

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 93
5360934

BETWEEN PHILLIP MURPHY
Applicant

A N D MITECH LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Mark Nutsford, Advocate for Applicant
James Turner, Counsel for Respondent

Submissions Received: 31 January 2013 from Applicant
21 January 2013 from Respondent

Date of Determination: 19 March 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority issued a determination in the substantive matter on 19 December 2012. Mr Murphy's claim was rejected by the Authority.

[2] Costs were reserved.

The application for costs

[3] The respondent (Mitech), as the successful party, seeks an award of costs of \$24,000. It is submitted that the matter was not straightforward and that two comprehensive briefs of evidence had to be prepared to deal with the various allegations made by the applicant (Mr Murphy).

[4] Mitech also make the point that the second part-day of the investigation meeting was required because Mr Murphy wished the Authority to hear the evidence

of his lawyer who attended the final disciplinary meeting. Mitech submit that that evidence turned out to be immaterial in the overall disposal of the matter.

[5] It is contended for Mitech that a settlement proposal made during the mediation process ought to be taken into consideration. The effect of that offer was that Mitech would withdraw its counterclaim for \$500, if Mr Murphy would withdraw his proceedings.

The response

[6] Mr Murphy's submissions concentrate on his financial position which is not good. Mr Murphy submits a balance sheet of his position which shows a monthly running deficit.

[7] In addition, Mr Murphy's statement indicates that he has serious health issues with substantial blockages in two coronary arteries. The prospect of surgical intervention is a real one with the consequential loss of income that that might cause.

[8] Mr Murphy also indicates that his wife's hours have been cut by 50% from 30 hours a week last year and of course, that has dramatically affected the couple's income.

The law

[9] The law concerning the fixing of costs in the Authority is well settled and is best encapsulated in the decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] ERNZ 808.

[10] That decision identifies the principles that the Authority uses in fixing costs. Those principles include the discretion whether to award costs or not, the fact that costs typically follow the event, the fact that awards of costs in the Authority are typically modest, that costs are frequently awarded on a notional daily rate and that factors such as the existence or otherwise of legitimate settlement offers will have an impact on the ultimate quantum awarded by the Authority.

[11] The Authority has also derived assistance from the application for three principles identified in an earlier Authority decision of *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland,

AA39/04, 28 January 2004). Those principles derived from that decision of the present Chief of the Authority are:

- What are the actual costs incurred by the successful party;
- Are those costs incurred reasonable;
- What proportion of those costs ought the unsuccessful party contribute?

Determination

[12] The strong submission made for Mr Murphy is that this is a matter where costs should lie where they fall. That of course would abrogate the normal rule that costs follow the event. Mr Murphy was the unsuccessful party and therefore, on general principles, could expect to make a contribution to the costs of the successful party.

[13] In broad terms, the position is that litigation is a process involving risk and one of the risks attendant on litigation is that the unsuccessful litigant will typically be asked to contribute to the costs of the successful party.

[14] In the particular circumstances of this case, the Authority is not persuaded that costs can simply lie where they fall. This was a straightforward personal grievance claim which the Authority considered and dealt with in favour of the employer. Presumably Mr Murphy went into the process with the understanding that if he were successful, he could expect to have the employer contribute to his costs and the opposite applied if he were unsuccessful. Notwithstanding Mr Murphy's financial position (about which more later) there is nothing in the circumstances of this matter which would encourage the Authority to conclude that it was appropriate to depart from the usual principle of the successful party having some assistance in its costs.

[15] Having reached that conclusion, it is appropriate for the Authority to reflect on the quantum of costs incurred by the successful party and the reasonableness of those costs. The Authority observes, without in any way wishing to be critical of the work done for Mitech, that the costs incurred are certainly at the higher end of total costs for a matter of this kind.

[16] Moreover, the Authority typically will not consider a contribution to costs incurred in pre-investigation mediation. Nor, for that matter, is the Authority

persuaded that a departure from the customary daily tariff of \$3,500 as the starting point can be justified in any way. This was a straightforward personal grievance without any unusual complexity and, save for one witness, was dealt with in a day's hearing time. In the normal course, the Authority would commence its consideration of the final award by identifying the quantum of the daily tariff and then either adding or subtracting to that figure based on the parties' submissions. Here, the appropriate starting point in the Authority's judgement is \$4,000 being the daily tariff for a full day together with a small allowance for the final witness on the second day.

[17] The Authority is supposed to be a low cost tribunal and typically, as *Da Cruz* makes clear, costs awards in the Authority are expected to be modest. In that general connection, the daily tariff computation applies to the elapsed time of the investigation meeting and is deemed to incorporate the preparation time required.

[18] In the present case, the Authority is not persuaded there are matters of great complexity in resisting Mr Murphy's claims, nor for there to be any basis on which preparation time should be contributed to by Mr Murphy. While it is apparent that counsel for Mitech did a conspicuously good job in opposing Mr Murphy's various contentions, it is outside the ambit of the Authority's practice to contemplate costs awards of the magnitude sought by Mitech unless the particular circumstances justify such an award.

[19] Mitech argue that one such circumstance is their attempt to settle matters before hearing and they invite the Authority to take account of a settlement proposal made during mediation. The Authority declines to do so. First, if the proposal was made in the course of mediation it is not something the Authority can properly consider unless Mr Murphy consents to the lifting of the confidentiality veil, which he does not. Second, the offer was not a formal Calderbank proposal, properly documented as such. Third, the terms of the offer are unclear or at least, in dispute. While Mitech say they offered to withdraw the counter claim if Mr Murphy withdrew his proceedings, Mr Murphy says the employer simply gave him the opportunity to withdraw, without more.

[20] It follows that the most that Mitech could expect to recover as a contribution to the costs they incurred is \$4,000 based on the time the case took to investigate. That computation takes into account the Authority's considered view that there was nothing complex about the case which necessitated any unusual attendances.

[21] Conversely, the advocate for Mr Murphy makes a determined claim for some acknowledgment by the Authority that Mr Murphy is, if not impecunious, certainly not flush with funds. This is a matter that the Authority is entitled to take into account along with the right that the Authority has to give time to pay should that be considered necessary.

[22] In all the circumstances, starting with a base figure of \$4,000 as the contribution, based on the daily tariff approach, the Authority considers that Mr Murphy is entitled to a reduction based on his financial circumstances which have been clearly, even eloquently, expressed, and on the basis the Authority directs that Mr Murphy is to contribute the sum of \$2,000 to Mitech's costs. Mr Murphy is to have time to pay that sum.

[23] Mr Murphy is also reminded that he is indebted to Mitech in the sum of \$500 being the cost of the insurance excess on the written-off vehicle.

[24] Mr Murphy's advocate should engage with counsel for Mitech to agree a payment regime in respect to both sums just referred to.

James Crichton
Member of the Employment Relations Authority