

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 198  
5389858

BETWEEN                      PETER GLENN LOCHEAD  
   Applicant  
  
A N D                              CERES NEW ZEALAND LLC  
   Respondent

Member of Authority:      Helen Doyle  
  
Representatives:            Peter Moore, Advocate for Applicant  
   Adam Gallagher, Counsel for Respondent  
  
Submissions Received:      17 September 2013 from Applicant  
   16 August 2013 from Respondent  
  
Date of Determination:      23 September 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A      The applicant is ordered to pay \$4000 costs to the respondent.**
- B      If the applicant’s proposed payment of this amount at \$75 per week is not acceptable to the respondent then either party can return to the Authority for further orders.**

**Application for costs**

[1]      The Authority found in its determination dated 1 May 2013 that the applicant had not raised his personal grievance that he had been unjustifiably dismissed by the respondent within 90 days of his dismissal. The Authority also found that the respondent had not impliedly consented to the late raising of the personal grievance.

[2]      Costs were reserved until the remaining matters of penalties had been resolved. The claims for penalties by the applicant were subsequently withdrawn.

[3] The parties were not able to reach agreement as to costs and the Authority has now received submissions from both parties.

### **The respondent's submissions**

[4] Mr Gallagher refers the Authority to the leading judgment of the Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. The Employment Court in *PBO* stated at [44] that the Authority is able to set its own procedure and has since its inception held to some basic tenets when considering costs.

[5] Mr Gallagher submits that the actual solicitor/client costs incurred by the respondent in defending the matter before the Authority were \$17,476. This figure takes into account a subsequent amendment to the amount of actual costs set out in the original submissions contained in an email from Mr Gallagher to the Authority and Mr Moore dated 19 August 2013.

[6] Mr Gallagher submits that in this particular matter the conduct of the parties has a bearing on costs. He refers to the late production of evidence relating to the issue of implied consent as impacting upon costs. He submits that in particular the respondent:

- Was required to assess the evidence that the applicant had sought to produce at a very late stage in the proceeding;
- Had to attend a directions conference to address the issue of late production of evidence;
- Had to consider the applicant's submissions in support of the late production of evidence, research relevant case law and prepare submissions in response;
- Had to obtain urgent instructions from the respondent and prepare witnesses on evidence that had been produced three days out from the investigation meeting; and
- Additional time was required to deal with the emails for preparation for the investigation meeting and the closing submissions.

[7] Mr Gallagher submits that the conduct unnecessarily increased the respondent's costs and that this should be reflected in any award the Authority makes in favour of the respondent.

[8] He submits that, for the reasons outlined, an award of costs should be made in favour of the respondent of \$7,500 which would be a reasonable contribution towards its costs.

### **The applicant's submissions**

[9] Mr Moore submits that there is nothing in the case and the way it was conducted to depart from the usual principles that while costs should follow events, awards are modest and a daily tariff approach should be used.

[10] Mr Moore submits that whilst the respondent was successful overall, considerable time was taken up in exploring defences raised by the respondent that were ultimately rejected by the Authority and that in short both parties had their wins and losses through the course of the investigation.

[11] Mr Moore refers to the late production of evidence as to whether the owner of the respondent company was in New Zealand at the relevant times. Mr Moore submits that the late production of documents, which included without prejudice emails to the Authority, did not increase the respondent's costs because, regardless of when they were produced, there would have been an objection to their production. Mr Moore submits that the way the emails were dealt with by the Authority did not contribute significantly to the length of the investigation or the cost.

[12] Mr Moore also submits that Mr Lohead was on an invalid's benefit before, during and after his employment with the respondent and continues on an invalid's benefit at the current time. This is a permissible step for a limited period if employment is obtained provided any income is accounted for. He submits that whilst the applicant is currently self-employed in a business started through a grant and then a subsidy from WINZ, the business was on the verge of collapse and the applicant did not at one stage have any money to feed himself.

[13] Mr Moore submits that the daily tariff should apply in this case and that costs should be set at no more than \$3,500. He submits that payment should be ordered at the rate of \$75 per week.

## **Determination**

[14] I have considered whether the advice some three days before the investigation meeting that the applicant wanted to rely on a series of emails, including some labelled “without prejudice”, increased the costs for the respondent. I do accept that there would have been an increase in costs as a result of this late application. Mr Gallagher and Mr Moore provided submissions as to whether the emails were admissible and this matter was dealt with by another Authority Member. As a result of a conclusion that the emails were not privileged, the Authority then considered them as part of its investigation. I accept that, as a result of that, Mr Gallagher would have had to seek further instructions from his primary witness about the emails, and then address the matter in closing submissions.

[15] I do accept, therefore, that in the exercise of its discretion that is a matter the Authority can properly have regard to. I do have regard to the fact that the respondent was not successful in its argument that the emails were not admissible. The Authority also has regard to the financial situation of the applicant and the fact that he is on an invalid’s benefit. I also have regard to the agreement by Mr Moore to hear two American based witnesses by SKYPE which reduced costs.

[16] I have considered all matters in the exercise of my discretion together with the general principle that costs will usually be modest. There is no suggestion in this case that costs should not follow the event. The Authority determined a preliminary matter, although one of importance to both parties. I accept that there should be a small increase in the circumstances of this case to the notional daily tariff but not to the extent Mr Gallagher submits which would be \$500 in excess of another day’s costs based on the daily tariff.

[17] I intend to start at the daily tariff and then make an adjustment upwards of \$500 to reflect additional costs incurred by the respondent. Any costs award should be capable of being paid within a realistic timeframe taking into account the applicant’s financial position and his health. I am of the view that a realistic timeframe would be within or very close to a one year period. An award of \$4,000 costs could be paid in a little over 53 weeks at the suggested rate of \$75. The parties should attempt to reach some agreement as to whether the sum of \$75 offered is a reasonable sum and, if not, either party can return to the Authority for a repayment schedule to be fixed.

[18] I order Peter Glenn Lohead to pay to Ceres New Zealand LLC the sum of \$4,000 being costs. If the parties cannot agree to that sum being repaid at the rate of \$75 per week, then either party can return to the Authority for further orders in that regard.

Helen Doyle  
Member of the Employment Relations Authority