ms Hutchison must pay \$1,750.00 towards the NCC's costs.

Christine Hickey
Member of the Employment Relations Authority

⁵ If the Court does not grant leave to file the personal grievance out of time.

⁶ If the Court does grant leave to file the personal grievance out of time and the substantive matter is then determined by the Authority.