IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 154
5366095

	BETWEEN	HARMONY MAY Applicant
	AND	FORDELL PRESCHOOL INC Respondent

Member of Authority:	P R Stapp
Representatives:	Vicki Eades, Advocate for Applicant Darren Mitchell, Advocate for Respondent
Investigation Meeting:	On the papers
Submissions by	19 November 2012
Date of Determination:	3 December 2012

COSTS DETERMINATION OF THE AUTHORITY

Application for costs

[1] The applicant has applied for costs as reserved by the Authority in a determination [2012] NZERA Wellington 120, 1 October 2012. The applicant wishes to recover a contribution towards her costs and has claimed $9,418.47. The claim is opposed by the respondent. The applicant is also seeking the filing fee of $71.56. The applicant wants more than the notional one day tariff. The applicant relies on costs as based on *Reid v NZ Fire Service Commission* [1995] 2 ERNZ 38 and *Trotter v Telecom Comp of NZ Limited* [1993] 2 ERNZ 935, 937. The applicant also relies on the principles relating to costs held in *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438 (CA), and to apply a starting point of at least 75% of actual costs.

Determination

[2] Costs in the Employment Relations Authority have been well set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808. I do

not need to point out the principles as they are well known and regularly applied and are different to those in the Court. The applicant's claim for a percentage of the actual costs based on court proceedings is wholly misconceived in regard to how the Employment Relations Authority works. Ms Eades did acknowledge the Authority did indicate that costs for a one day hearing are in the vicinity of $3,500. Ms Eades is a regular user of the Employment Relations Authority and should know that it is rare to depart from the tariff approach to costs in the Authority. There has been nothing presented in this case that would warrant me making an order in the terms that Ms Eades has made. Instead the notional daily rate of $3,500 is, and remains, the starting for the assessment of costs.

[3] There are matters in this case that relate to the parties' conduct. One of these relates to the parties' failure to settle costs that they blame each other for. First, put simply the applicant could have asked for $3,500 costs from the respondent before applying for costs because this is the realistic starting point, and she could have reasonably expected to get that sum, but nobody tried to settle.

[4] Second, on balance, all the factors in the parties' conduct to be taken in to account. The following factors are relevant in this matter as to whether the award is moved up or down on the notional daily tariff:

a. That the applicant was successful in her claim but was unsuccessful in other claims relating to unjustified disadvantage, unlawful suspension and breaches of good faith. She always had an uphill task on these claims and should have abandoned them to avoid unnecessary time and preparation.

b. That the respondent did oppose the basis of the applicant's grievance actions. However, it approached the case pragmatically to ensure that the hearing proceeded efficiently without being unreasonable and increasing the applicant's costs.

c. That the applicant's conduct is relevant in considering costs. The applicant's conduct included the following:

i. The applicant pursued claims that were out of time, lacking specificity and details. Moreover she construed many of them wrongly in the first place.

ii. That the applicant pursued her claims of disadvantage and unlawful suspension despite being advised by the Authority at an early stage that such matters lacked specificity and appeared to have been raised outside the 90 day time limit. Indeed the respondent identified these problems at a very early stage in the proceedings and the applicant's representative did not desist with them. Nothing changed later with the briefs of evidence. All that could they could be relied on was for them to be used as background if necessary.

iii. That the applicant pursued and then later withdrew a claim for reinstatement when the remedy clearly had real risks earlier than the Authority's intervention. It was always going to be very difficult for the applicant to establish reinstatement as a remedy. At least it was withdrawn in a reasonable time before the investigation meeting.

iv. That the applicant pursued matters in her evidence and supporting documentation that were either irrelevant or could not be considered to be within the Authority's jurisdiction to determine. For example: the events relating to a separate and subsequent investigation by the Teachers Council that resulted from the respondent's mandatory obligation to report the dismissal to that body. Also, the applicant could not have reasonably expected such matters to be relevant to her personal grievance claims as these occurred post dismissal. As such they had little impact on the case in the Authority.

d. That the applicant raised and pursued matters that clearly had no reasonable basis and/or likelihood of success. For example the claims of bias and predetermination made against the respondent's committee and staff members.

e. That the applicant raised new matters in her submissions relating to breaches of good faith that had not been raised at the investigation meeting. Furthermore the applicant's representative raised new issues around the 90 day matters for the first time in her reply submissions on costs that I simply do not recall being raised properly earlier. That they have been raised belatedly is disturbing. Moreover it adds to my concerns about the applicant's running of her case, especially if any relevant arguments have been lost in the voluminous information provided by the applicant's representative in the entire matter.

f. That the respondent says the applicant conducted the case in a way which has increased costs for both parties. It has also incurred for the respondent significant time and expense to respond to the various claims and for witnesses to be briefed to appear at the Authority's investigation meeting just in case. This is especially so as the respondent is a voluntary organisation.

g. That the applicant provided over lengthy and detailed statements and submissions to support her actions which contributed to the costs incurred by both parties. A significant amount of the documentation focused on irrelevancies and provided a level of detail that was unnecessary.

h. That there has been no attempt to resolve costs between the parties. Instead an application has been made directly to the Authority. This has incurred further legal costs associated with the overall matter. What is clear there has been no attempt to settle on costs. Because of my early indication of the tariff it seems to me that this should have been the clue to settlement, but clearly the applicant's whole approach has been for much more, and that is unrealistic. Both parties should meet their own costs for the cost of the written submissions. Thus the daily tariff should remain at $3,500.

i. That there is a *Calderbank* offer dated 15 February 2012 from the respondent that had an amount of $8,000 for the parties to settle. This does not apply because the applicant has been successful in part of her

claims and the overall amount awarded to the applicant for compensation and lost wages exceeded the $8,000 offer. However, the applicant's response to that *Calderbank* offer was a counteroffer to settle at $30,000. I have to say that such a counter offer leaves the impression of unrealistic expectations. Indeed I have to agree with the respondent that this position was unrealistic. This case was never within that range and thus both parties have incurred unnecessary costs for the preparation and attendances at the investigation meeting.

j. That the respondent does have financial circumstances that rely on funding and inability to pay. It has had to incur its own costs in this matter also.

k. That mediation is a cost both parties must meet and are not included in the Authority's costs determination.

Conclusion

[5] There was nothing exceptional and or unusual to move the tariff. The way in which the applicant's case was conducted and involved a number of matters that were arguably irrelevant and unhelpful mean that there should be an award of no more than $3,500. The applicant is entitled to this sum because she was successful in the main point of her employment relationship problem which was the dismissal. She has incurred costs.

Authority's Order

[6] Fordell Pre-School Inc. is to pay Harmony May $3,500 as a contribution to her costs, plus the filing fee of $71.56.

P R Stapp
Member of Authority