IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 68
5444559

	BETWEEN	MICHAEL MORRIS Applicant
	A N D	CHRISTCHURCH POLYTECHNIC INSTITUTE OF TECHNOLOGY Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Kerry Smith, Counsel for Respondent
Submissions Received:	25 March 2014 from Respondent 13 April 2014 from Applicant
Date of Determination:	24 April 2014

COSTS DETERMINATION OF THE AUTHORITY

Dr Morris is to pay the sum of $1,750 as a contribution to the respondent's costs.

[1] By way of a determination of the Authority dated 25 February 2014, the Authority found that it did not have the jurisdiction to consider Dr Morris' claims for unjustified dismissal and a compliance order. Costs were reserved and the parties directed to seek to agree how they were to be disposed of between them. The parties have subsequently been unable to agree, and so they have lodged submissions to the Authority.

[2] The respondent seeks the sum of $3,600, being the GST exclusive costs incurred in defending the claims from Dr Morris. The thrust of Mr Smith's submissions on behalf of the respondent is that Dr Morris was advised on several occasions, first by the respondent itself, and also by Mr Smith via the statement in

reply, that no employment relationship had been created between him and the respondent.

[3] Mr Smith also submits that these costs are reasonable and that awarding costs against Dr Morris in this sum would satisfy the principles of *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808, which is the leading case on the principles to be applied by the Authority in considering costs awards.

[4] In response, Dr Morris submits that the invoice for $3,600 plus GST submitted to the respondent, and sent to the Authority with Mr Smith's submissions, does not contain a breakdown so as to render the costs clearly transparent. He also suggests, citing a passage from Mr Smith's submissions, that the respondent is seeking costs as a punishment against him, despite its statement to the contrary.

[5] Dr Morris also points out that it was not obvious to him what the legal position was regarding his claim, as he is not a lawyer, and that he could not have been expected to have taken advice from the respondent itself. He also suggests that, if the arguments were so straightforward, the respondent did not need to hire a lawyer at all.

[6] Finally, Dr Morris acknowledges that it may be appropriate for him to pay some *compensation*, but that it should be restricted to paying for the time and expense of CPIT staff, and not their *expensive lawyer*, to use Dr Morris' words.

Determination

[7] The Authority's statutory power to award costs derives from paragraph 15 of Schedule 2 of the Employment Relations Act 2000, which provides as follows:

> ***15 Power to award costs***
> *(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
> *(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[8] I shall not repeat the *Da Cruz* principles here, as Mr Smith set them out fully and accurately in his submissions. First, I accept the principle that, in this case, costs should follow the event, so that, as Dr Morris' claim failed, some costs should be awarded to the respondent against him.

[9] Addressing Dr Morris' first argument, it is true that Mr Smith does not provide a full breakdown of how the fee was incurred. Mr Smith is not alone in failing to do this, and this is a very common failing of counsel when a party seeks a contribution to its legal costs. I take the opportunity to state that the *Da Cruz* principles recognise that the Authority may consider whether any of the costs sought are unnecessary or unreasonable. Without a detailed time breakdown and an indication of the charge out rate of the lawyer involved, it is often very hard to make that judgement. In such cases, I am disinclined to accept them as reasonable. Furthermore, most law firms now operate a time recording system which enables a breakdown of time recorded to be easily printed off, with redactions if desired.

[10] Having said this, being aware of Mr Smith's seniority, the documents he was required to prepare for the Authority, and also the likely steps he took to advise his client, on this occasion I estimate that his fee of $3,600, excluding GST, does not fall outside of a reasonable range.

[11] I now turn to a main plank of Dr Morris's objection, namely that the respondent had to hire a lawyer at all to defend his claims. Although there is some logic behind Dr Morris' arguments, the overriding principle remains that, with few exceptions, any party in a matter before the Authority may hire whomever they wish to represent them. It is likely that Mr Smith is the respondent's preferred advisor on employment law matters, and so it was perfectly entitled to engage him to act on this matter.

[12] I would also add that, although Dr Morris refers to Mr Smith's *long winded legal arguments over several pages*, the statement in reply and Mr Smith's legal submissions were requested by the Authority, and covered everything that would be expected from counsel in such a matter. Mr Smith cannot be criticised for doing what he was asked to do by both his client (defend Dr Morris' claims) and the Authority (prepare and submit the statement in reply and his legal submissions).

[13] Having accepted that Dr Morris should make a contribution to the respondent's legal costs, and having rejected his argument that Mr Smith should not have been engaged, or that he did unnecessary work, I turn to consideration of what is a fair and reasonable contribution for Dr Morris to make.

[14] Mr Smith compares the sum sought from Dr Morris with the Authority's standard daily costs tariff, which he correctly identifies as $3,500. In this case, the matter was decided on the papers by consent. Mr Smith suggests that the work required of the respondent is consistent with at least one day's work at an investigation meeting.

[15] It is almost certainly the case that, had the Authority decided to investigate the preliminary jurisdictional matter by holding a meeting, the costs incurred by the respondent would have been greater, as Mr Smith would have had to have attended the meeting, as well as do everything else he did in defending the claim. However, it is inconceivable that, had such a meeting taken place, it would have lasted more than half a day.

[16] Furthermore, if I were then to be considering the appropriate costs to award to the respondent following a half day investigation meeting, the starting point, all other things being equal, would have been to award costs based on one half of a day's tariff; namely $1,750. Mr Smith may suggest that, as Dr Morris' claim was doomed to fail, all other things were not equal, and he should therefore have to pay a greater proportion of the respondent's costs. However, Dr Morris' claims were not vexatious or frivolous and I do not believe that he otherwise brought them in bad faith.

[17] Standing back to consider the overall fairness of the matter, and being cognisant of the Authority's statutory jurisdiction to award costs in a way that is consistent with its equity and good conscience jurisdiction, I do not believe that it would be fair and reasonable to expect Dr Morris to pay more in costs than he would have done if a half day's investigation meeting had taken place.

Order

[18] Accordingly, I order Dr Morris to pay to the respondent the sum of $1,750 as a contribution to its costs.

David Appleton
Member of the Employment Relations Authority