

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 79
5541692

BETWEEN SONNY NGERENGERE
 Applicant

AND PUKEKO FREIGHT LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Faith Kim, on behalf of the Applicant
 Gary May, on behalf of the Respondent

Submissions received: 7 April 2016 from the Applicant
 8 April 2016 from the Respondent

Determination: 8 July 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination issued on 31 March 2016¹ Mr Ngerengere’s dismissal was found to be procedurally unfair. His actions leading to his termination would ordinarily have warranted a 100% reduction to remedies but leeway was given in response to his exceptional personal circumstances at the time of dismissal. Remedies were reduced by 50% resulting in a total award of \$500.

[2] Mr Ngerengere was represented by Employment Dispute Services (2014) Ltd (EDSL). It submits Mr Ngerengere’s actual costs were \$6,385 including GST and seeks a contribution of \$4,000 on the basis of a “*hearing for a full day*”.

[3] The director of Pukeko Freight Ltd (PFL), Mr Gary May, represented the company. He seeks an award of \$3,475.32 plus GST. PFL submits Mr Ngerengere (and his representatives) provided inadequate pleadings and that the approach taken, both before and during the investigation meeting, increased costs and caused delay.

¹ *Ngerengere v Pukeko Freight Limited* [2016] NZERA Wellington 39

[4] The Authority has a wide discretion as to whether to award costs and if so, the quantum. The relevant principles when assessing costs are set out in *PBO Ltd v Da Cruz*.² It is unnecessary to restate all of these in full. I have given particular regard to the principles that:

- costs generally follow the event and are modest;
- costs should not to be used as an expression of disapproval of a party's conduct, although conduct which increased costs unnecessarily can be taken into account in terms of an award;
- any award should be is consistent with the equity and good conscience jurisdiction of the Authority, and
- the nature of the case can also influence costs.

[5] EDSL did not provide adequate information detailing what work was undertaken, the time apportioned to perform any activity, or the charge out rate. I am unable to properly assess whether those costs were reasonable.

[6] I accept Mr May's criticisms that the applicant's case was not advanced well. There were lengthy delays to obtaining a response from EDSL as to availability for case management calls, and ongoing difficulties establishing who, amongst several ostensible representatives, was representing the applicant, and therefore whom should the Authority and the respondent be communicating with. EDSL's head office staff appear to have been involved with lodging pleadings and documents but were insufficiently briefed to assist the Authority or clarify Mr Ngerengere's claims during several case management calls. A regional EDSL representative attended the Authority's investigation meeting, but without the respondent's evidence, causing moderate delay in the investigation meeting. The applicant and his representatives must take responsibility for that methodology.

[7] Those issues have negatively impacted on the progression of Mr Ngerengere's application but PFL did not expend costs on representation in this matter and there are no costs for it to recover.³

² [2005] ERNZ 808

³ I accept that defending personal grievance claims by an employee incurs costs to a business; however the purpose of a costs award is not to compensate a business for business disruption but for the cost of engaged legal assistance.

[8] I consider the appropriate approach in this matter is to first apply the Authority's notional daily tariff currently set at \$3,500 per day of investigation and then assess, on a principled basis, whether the tariff should be adjusted to reflect the particular circumstances of this case.

[9] The application for costs appears to have been lodged by an EDSL person who had been previously involved with the matter. The investigation meeting lasted approximately two hours.⁴ It was not conducted over a full day as was asserted.

[10] The case was straight forward. There was no real dispute Mr Ngerengere engaged in the conduct for which he was dismissed. At issue was whether the respondent's process when it dismissed Mr Ngerengere was procedurally fair. I found it was not and costs should follow the event. I note however that the remedy awarded was very modest. This is a relevant consideration in a costs assessment and was signalled to EDSL throughout the Authority's engagement on this matter. That factor alongside my finding as to the way his claim was advanced, and the length of the investigation meeting, leads me to conclude PFL should contribute \$500 towards Mr Ngerengere's costs.

Orders

[11] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order Pukeko Freight Limited to pay Mr Ngerengere the sum of \$500 as a contribution to costs, plus \$71.56 for the filing fee.

Michele Ryan
Member of the Employment Relations Authority

⁴ including time to allow Mr Ngerengere to be acquainted with the respondent's evidence