

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 134
5242829

BETWEEN KATHLEEN ANN BEATTIE
 MILNE
 Applicant

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: KAB Milne in person (on costs)
 K Thompson, counsel for respondent

Memoranda received: 25 March 2011 from applicant
 1 March 2011 from respondent

Determination: 6 April 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 3 February 2011 I found Ms Milne was not dismissed unjustifiably. Costs were reserved and the parties have filed memoranda on the matter.

[2] Counsel for the respondent sought a contribution to costs in the sum of \$10,000 for a two-day investigation based on a notional daily rate of \$5,000 per day. He cited the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*¹ and referred to the common notional daily rate of \$3,000, but submitted that the rate should be increased here: because of the extent of the pre-meeting engagement between the Authority and the parties; with reference to the fact that the employment relationship problem was filed in early 2005, the extent of the delays and inconvenience due almost entirely to Ms Milne's defaults; the presence of unrealistic claims particularly given certain admissions at the investigation meeting; the

¹ [2005] ERNZ 808

substantial preparation required for the matters that were traversed; and the need to prepare a memorandum on costs because of Ms Milne's failure to respond to the reasonable position the respondent was taking.

[3] Ms Milne said she opposed the respondent's request for an order for costs. However many of the reasons she cited in support amounted to a re-visiting of the merits of her case and the remedies she sought. Those matters can be addressed on a challenge to the determination, but not in the course of a claim for costs.

[4] For Ms Milne's information, it is common for the successful party in a proceeding to seek from the unsuccessful party at least a contribution to its costs. The approach to costs in the Employment Relations Authority, as set out in *da Cruz*, is that:

- . the Authority has a discretion as to whether costs should be awarded, and in what amount;
- . the discretion must be exercised in accordance with principle;
- . costs can be approached on a case by case basis;
- . costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account;
- . it is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- . costs generally follow the event;
- . awards will be modest;
- . frequently costs are judged against a notional daily rate; and
- . the nature of the case can influence costs.

[5] Ms Milne indicated a belief that an order for costs would penalise her, but that is not the purpose of an order for costs and is not the basis on which an order will be made in this case. Ms Milne has brought a claim in the Authority in which she was unsuccessful, and as with any party to a proceeding she was at risk of an order for costs against her in the event she was not successful.

[6] I conclude that the respondent is entitled to a contribution to its costs. I also conclude that aspects of Ms Milne's conduct of the matter added unnecessarily to the respondent's costs, and that the nature of this case was such that the notional daily rate should be adjusted upwards. In that respect I take into account: that there were extensive and unexplained delays on Ms Milne's part which caused unnecessary expenditure of time in the Authority; the breadth and the sometimes shifting nature of the allegations Ms Milne made, and the extent of the preparation required of the respondent in order to address them; and, in the light of admissions Ms Milne made at the investigation meeting about her state of health and her own wishes, that some of this activity should never have been necessary.

[7] Accordingly while I acknowledge that an attempt was made to prevent the unnecessary incurring of even greater costs by both parties, for the above reasons I consider it appropriate to adjust the notional daily rate upwards. However as a proportion of the notional daily rate I consider the respondent's request a little high. I adjust the rate upwards to \$4,000 per day and order Ms Milne to contribute to the respondent's costs in the sum of \$8,000.

R A Monaghan

Member of the Employment Relations Authority