

- The Respondent continuously advised the Applicant that his claim had no merit, but he pursued it despite this;
- The Applicant failed to adhere to the Authority's timetable which necessitated the Respondent attending additional case management conferences calls with the Authority;
- The necessity of moving the hearing date put the Respondent to disadvantage as a result of it having scheduled its witnesses to attend on the original date and having arranged cover for their absence from the workplace accordingly;
- The Respondent's employee who had been summoned by the Applicant had been so distressed by the experience that he required time off work as a result which was a cost to the Respondent.

[6] Mr Jacobson, on behalf of Mr Goldsmith, submits that costs should lie where they fall or alternatively there be a token award of costs only.

[7] In support of his claim Mr Jacobson cites the following:

- Every employee has a statutory right to raise a personal grievance where they consider they have been unjustifiably treated by their employer;
- The Respondent initially refused to attend mediation thereby depriving the Applicant of the opportunity to resolve his grievance at low cost;
- The Applicant is of limited financial means.

Principles

[8] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 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.

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

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

[11] 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.*”

[12] It is also a principle that: “*Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful parties conduct, although conduct which has increased costs unnecessarily*” can be taken into consideration and thereby increase the notional daily tariff rate.

Determination

[13] Costs normally follow the event and Counties Ready Mix was the successful party in the matter.

[14] Costs may be raised or lowered in accordance with the principle that conduct which unnecessarily increased costs may be taken into account.

[15] I accept that the conduct of Applicant during the Authority’s process, which included the necessity of additional case management conference calls and rescheduling the hearing date unnecessarily increased costs, and I have taken this into consideration in determining this matter. I have further taken into consideration the fact that Counties Ready Mix did not attend mediation until such time as the Applicant had filed with the Authority.

[16] In considering the amount of any award of costs I observe that it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. This is a case in

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

which it is appropriate for the Authority to use its discretion by lowering the tariff. As observed by Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*:⁵ “...even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay...”

[17] However I find that in all the circumstances surrounding this case, Counties Ready Mix as the successful party is entitled to some recompense for costs. In the circumstances I believe a contribution towards costs of \$2,000.00 is a reasonable contribution.

[18] Accordingly, Mr Goldsmith is ordered to pay Counties Ready Mix a contribution to costs in the sum of \$2,000.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[19] An arrangement may need to be made for Mr Goldsmith to pay the costs by way of instalments over several months. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are sought and cannot be agreed.

Eleanor Robinson
Member of the Employment Relations Authority

⁵ Ibid at para [46]