

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 179
3021053

BETWEEN DENE MILLER
 Applicant

A N D COMMISSIONER OF POLICE
 Respondent

Member of Authority: Peter van Keulen

Representatives: Anna Oberndorfer, advocate for Applicant
 Greg Cain and Renee Butler, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 19 November 2018 for Applicant
 6 November 2018 and 26 November 2018 for
 Respondent

Date of Determination: 5 December 2018

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 10 October 2018, I dismissed Senior Constable Dene Miller's claims against the Commissioner of Police.

[2] In my determination, I reserved costs in order to give the parties an opportunity to try and resolve the question of costs. The parties have been unable to agree costs and the Commissioner of Police now seeks costs.

[3] The Commissioner of Police, through counsel, says:

- a. Costs should follow the event and therefore costs should be awarded to the Commissioner of Police.
- b. That costs award should be based on the daily tariff for two days of investigation meeting.
- c. Given the complexity of this matter and the actual costs, that the Commissioner of Police reasonably incurred, there is no basis to adjust the daily tariff.
- d. So, I should award costs of \$8,000.00 as a contribution to the Commissioner of Police's costs.

[4] The advocate for Senior Constable Miller says:

- a. Senior Constable Miller accepts that costs should follow the event and therefore I should award costs to the Commissioner of Police.
- b. The starting point of the assessment of the award is to apply the daily tariff.
- c. The investigation meeting only lasted one full day and one part day and therefore only \$2,000.00 should be awarded for the second day, giving a total of \$6,500.00.
- d. Senior Constable Miller is not in the financial position to pay an award of costs based on the daily tariff so a reduction in the tariff is appropriate.
- e. Overall an appropriate award for costs would be \$3,000.00, payable in twelve instalments of \$250.00 given Senior Constable Miller's financial position.

Costs

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹ and other relevant Employment Court and Court of Appeal decisions².

[6] It against these principles that I will assess the application for costs.

Costs for the Commissioner

[7] Both parties accept that costs should follow the event and the Commissioner of Police is entitled to an award of costs. I agree. I accept that the Commissioner of Police has reasonably incurred costs and is entitled to be compensated for some of those costs as the successful party.

Daily tariff

[8] The next decision is whether I should depart from the normal practice of the Authority when setting costs, of applying the daily tariff. There is no basis for me to do so in this case and neither party suggests I should use some other method of determining the quantum of any award other than the tariff, albeit that Senior Constable Miller says that I should adjust the tariff.

[9] So, I will apply the daily tariff.

Length of the investigation meeting

[10] The first issue in applying the daily tariff is the length of the investigation meeting and therefore the multiplier to the tariff.

¹ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

² *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *GSTech Limited v A labour Inspector of MBIE* [2018] NZEmpC 127

[11] Whilst I accept that the second day of the investigation meeting was not a full day I do not accept that this translates to a reduced day for the application of the daily tariff. This is because I accept counsel for the Commissioner of Police's submission that additional work was carried out during the day and after. This work included reviewing a transcript of a meeting, provided by Senior Constable Miller that morning, in breaks during the day and submissions were then made in writing rather than orally. On balance, I think it is appropriate to award a full day of the tariff for the second day of the investigation meeting.

Adjusting the daily tariff

[12] The second issue with applying the daily tariff is that the advocate for Senior Constable Miller submits that I should reduce the tariff to reflect Senior Constable Miller's financial position. She asserts that Senior Constable Miller is not in a financial position to pay an award based on the full tariff. There is limited information to support this assertion. And this is not enough information to conclude that an award based on the tariff would cause a degree of hardship that is excessive or disproportionate to the purpose of compensating the successful party³, which is the test I was referred to.

[13] I do not accept, on the information put in submissions, that Senior Constable Miller's financial position is such that the daily tariff should be reduced – there is simply no evidence that an award of costs based on the tariff would cause hardship to Senior Constable Miller to the level that requires a reduction to be imposed.

[14] In the same vein, there is no evidence to justify making an order at this stage that Senior Constable Miller should pay any cost award in instalments.

³ Gates v Air New Zealand Limited [2010] NZEmpC 26

Conclusion

[15] I will award costs to the Commissioner of Police based on the daily tariff for two days without any adjustment, totalling \$8,000.00

Order

[16] Senior Constable Miller must pay the Commissioner of Police \$8,000.00 as a contribution to the costs incurred in this matter. I cannot make any order for payment by instalments – if the parties cannot agree a payment schedule then they can revert to the Authority for an order for compliance, which can deal with any proposed instalment payments.

Peter van Keulen
Member of the Employment Relations Authority