

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 249
5412288

BETWEEN

LISA MARTIN-PAYNE
Applicant

A N D

RESERVENEWZEALAND
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: No appearance for the Applicant
Jo Taute, Advocate for the Respondent

Submissions Received: No submissions from the Applicant
27 May 2014 from the Respondent

Date of Determination: 19 June 2014

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority's determination on the substantive issue issued as [2014] NZERA Auckland 188 and was dated 14 May 2014.

[2] In that determination, I dismissed the application made by Ms Martin-Payne and reserved costs.

[3] However, I also drew attention to observations previously made by my colleague, Member Anderson, in an earlier preliminary determination of the Authority in which he referred to ReserveNewZealand Limited's right to have costs fixed in the Authority if it had incurred costs in defence of the matter.

The claim for costs

[4] ReserveNewZealand Limited (ReserveNewZealand) seeks costs and has supplied to the Authority invoices pertaining to its successful defence of Ms Martin-Payne's claim.

[5] Those invoices are not from either a lawyer in private practice or indeed from an advocate practising in this jurisdiction. Nonetheless, they are costs incurred by ReserveNewZealand in the defence of Ms Martin-Payne's proceeding and I am satisfied that it is appropriate for me to consider that material.

[6] On the face of it, there is no distinction in reality between the contractor who acted for ReserveNewZealand in this matter and a person who conducts business as an advocate in this jurisdiction. Whatever the usual work of the party concerned, in the particular circumstances of this case, I am satisfied that the contractor who has rendered invoices to ReserveNewZealand provided advocacy services to ReserveNewZealand in resisting Ms Martin-Payne's claim.

The response

[7] There has been no response from Ms Martin-Payne notwithstanding the Authority's efforts to again interest her in the proceeding. Given that she did not attend the Authority's investigation meeting nor keep to any timetable previously set by the Authority in relation to the whole proceeding, I am satisfied that Ms Martin-Payne's failure to provide submissions is not inadvertent but simply a subset of a consistent decision not to engage.

Discussion

[8] The law on costs fixing in the Authority is well settled and need not be recited again here. Generally, the Authority adopts a daily tariff approach. The daily tariff is currently set at \$3,500.

[9] It follows that for a proceeding occupying one hearing day or less, the starting point must be that figure of \$3,500. Moreover, the daily tariff rate excludes any allowance for ancillary matters not directly related to the investigation meeting in the Authority and in particular excludes any allowance for mediation and matters of that kind.

[10] In the present case, because Ms Martin-Payne did not attend the Authority's investigation meeting, the meeting was significantly shorter than it might otherwise have been. I think the proper course of action in the present case is to assess costs not on the basis of the actual time expended in the investigation meeting but on the basis of an estimate of the time that would likely have been involved had Ms Martin-Payne actually attended.

[11] I approach the matter in this way because it seems to me unfair to penalise ReserveNewZealand by reducing the total amount it can look to expect from Ms Martin-Payne simply because Ms Martin-Payne did not turn up. ReserveNewZealand would have prepared its defence on the footing that it had to attend the investigation meeting and argue the matter and it could not have undertaken proper preparations (which it plainly did) in the expectation that Ms Martin-Payne would not attend.

[12] Accordingly, I consider that it is appropriate that I assume that had Ms Martin-Payne attended the investigation meeting to prosecute her claim, the matter would likely have taken perhaps two thirds of a normal hearing day. On that basis, a starting point for the fixing of costs using the daily tariff approach might be \$2,500.

[13] There is nothing in the behaviour of ReserveNewZealand which encourages me to reduce that amount. Conversely, there is also nothing in Ms Martin-Payne's argument before the Authority that encourages me to increase it. Had Ms Martin-Payne attended the investigation meeting, she would have been able to give her evidence on oath and while it is impossible to reach any conclusion about what the result might have been had she attended, there is nothing in the documents before the Authority which suggests any improper submission from Ms Martin-Payne or any attempt to waste the time of the Authority or of ReserveNewZealand.

[14] I understand and accept that ReserveNewZealand thinks that the claim brought by Ms Martin-Payne had no merit (and of course that was the Authority's view in the end, as well), but the law still allows Ms Martin-Payne to bring a claim provided that she makes that claim appropriately and in accordance with normal legal principles. I am satisfied that she did that and on that footing, there is no reason to adjust the tariff approach upwards.

Determination

[15] Accordingly, for reasons just traversed in the previous section of this determination, I direct that Ms Martin-Payne is to pay to ReserveNewZealand the sum of \$2,500 as a contribution to the costs that ReserveNewZealand incurred in defending Ms Martin-Payne's claim.

[16] I accept and acknowledge in doing so that such an amount is no more than a contribution to the costs that ReserveNewZealand has incurred. That is in the nature of things and is absolutely consistent with legal proceedings not only in this jurisdiction but in other civil jurisdictions as well. All the law provides for is for the unsuccessful party to make a contribution to the costs of the successful party; it is a rare case indeed where the total costs incurred by the successful party are met by the unsuccessful party and nothing on the facts of this case suggests that this should be one of those unusual cases.

James Crichton
Member of the Employment Relations Authority