IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 164A/09
5161495

	BETWEEN	BRONWYN MILES Applicant
	AND	MURRAYS VETERINARY CLINIC LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Rhonda Harris, Counsel for Applicant John Farrow, Counsel for Respondent
Submissions received:	7 December 2009 from Applicant 23 November 2009 from Respondent
Determination:	8 December 2009

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 1 October 2009, the Authority resolved the employment relationship problem between these parties by determining that the applicant (Ms Miles) had not raised her personal grievance within time.

[2] Costs were reserved.

The claim for costs

[3] Counsel for Murrays Veterinary Clinic Limited (Murrays), seeks indemnity costs in relation to this matter in the sum of $10,729.81. Counsel for Murrays argues that it was always clear that Ms Miles' application would have difficulty satisfying the Authority that it was brought within time and that Ms Miles was aware of the difficulties with her application from the beginning. However, despite the alleged difficulties, it is contended that Ms Miles pressed on with her application, caused the employer, Murrays, significant cost in defending the application, and that in those circumstances indemnity costs ought to apply.

[4] Counsel for Ms Miles, on the other hand, suggests that costs should either lie where they fall or that if the Authority is minded to fix costs, they should be at a more modest level and perhaps on the daily tariff basis the Authority traditionally considers in a costs setting.

[5] Ms Miles' counsel also contends that the costs charged to Murrays were *unreasonable* and that was particularly demonstrated by the fact that this was not a substantive application at all but an interlocutory matter designed to deal with the question whether the personal grievance had been brought within time, or not. On that basis, it is suggested that a fee of over $10,000 is unreasonable.

The relevant law

[6] The leading case on the fixing of costs in the Authority's jurisprudence is the decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* AC2A/5. That decision helpfully codifies the principles used by the Authority in costs fixing and comments positively on the *tariff-based approach* which has traditionally been a feature of cost setting in the Authority.

Discussion

[7] Murrays' argument is simple. It says it had no knowledge whatever that a personal grievance had been raised by Ms Miles until some seven months after the events complained of, by which time it was completely impossible for it to address any of her concerns, assuming it was able to. This caused Murrays significant anxiety and, of course, incurred cost in meeting Ms Miles' application.

[8] Precisely because Murray's claim that Ms Miles' application to the Authority had no merit whatever (because it was completely unaware of the personal grievance having been raised), Murrays' view is that this is an appropriate case for the Authority to exercise its discretion and award full indemnity costs or, at the very least, a higher than usual award.

[9] Ms Miles, on the other hand, says that she acted throughout in good faith, that she acted on legal advice (which was that the Authority might conclude that the grievance ought to be deemed to have been received in the normal course of post) and therefore that the matter was worth pursuing because she was aggrieved about her

circumstances and she did want an opportunity to progress the substantive grievance in the Authority.

[10] I have some considerable sympathy for both viewpoints. I accept Ms Miles' view that she acted on legal advice and that that advice was that she had an arguable case. The fact that, in the result, the Authority found against her is not Ms Miles' fault. However, I also accept Murrays' view that it was completely unaware of the existence of the personal grievance and had it been aware of it in a timely fashion, it might well have been able to deal with it. I accepted its evidence at the investigation meeting that it simply did not know that Ms Miles was so aggrieved by her position being disestablished that she would proceed with a personal grievance. Furthermore, I preferred the Murrays' evidence to Ms Miles' evidence about the hours of work that she (Ms Miles) was prepared to work. This was an important issue in the determination of the Authority. Ms Miles said that she was flexible about her hours (the very thing the employer wanted), whereas Murrays said it had no knowledge that Ms Miles was prepared to be that flexible.

[11] On balance, I think there is some force in Ms Miles' argument that the costs incurred by Murrays are, if not unreasonable, then on the high side. No doubt Murrays' solicitors were anxious to do a good and thorough job and ensure that the right result was achieved, but the reality is that the costs charged would, in my judgement, be within an acceptable range for a full substantive hearing and this, as Ms Miles correctly points out, was not one of those. This was simply an interlocutory application to deal with the question of whether there had been a personal grievance raised within time, or not, and on that basis, I think the costs charged to Murrays are at the high end of the appropriate and desirable range. That being my conclusion, the notion of indemnity costs is not a realistic approach to costs fixing in the present case.

[12] Having made that observation though, the fact is that costs should, in the normal course of events, follow the event and Murrays was completely successful in its defence of Ms Miles' claim and in preparing and making that defence, Murrays clearly incurred costs for which it is entitled to a contribution. I think the appropriate course of action is to deal with the matter in a holistic way and, while noting that the tariff-based approach would require me to assess the appropriate contribution for what amounted to a half day hearing, I think the better view might be to apportion an

amount which takes account of the lucid and persuasive arguments advanced by both counsel.

[13] If the daily tariff approach were applied for a half day hearing, a contribution from Ms Miles to Murrays might be in the order of $2,000. However, I think Murrays correctly identified that this was a matter of particular concern to it, it was completely successful in the substantive matter and there were findings in the substantive determination which suggested that the Authority felt Ms Miles had been less proactive than she ought to have been. In particular, the determination refers to the stress on employers of personal grievance matters, particularly small employers, and in those circumstances, a lack of proactive action by a grievant or potential grievant ought, I think, to sound in costs. As I made such a finding in the substantive determination, I think it appropriate to reflect that in a costs setting now.

Determination

[14] I direct that Ms Miles is to contribute the sum of $4,500 to Murrays to assist it in meeting the costs of its successful defence of this matter.

James Crichton
Member of the Employment Relations Authority