

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 20A/09
5104294

BETWEEN TONY KONELIO OPETAIA
 Applicant

AND TRANS OTWAY LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Kent Arnott, Counsel for Applicant
 Amy Scott, Counsel for Respondent

Submissions received: 16 March 2009 from Applicant
 14 April 2009 from Respondent

Determination: 20 May 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 24 February 2009 I found that the applicant had personal grievances that he had been unjustifiably disadvantaged and unjustifiably constructively dismissed. I made awards in his favour for compensation and lost wages. I also found that the applicant should be paid for one day when he was on sick leave and I ordered the applicant be reimbursed for three alternative leave days that I found were incorrectly deducted.

[2] I reserved the issue of costs and encouraged the parties to come to an agreement about costs, failing which I timetabled for an exchange of submissions.

[3] The applicant duly complied with the timetable and lodged and served submissions as to costs. The respondent through its counsel advised that a challenge had been lodged and would prefer submissions on costs to be dealt with after the challenge had been heard.

[4] I indicated to the parties that it was my preference to deal with the issue of costs in the Authority at this stage. The respondent then provided its submissions as to costs.

The applicant's submissions

[5] Mr Arnott submits on behalf of the applicant the actual costs incurred by the applicant excluding attendances related to mediation were \$8,301.71 inclusive of GST and disbursements in the sum of \$296.41 made up of the filing fee, photocopying and courier fees.

[6] Mr Arnott set out the following factors to be considered in terms of costs:

- The Authority investigation meeting took one full day;
- Considerable time had to be spent on submissions due to the manner in which the respondent approached the matter;
- The applicant approached the matter fairly and appropriately;
- The Authority found for the applicant in every respect and did not find that he contributed to his personal grievance;
- The respondent took a lot of convincing to attend mediation and the matter should have resolved earlier if mediation had been attempted at the outset.

[7] Mr Arnott refers to the full Employment Court judgment in *PBO Limited (formerly Rush Security Limited) v. Da Cruz* [2005] 1 ERNZ 808 and the principles in that case when the Authority is considering costs.

[8] Mr Arnott submits that while a daily tariff can be used the applicant requests in this case that an award of costs be based on actual reasonable costs incurred because if there is not a substantial award then it renders the ability of an applicant to take a justifiable grievance to the Authority somewhat illusory if the costs of doing so are a substantial part of the award.

Respondent's submissions

[9] Ms Scott on behalf of the respondent says in her submissions that she accepts that the investigation meeting took one day and that the Authority found against the respondent in every respect of the applicant's claim and there was no contribution assessed.

[10] Ms Scott submits that the legal principles applied by the Authority in determining costs are well established and there is an underlying philosophy that the Authority is a simple and cost effective way to resolve employment relationship problems. Ms Scott also refers to the principles in *PBO Limited*.

[11] Ms Scott submits that there are no circumstances in this case to support that an award be made for a greater amount than the notional daily tariff because the respondent approached the matter fairly and in good conscience. The respondent, she submits, does not accept that it took a considerable amount of convincing to attend mediation and the respondent attend mediation when directed to by the Authority in March 2008.

[12] Ms Scott also submits that the applicant's claim was not framed in a concise manner as a constructive dismissal claim and that the amount of the award made to the applicant is sufficient to pay his legal costs and reap some financial benefit and that an award of costs is not to act as a punishment. Ms Scott submits that the claim was a fairly straightforward personal grievance, the applicant did not incur any travel costs with respect to his witnesses or legal representative and there are no reasons on the part of the respondent to warrant a greater award of costs. She submits an award in the normal range of \$1,500 - \$2,000 would be appropriate.

Determination

[13] There is no good reason in this case to depart from the usual principle that the party who is not successful pays a contribution towards the costs of the successful party. I am not satisfied that this is a case however where there should be an award of full costs.

[14] I have regard to the full Court judgment in *PBO Limited* and the principles concerning costs in the Authority. I accept Ms Scott's submission that costs are not to act as a punishment. Although the employment relationship problem in this case was

described in the statement of problem as an unjustified dismissal rather than an unjustified constructive dismissal, it would have been obvious during the investigation meeting and the evidence that the claim was in reality an unjustified constructive dismissal claim. The respondent did request an opportunity to put further submissions on that point and was given that opportunity. In my view it was clear from the applicant's final submission that there was a claim of unjustified constructive dismissal and therefore this could have been dealt with by the respondent in its original submission. I do not take the way the matter was framed therefore in the statement of problem into account in terms of costs.

[15] The personal grievance was not unduly complex but there were some other matters about unpaid leave which increased the time that would normally be required to prepare and investigate a personal grievance of this nature.

[16] In the Employment Court judgment of *Terson Industries Limited v. Aaron Loder* WC 10/09 30 April 2009 Judge Shaw said at pg.[45] that:

The Court has recently observed that, given the passage of time since the PBO Ltd case, a tariff of \$3,000 per day can be considered an appropriate starting point for costs awards in the Authority, rather than the upper end of the scale.

[17] I am of the view that a suitable starting point in this case is \$3,000. The applicant was required to lodge an application with the Employment Relations Authority because there was no agreement at an early stage to attend mediation. I am not satisfied in the circumstances of this case that there should be an adjustment for that because it is difficult to assess whether lodging such an application would have been required in any event, therefore not increasing the cost to the applicant.

[18] I do find however that the matter concerning the leave claim did increase the time taken to investigate and also taken to prepare for this matter. An assessment by Trans Otway of at least the alternative leave days may well have resolved that matter saving time and cost. Availability and taking of alternative leave days are matters of record and an employer should be able to easily ascertain whether or not alternative leave days have been taken. The inability for the respondent to do that resulted in a cost to the applicant in terms of establishing his entitlement and giving evidence about it. I make an adjustment in terms of that additional cost upward of \$300.

[19] I also make an adjustment for the applicant's written submissions received after the investigation meeting and the cost of preparing the costs submission. I made an adjustment in that regard of \$500.

[20] The disbursements of \$70 for the filing fee and \$216.42 for the photocopying and \$9.99 for the courier are in my view reasonable and should be awarded.

[21] I order Trans Otway Limited to pay to Tony Konelio Opeteia the sum of \$3,800 costs and \$296.41 being disbursements.

Helen Doyle
Member of the Employment Relations Authority