

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Lance Muir (Applicant)
AND Savour & Devour Limited (Respondent)
REPRESENTATIVES Applicant in person
Maria Dew, Counsel for Respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 13 September 2005
DATE OF DETERMINATION 2 February 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA 423/05 dated 21 October 2005 the respondent was found to have unjustifiably dismissed the applicant on 10 May 2005. He was awarded lost wages for nine weeks, further lost wages for the differential between his previous job and a new lower-paid job, and compensation for hurt and humiliation. The remedies were reduced to allow for earnings in mitigation and by 20 per cent overall for contribution. Although I am not aware of the details of the calculations, I estimate that after allowing for those deductions and tax on the lost wages component, the total value of the remedies was around \$9900.

[2] Costs were reserved with the parties invited to resolve the issue themselves. They have been unable to do so and the applicant seeks a determination on costs. The applicant was represented at the investigation meeting but applies in person for costs to avoid further legal expense.

[3] The applicant seeks full costs of \$11,500 for preparation for the Authority investigation and provides copies of his lawyer's invoices. He cites excerpts from the determination that his dismissal was unjustified, highlighting findings on the inadequacy of the respondent's investigation and breach of good faith by deliberately misleading the applicant before dismissing him. He also says his earnings and job prospects remain lower than before his dismissal.

[4] The respondent submits that an award in the region of \$2000 would be usual for the one day investigation meeting held. It submits that an award should be reduced by one fifth to reflect the proportion that the applicant's remedies were reduced for contribution and to recognise the respondent's costs in defending unsuccessful aspects of the claim – being an application for urgency and reinstatement.

[5] The Authority's statutory discretion to award costs is to be exercised on a principled basis that treats each case on its own facts and in equity and good conscience. Costs are not to punish the unsuccessful party but conduct unnecessarily increasing costs may be taken into account to reduce or increase an award. The Authority may consider the reasonableness of the costs incurred and

may, where appropriate, apply a notional daily rate, to determine a reasonable contribution to reasonably incurred costs.

[6] In this particular case some factors suggested by the parties as relevant to costs are not. The applicant's concern about lost income was addressed in the original remedies and is not a factor in increasing any costs award. The respondent's success in resisting urgency and reinstatement does not negate the principle that costs generally follow the event. Similarly, contribution is addressed in the remedies not costs.

[7] The substantive determination noted that the respondent's conduct in the manner of its interviewing of the applicant prior to his dismissal may have warranted a penalty for breach of good faith had it been sought. However it is not the role of the costs award to punish.

[8] While conduct of the respondent in the circumstances giving rise to the personal grievance was reprehensible, there was nothing in its conduct in preparation for and participation in the investigation meeting – assisted by learned counsel – which would warrant increasing the costs.

[9] The issues, while important to the parties, were not complex. Preparation of the applicant's case involved only his own witness statement, no others.

[10] In this matter I assess notional reasonable costs on the basis of a multiplier of 2 applied to 8 hours for the one-day investigation meeting resulting in 16 hours of professional time. Applying an hourly rate of \$250 for counsel results in a notional sum of reasonably incurred costs of \$4000. The applicant is entitled to a reasonable contribution to those costs which I assess as being \$3000.

[11] The respondent is ordered to pay to the applicant the sum of \$3000 as a contribution to his costs.

[12] I note that the applicant's actual legal costs appear to have taken most, if not all, of the amount he received in remedies and costs awarded. While I cannot assist the applicant further, it is a matter he may wish to discuss with his representative. In its recent decision in *PBO Limited v Da Cruz* (unreported, EC Auckland, AC2A/05, 9 December 2005) a full bench of the Employment Court urged representatives of parties in the Authority to approach cases economically and in a way likely to leave a successful party with a satisfactory outcome. Costs incurred need to be reasonable in light of the amount likely to be recovered as remedies and costs in the Authority.

Robin Arthur
Member of Employment Relations Authority