

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 193
5334589

BETWEEN ADRIANA PENNEY
 Applicant

AND DEBORAH JEANNE
 HAMBLY
 Respondent

Member of Authority: R A Monaghan

Representatives: D Foster, counsel for applicant (on costs)
 D Hambly in person

Memoranda received: 22 May 2012 from applicant
 8 May 2012 from respondent

Determination: 6 June 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 31 October 2011 I found that Ms Penney and Ms Hambly were not in an employment relationship.

[2] Costs were reserved, and Ms Hambly has sought an order for costs in her favour.

Delay in seeking costs

[3] Ms Hambly advised the Authority she would be seeking legal advice from a community-based service about what could be claimed by way of costs. To that end she sought an extension of the timetable set out in the determination. As Ms Hambly lives in a rural area, and the services she sought are provided during what I understood to be clinics conducted on a 6-weekly cycle of visits to her area, several extensions of time were granted in order to accommodate these circumstances.

[4] Counsel for Ms Penney submitted that, even so, Ms Hambly had not taken opportunities to obtain advice in a more timely way, and pointed out that she failed to meet a final date of 4 May 2012 set by the Authority. He submitted that the claim should be declined because of the excessive delay in pursuing it.

[5] I am satisfied with Ms Hambly's attempts to obtain advice and to seek extensions of time as appropriate. Her claim for costs can be considered.

The parties' submissions

[6] Ms Hambly seeks costs on the basis of a notional daily rate of \$3,000 for an investigation meeting. The \$6,000 claimed as a result comprises one half day in respect of mediation conducted on 15 June 2011¹, one day for an investigation meeting conducted on 25 July 2011, and a further half day for the resumed investigation conducted by telephone in August 2011. Since time spent in mediation is not included when determining the number of days to which the notional daily rate applies, and a full day was not required on 25 July, the appropriate starting point would be \$3,000 not \$6,000.

[7] In the alternative, Ms Hambly seeks a contribution to the expenses she incurred, in the sum of \$4,000. Her expenses included:

- Travelling time and parking costs;
- Professional services provided by a retired lawyer, in the sum of \$750;
- Medical attention;
- Babysitting costs;
- Personal time calculated at \$200 per day; and
- Miscellaneous disbursements.

[8] Counsel for Ms Penney submitted that costs should lie where they fall. He pointed to the preliminary nature of the matter investigated and the fact that there was an important issue to be clarified in respect of the relationships between Ms Penney, Ms Hambly and BJs Homebased Childcare Services Limited. He said further that Ms

¹ Although the mediation occurred at the same premises as the investigation meeting, Ms Hambly's attendance on 15 June was for that purpose and not for an investigation meeting in the Authority.

Penney is not in a position to pay large amounts of costs, although he did not provide any information in support of that point.

Determination

[9] The notional daily rate approach had its genesis in determinations on costs where one or both parties were represented at an investigation, and reflected the fact that there was a cost associated with obtaining that representation. The notional daily rate approach does not in general apply in respect of a party acting in person, as both Ms Penney and Ms Hambly did here.

[10] Similarly, as a party acting in person, Ms Hambly is not entitled to recover the costs of her time and other expenses incurred in attending to the matter. Only one of the items listed in support of her claim for costs is recoverable, namely the payment made to the retired lawyer.

[11] Counsel for Ms Penney pointed out, correctly, that the payment was not properly supported by an invoice, but prior to the investigation meeting and prior to counsel's involvement Ms Hambly had advised that she had obtained such assistance. I accept that she did so, and since the sum in question is modest and was supported by a bank record I take that matter no further.

[12] Counsel also pointed out, correctly, that it is likely some of the assistance concerned the mediation and is not recoverable.

[13] Taking these factors into account, Ms Penney is ordered to contribute to Ms Hambly's costs in the sum of \$375, being one half of the cost incurred in obtaining assistance from the retired lawyer.

R A Monaghan

Member of the Employment Relations Authority