

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 332
5363996

BETWEEN ROSITA O'CONNOR
Applicant

A N D AUCKLAND
KINDERGARTEN
ASSOCIATION
Respondent

Member of Authority: Rachel Larmer

Representatives: Ian Gibson, Counsel for Applicant
Michael McFadden/Dean Organ, Advocates for
Respondent

Submissions Received: 31 August 2012 from Respondent
14 September 2012 from Applicant
21 September 2012 from Respondent

Date of Determination: 24 September 2012

COSTS DETERMINATION OF THE AUTHORITY

**A. Ms Rosita O'Connor is ordered to contribute \$1,300 towards
Auckland Kindergarten Association's legal costs.**

Employment relationship problem

[1] The Authority in its determination dated 17 August 2012¹ held it did not have jurisdiction to investigate Ms Rosita O'Connor's unjustified dismissal personal grievance claim because she did not raise her grievance with Auckland Kindergarten Association (AKA) within 90 days of her dismissal.

¹ [2012] NZERA Auckland 281

[2] AKA seeks \$3,000 costs from Ms O'Connor. Ms O'Connor says her dismissal caused her hardship so she asks that AKA not be awarded any costs.

Preliminary investigation

[3] The Authority's investigation into the 90 day issue was dealt with, by agreement of the parties, on the papers as a preliminary issue. Both parties filed two affidavits each together with written submissions.

Issues

[4] The following issues require determination:

- (a) What approach should the Authority adopt when fixing costs?
- (b) Should the Authority's notional tariff be adjusted?
- (c) What costs should be awarded?

What approach should the Authority adopt when fixing costs?

[5] Costs are discretionary. The Full Court of the Employment Court's decision in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² identifies the principles which apply to costs in the Authority. Bearing in mind those principles, I see no reason to depart from the Authority's usual tariff based approach to costs.

[6] The notional daily tariff for a full one day investigation meeting (IM) is currently \$3,500. This matter was dealt with on the papers in order to reduce cost to the parties. I therefore consider the appropriate notional starting point for assessing costs in this matter should be \$1,166 being one third of the notional daily tariff for a full day IM.

[7] I must then consider, on a principled basis, whether the notional daily tariff should be adjusted to reflect the particular circumstances of this case.

² [2005] 1 ERNZ 808

Should the Authority's notional tariff be adjusted?

[8] The Authority has not been informed of any factors which would warrant a decrease to the notional daily tariff. Ms O'Connor did not provide sufficient information to establish that any award of costs should be reduced to avoid unnecessary hardship to her.

[9] AKA put Ms O'Connor on notice by letter dated 29 March 2012 that it believed she had not properly raised her dismissal grievance within 90 days and it set out the reasons it held that view. AKA also warned Ms O'Connor that it would be seeking costs against her should she proceed with her claim.

[10] I consider that warrants a small increase to the notional starting tariff. I therefore increase the starting tariff to \$1,300 to reflect that.

What costs should be awarded?

[11] There is no reason to depart from the well established principle that costs usually follow the event, so AKA as the successful party is entitled to a contribution towards its actual costs.

[12] I do not consider it appropriate to award AKA the \$3,000 costs it claims when the matter was dealt with on the papers which saved both parties considerable costs.

[13] I consider that an award of \$1,300 costs in AKA's favour is appropriate to do justice between the parties in all of the circumstances.

Outcome

[14] Ms O'Connor is ordered to pay AKA \$1,300 towards its actual legal costs.

Rachel Larmer
Member of the Employment Relations Authority