

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 286
5314944

BETWEEN VIPULKUMAR PATEL
 Applicant

AND PEGASUS STATIONS
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: V Patel in person
 S-J Davies, counsel for respondent

Memoranda received: 27 June 2011 from applicant
 17 June 2011 from respondent

Determination: 4 July 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 19 May 2011 I found Mr Patel's dismissal was justified. Costs were reserved.

[2] The respondent seeks costs calculated as \$3,000, being the notional daily rate applied for investigation meetings of one day, plus the travel costs for out-of town counsel and one witness.

[3] Mr Patel submitted that:

- (i) the application should be declined because it was filed outside the timetable specified in the authority's determination;
- (ii) he is unable to meet an order for costs;
- (iii) he is not obliged to meet the costs of the out-of-town counsel and witness; and

- (iv) costs should be declined because the respondent refused to attend mediation.

[4] The remaining matters Mr Patel has raised concern the merits of his grievance, as well as aspects of his dissatisfaction with the approach taken by the Authority to its investigation. These are not relevant to a consideration of costs.

1. Leave to proceed out of time

[5] The Authority received the respondent's memorandum on costs on the day after the expiry of the timetable specified in the substantive determination. The respondent has asked either that the timetable be varied or that leave to file the memorandum out of time be granted. No reason was given for the late filing, but nor was there any indication of prejudice to Mr Patel as a result. Accordingly leave is granted to file out of time.

2. Whether costs should be awarded

[6] As the successful party, the respondent is entitled to a contribution to its costs.

[7] The applicant's ability to pay is a relevant consideration. I have no information about his circumstances beyond the employment-related information produced at the investigation meeting, and his assertion that neither a union nor legal aid would assist him. There was, however, an element of acknowledgement that his ability to pay is limited. That may be taken into account in considering a possible reduction in the amount sought.

[8] As to the costs of counsel and the out of town witness, I accept that the witness' flights should be reimbursed, but since Auckland-based counsel could have been instructed I make no order for the reimbursement of counsel's flights.

[9] Regarding mediation, the respondent refused initially to attend mediation, but was directed to do so by the Authority. The record indicates mediation went ahead. There is no need for that matter to sound in costs.

[10] Moreover, during the conference call at which the direction was made the respondent referred to the weakness of the applicant's case, and asked that the applicant be formally warned of the possibility of an order for costs against him in the event that he proceeded and was unsuccessful. The warning was noted, in the presence of the advocate on record as representing Mr Patel at the time. Mr Patel is therefore fixed with notice of the warning, and has chosen to proceed. I also take that matter into account in assessing costs.

[11] On balance, and subject to the cost of counsel's flights, the respondent's request for an award of costs in the sums identified is fair and reasonable, and should be granted.

Order for costs

[12] Mr Patel is ordered to contribute to the respondent's costs in the sum of \$3,000 plus \$338.37 in respect of the witness' travel costs.

Security for costs

[13] The respondent sought a further order that any award of costs in the Authority be paid in full into a Ministry of Justice account as partial security for costs in the challenge Mr Patel has filed in the Employment Court. I consider the matter of security for costs in the challenge to be one for the Employment Court and make no further order.

R A Monaghan

Member of the Employment Relations Authority