

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 155A/08
File Number 5091221

BETWEEN Janusz Jacek Maryniak
 Applicant

AND Waikato Institute of Technology
 Respondent

Member of Authority: Janet Scott

Representatives: David Hayes Counsel for Applicant
 Sam Hood Counsel for Respondent

Submissions received: 4 June 2008 from Applicant
 16 June from Respondent

Determination: 23 June 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] On 28 April 2008 the Authority declined the applicant's claim that he had been unjustifiably dismissed by the respondent. Costs were reserved on the basis that the parties were to attempt to resolve the issue between them. They have been unable to do so and the parties have now forwarded submissions so that the Authority can determine the matter.

Principles and Discussion

[2] In arriving at this determination on costs I have had regard to the features of the matter to which the costs award relates, to the submissions of the parties and to relevant case law.

[3] In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, the Court considered that the costs principles applied by the Authority were not necessarily as comprehensive or as prescriptive as those set out in *Okeby*¹ and similar

¹ *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613.

earlier judgments (judgment at para 44). The Court went on to refer to some “basic tenets” that had been held to by the Authority when considering costs. These were said to include:

- There is discretion as to whether costs would be awarded and what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party’s conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties’ costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice except as to costs offers can be taken into account.
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[4] The Court held, at para 45, that these principles are appropriate to the Authority and consistent with its powers, and said:

“They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the Binnie² principles

² Binnie v Pacific Health Ltd [2002] 1 ERNZ,438 (CA)

which extend the range of costs which the Court may award beyond what could reasonably be labelled 'modest'."

[5] The Court considered that there was nothing wrong in principle with the Authority's tariff-based approach so long as it was not applied in a rigid manner without regard to the particular characteristics of the case.

[6] The respondent in this matter has incurred costs and disbursements in the sum of \$21,585.45 (inclusive of GST) and disbursements of \$1,143.60.

[7] The respondent recognises the daily tariff approach commonly taken by the Authority to setting costs but asks that costs awarded should recognise both the Calderbank offer made to the applicant and the significant delay occasioned by him in commencing action in the Authority³. Counsel submits this has led to increased costs in the matter given the departure from the respondent's employment of key staff involved. It is submitted that in these circumstances the costs incurred are reasonable and that costs awarded to the respondent should be commensurately greater than the normal level of costs awarded in the Authority.

[8] For the applicant it is submitted the delay in pursuing his grievance came about as a result of Wintec providing incorrect information to Work Aon which led to the applicant's earnings related compensation being stopped and his being forced on to a sickness benefit. The applicant challenged this decision and was in the position where it was financially impossible for him to pursue two cases at the same time.

[9] In relation to the Calderbank offer, the general principles are accepted. It is noted that the Calderbank offer stated that Wintec's legal costs would exceed \$5000. The applicant's costs were about that level and there was no indication that the respondent's costs would be almost five times that sum. It was further submitted that as Wintec could always seek an award of costs at the daily tariff (described as \$3000) then the effect of the Calderbank offer was \$2000. It is submitted therefore that any uplift in the award of costs for the Calderbank offer should be a percentage of \$2000.

[10] It is submitted for the applicant that an award of \$4,150 for costs and disbursements would be reasonable.

[11] In setting an award of costs in this matter I have, as noted, considered the features of the case, the submissions and relevant case law. I consider the costs

³ The applicant raised his grievance with the respondent early in 2004 but he did not commence action in the Authority until December 2007.

incurred by the respondent were very high for a case of this type and duration of hearing (less than one day) even taking into account the difficulties occasioned by Mr Maryniak's delay in pursuing his grievance. In setting costs I have also had regard to the concessions for the applicant in relation to the Calderbank offer.

Determination

[12] Costs must follow the event. I therefore direct the applicant to pay to the respondent the sum of \$4,150 as a contribution towards the costs and disbursement incurred by it in defending the matter in the Authority.

Janet Scott

Member of the Employment Relations Authority