

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012 NZERA Christchurch 189
5275539

BETWEEN

LEROY JARVIS

Applicant

A N D

T H ENTERPRISES LIMITED

Respondent

Member of Authority: James Crichton

Representatives: Mandy Freeman, Advocate for Applicant
Kathryn Dalziel, Counsel for Respondent

Submissions Received: 6 August 2012 from applicant
28 June 2012 from respondent

Date of Determination: 30 August 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] By determination dated 30 May 2012, the applicant disposed of Mr Jarvis' employment relationship problem with T H Enterprises Limited by determining that T G Enterprises Limited were completely successful in resisting Mr Jarvis' various claims.

[2] Costs were reserved.

The claim for costs

[3] By memorandum dated 28 June 2012, counsel for the respondent seeks an award of costs either on the full indemnity basis or in the alternative costs in excess of the usual notional daily rate.

[4] The basis for the contention that Mr Jarvis be asked to pay either full indemnity costs or a higher award than is usual is primarily based on the contention that the behaviour of the applicant's advocate in her attempted extortion to conclude

Mr Jarvis' claim, justified an increased award and that the very behaviour of Mr Jarvis' advocate necessitated instructing counsel to deal with the matter.

The response from the unsuccessful party

[5] In very brief submissions filed on 6 August 2012, the applicant's advocate submits that in consequence of a death in the family, she has been unable to address the issue of submissions in any detail but she does make the following points in defence of Mr Jarvis' position on costs:

- (a) that he suffered financially as a consequence of the Christchurch earthquake;
- (b) that his child is due to be born shortly;
- (c) that he would be disadvantaged on any costs awards made against him; and
- (d) that the employer chose to engage counsel and therefore should meet their own costs.

[6] The Authority observes for the sake of completeness that neither of the last two listed submissions above have any force or effect. It is a truism that any costs award made against a party will have an effect on them which will be disadvantageous to the extent that that party will have to meet costs incurred by the other party. But that is the reality of litigation. A party cannot expect to undertake a legal proceeding against another, lose that proceeding in its entirety, and then not suffer the legal consequences.

[7] Moreover, the suggestion that because the respondent chose to engage legal counsel, it is their obligation to meet those costs simply misses the point. In litigation, including in employment litigation, a party must undertake such a proceeding in the sure and certain knowledge that if they are unsuccessful, they may face the obligation of meeting some or all of the successful parties costs.

[8] Conversely, the first two submissions made on Mr Jarvis' behalf do need to be considered by the Authority in a cost fixing exercise. If Mr Jarvis is impecunious, as the Authority considers it is entitled to conclude from the very brief submissions filed on Mr Jarvis' behalf, then that is a factor which ought to be considered.

Discussion

[9] The law on costs fixing in the Authority is well settled and the principles that ought to apply have been clearly enunciated by the full bench of the Employment Court in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[10] That decision, amongst other things, approves the Authority's common practice of applying a daily tariff, and enunciates various other principles such as the Authority's discretion to grant costs or not, the fact that costs will typically follow the event, the fact that costs in the Authority will typically be modest and the fact that the behaviour of the unsuccessful party may sound in costs.

[11] In the instant case, Mr Jarvis was completely unsuccessful in his claims against the respondent employer. The Authority in its substantive determination was critical of Mr Jarvis' advocate, Ms Freeman, who in the Authority's judgment had gone far further than was prudent in seeking to negotiate a settlement of the employment relationship problem prior to the Authority's hearing, so much so that the Authority was moved to indicate that it considered that Ms Freeman was dangerously close to committing the criminal offence of extortion. As the Authority has already noted, it was that aspect particularly that both encouraged the respondent to obtain legal counsel for the investigation meeting and also justified the respondent's claim that they were entitled to a greater than usual award.

[12] Of course, costs are not a punishment for wrongdoing and ought not to be seen as such. That being the legal position, the Authority thinks it improper to increase what might otherwise be awarded in respect to costs in order to, as it were, punish Ms Freeman's wrongdoing in her advocacy of Mr Jarvis' claim. However, the position is otherwise in relation to engaging counsel in the first place. In that regard, clearly Ms Freeman's behaviour made it imperative that the respondent engaged independent advice so that they would have the benefit of dispassionate advocacy in the Authority's investigation.

[13] On the other hand, submissions for Mr Jarvis indicate that he is impecunious and is about to incur additional responsibility as a consequence of becoming a father for the first time. Those are matters which the Authority ought properly to consider in fixing costs against Mr Jarvis.

Determination

[14] In all the circumstances, the Authority considers that the best approach is to apply the principles enunciated in *Graham v. Airways Corporation of New Zealand Limited* where the present Chief of the Authority Member Dumbleton postulated three questions to be considered:

- (a) What were the actual costs incurred by the successful party?
- (b) Were those costs reasonable?
- (c) What proportion of those costs ought to be met by the unsuccessful party?

[15] Considering those three questions now, the Authority is told that the total costs incurred by the respondent for the proceeding in the Authority amount to \$10,795.00. That amount is in the Authority's view within the "reasonable" range for the defence of a claim of this kind.

[16] The Authority is not attracted by the submission that it ought to impose full indemnity costs against Mr Jarvis. For one thing, it seems unlikely that he would be in any position to meet such an impost and in any event, the argument for full solicitor/client costs is not strong. However, it would be unjust if Mr Jarvis made no contribution at all to the costs incurred by the successful party. As the Authority has already made clear in this determination, parties cannot expect to undertake litigation without risk. If this matter were determined exclusively on the daily tariff basis then a notional daily rate would apply. The Authority has now set that rate at \$3,500 which in effect the starting point from which the Authority will move up or down depending on the circumstances.

[17] In the particular circumstances of this case, the Authority thinks it just that Mr Jarvis pay \$1,500 towards the costs incurred by the respondent in successfully defending Mr Jarvis' personal grievance allegations. That amount reflects the Authority taking into account Mr Jarvis' additional family responsibilities and his impecuniosity but also reflects the Authority's conviction that parties must accept that litigation has risk and that that risk in part is reflected by costs being imposed against the unsuccessful party.

[18] Mr Jarvis is to have time to pay the amount of costs fixed against him.

James Crichton
Member of the Employment Relations Authority