

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 141  
5554643

BETWEEN            DARREN OLIVER  
Applicant

A N D                SCOTT HAULAGE 2010  
LIMITED  
Respondent

Member of Authority:     David Appleton

Representatives:         Kevin Murray and Shayne Boyce, Advocates for  
Applicant  
Craig Morice, Counsel for Respondent

Investigation Meeting:    Determined on the papers

Submissions Received:    21 July 2016 for Applicant  
4 August 2016 for Respondent

Date of Determination:    23 August 2016

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**COSTS DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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[1]     By way of a determination of the Authority dated 26 May 2016<sup>1</sup> the Authority found that Mr Oliver had been unjustifiably constructively dismissed and subjected to an unjustified disadvantage in his employment. The Authority, however, agreed with the respondent that Scott Haulage 2010 Limited had been the employer of Mr Oliver at the time of his resignation, not Star Moving Limited.

[2]     By way of a further determination of the Authority dated 4 July 2016<sup>2</sup> the Authority awarded Mr Oliver further sums in respect of holiday pay and sick pay.

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<sup>1</sup> [2016] NZERA Christchurch 70

<sup>2</sup> [2016] NZERA Christchurch 101

[3] Costs were reserved in respect of both determinations and the parties invited to seek to agree costs between them. This has evidently not been possible and so Mr Oliver now seeks a contribution towards his legal costs on an indemnity basis.

[4] Although Mr Morice advises the Authority that he has been unable to obtain instructions with respect to Mr Oliver's costs submissions, Mr Morice has made the comment that there is no good reason for indemnity costs to be ordered, contrary to the Authority's usual practice of awarding a daily tariff of \$3,500. I treat this communication by Mr Morice as his submission.

### **Submissions on behalf of Mr Oliver**

[5] The submissions made on behalf of Mr Oliver may be summarised by the following points:

- (a) It was necessary to bring a claim before the Authority in order to elicit a response from the respondent to Mr Oliver's personal grievance.
- (b) It should not be necessary for an employee to have to bring a claim for unpaid annual holiday and public pay and other straightforward pay entitlements, particularly if proper wage, time and holiday records have been kept by the employer and have been produced when requested by the employee, as the law requires.
- (c) The respondent had an opportunity to settle the matter at mediation, but instead chose to refuse to engage in the process to enable the matter to be settled.

[6] Mr Murray and Mr Boyce submit that, if the Authority does not award full costs, then a reasonable contribution to the costs incurred should be made as a consequence of *the unmeritorious action of the respondent and the costs that the applicant was put to responding to the actions by the respondent.*

[7] As stated above, the only submission made on behalf of the respondent was that the daily tariff should be sufficient in terms of a contribution towards Mr Oliver's costs.

## The legal principles applying to the award of costs in the Authority

[8] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, 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.

[9] It is well established that the Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> when setting costs awards<sup>4</sup>. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.

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<sup>3</sup> [2005] ERNZ 808

<sup>4</sup> Confirmed as still applicable law by the full Employment Court in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

## **Discussion**

[10] First, whilst Mr Oliver was unsuccessful in arguing that Star Moving Limited had been his employer when he resigned, he was successful in the substantive claims he had before the Authority. Therefore, in accordance with the principle that costs normally follow the event, I accept that a contribution should be made by the respondent to Mr Oliver's costs. I also believe that the costs of representation incurred by Mr Oliver seem broadly reasonable.

[11] The investigation meeting which resulted in the Authority's first determination lasted from 10.15am to 3.30pm on the first day (31 March 2016) and from 9.30am to 2.25pm on the second day (22 April). Submissions were delivered at a later date in writing. That makes a total of a little over 10 hours of investigation meeting, ignoring breaks for lunch. I regard that as being equivalent to a day and a half of investigation meeting.

[12] As to whether Mr Oliver should be entitled to costs on an indemnity basis, it is only in exceptional circumstances that the Authority may make an award on such a basis. Those circumstances have been summarised by the Employment Court recently in *Richard & Jennifer Adams t/a Untouchable Hair & Skin v. Shannen Brown*<sup>5</sup>. In *Brown* the Court held that indemnity costs were appropriate where a party has acted *vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding*. The threshold for such an order requires *exceptionally bad behaviour*.

[13] I do not accept that the respondent behaved *exceptionally badly* in defending the claims against it. First, it is regrettably not uncommon for parties not to respond to

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<sup>5</sup> [2016] NZEmpC 13, at [44]

written personal grievance letters raised by advocates and lawyers on behalf of former employees. Whilst such conduct is not to be condoned, there might be any number of reasons for such conduct which does not justify the award of indemnity costs.

[14] In this case, for example, I note that Mr Oliver was arguing that Star Moving Limited had been his employer at the time of his resignation. The Authority found that this was not the case. Therefore, there could well have been an acceptable reason for the respondent not to feel compelled to respond to the personal grievance letter.

[15] Whilst the Authority is able to take into account *Calderbank* offers (offers of settlement made which are clearly intended to be without prejudice save as to costs), it does not appear that any such offers were made by or on behalf of Mr Oliver that the Authority is able to consider. Therefore, as the Authority is not permitted to know what happened at mediation between the parties, it cannot take the submission by Ms Boyce and Mr Murray regarding mediation any further.

[16] With respect to the submission that it should not have been necessary for Mr Oliver to have had to have brought a claim for unpaid holiday and sick pay, the majority of the investigation meeting was taken up by the Authority investigating the unjustified dismissal and disadvantage allegations.

### **Determination**

[17] I do not consider that the circumstances of this case merit the award of costs against the respondent on an indemnity basis. The starting point will, therefore, be the daily tariff which, at the material time, was \$3,500 per day.

[18] As I have stated above, the investigation meeting can be taken to have lasted one and a half days. This gives a potential costs award of \$5,250 (\$3,500 plus \$1,750).

[19] Mr Oliver was not entirely successful in his application in that the Authority did not agree with him that his employer was Star Moving Limited at the time of his resignation. However, in taking into account only how long the investigation meeting lasted in total, no account has been taken of the further costs incurred by Mr Oliver's advocates having to prepare further submissions in respect of the unpaid holiday pay and pay for a day's sick leave. Therefore, on a "swings and roundabouts" basis, I

believe that it is just not to reduce the sum of \$5,250 despite Mr Oliver not being wholly successful.

[20] Not seeing any cogent reason to increase this sum, nor to reduce it, my finding is that the appropriate award of costs against the respondent as a contribution to Mr Oliver's costs is the sum of \$5,250.

[21] Turning to disbursements, Mr Oliver is clearly entitled to a refund of the \$71.56 lodgement fee and the further sum of \$153.33 for the second half day of investigation<sup>6</sup>.

[22] Turning to airfares claimed by Mr Murray for travelling to Nelson from Christchurch, I do not accept that the respondent should pay these fares. This is for two reasons. First, Mr Oliver chose to engage two advocates, Ms Boyce and Mr Murray. Ms Boyce is an experienced employment law advocate and is based in Nelson. In my view, she could have represented Mr Oliver on her own.

[23] Secondly, the Employment Court has adopted the approach of refusing to pay for the cost of travel and accommodation incurred by out of town counsel; I refer to *Commissioner of Salford School v Campbell*<sup>7</sup>. For the same reason, I disallow this disbursement.

## **Orders**

[24] I order the respondent to pay to Mr Oliver:

- (a) the sum of \$5,250; and
- (b) the Authority's aggregated fees of \$224.89.

**David Appleton**  
**Member of the Employment Relations Authority**

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<sup>6</sup> I understand that this sum has not yet been charged by the Authority, but that it will be shortly.

<sup>7</sup> [2015] NZEmpC 186 at para.[70]