

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 46A/09
5076597

BETWEEN HAROLD PERKIN
 Applicant

AND NICK McCABE t/a McCABE
 SILVICULTURE
 Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Advocate for Applicant
 Nicole Ironside, Counsel for Respondent

Investigation Meeting: 2 December 2008 at Nelson

Submissions received: 1 May 2009 from Applicant
 22 May 2009 from Respondent

Determination: 15 July 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 14 April 2009 I found in favour of the applicant that he had a personal grievance that he had been unjustifiably dismissed.

[2] I ordered the respondent to pay to the applicant the sum of \$2,500 for a compensatory payment.

[3] I reserved the issue of costs and have now received submissions from both representatives.

The applicant's submissions

[4] Ms Sharma refers in her submissions to a number of Employment Court cases and the principles therein with respect to costs. She refers to the principles in the leading case of the Full Court of the Employment Court *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

[5] Ms Sharma submits that the applicant incurred actual costs in the sum of \$5,629.37 (GST inclusive). She says for reasons set out in her submissions relating to settlement offers made between the parties that the applicant is entitled to a significant contribution towards his costs and indeed full costs.

The respondent's submission

[6] Ms Ironside in her submission submits the respondent offered the applicant \$2,500 and a written apology some eight days out from the investigation meeting which offer was exactly the same offer put on the applicant's behalf by Ms Sharma some six days earlier.

[7] Ms Ironside submits that the offer was made by the respondent within the context of an ongoing and continuous process of negotiation and the existence of such an offer from the respondent is relevant to the determination of costs in this matter.

[8] Ms Ironside submits that in all the circumstances the applicant should be required to contribute towards the respondent's costs or, alternatively, that costs should lie where they fall.

Determination

[9] It was of concern to the Authority that Ms Sharma did not attach the emails which Ms Ironside did, to her submissions dated 24 and 25 November 2008. That is because Ms Sharma made a submission that it was the actions of the respondent, in particular its inability to offer a simple written note of apology to the applicant that resulted in unnecessary costs to the applicant and on that basis the cost award should be full costs.

[10] The last letters attached to Ms Sharma's submissions were two letters that contained settlement proposals. The first letter was dated 18 November 2008 and was headed *without prejudice except as to costs*. The letter advised Ms Ironside that the applicant was agreeable to the respondent's offer of \$1,500 plus \$1,000 towards his legal costs in settlement of this matter. It made it clear that the acceptance of the offer was conditional upon the respondent writing a handwritten and signed letter of apology to the applicant. The offer was expressed to remain open until 4pm Wednesday 19 November 2008.

[11] Ms Ironside advised by email dated 18 November 2008 that there would be no apology made to the applicant and Ms Ironside asked for advice by 4pm that same day whether the matter could settle or whether the parties were required to proceed to the Authority hearing.

[12] On 20 November 2008 Ms Ironside wrote again to Ms Sharma and put forward a further settlement on the basis of the same monetary payments but that there is an oral apology extended to the applicant by her client.

[13] Ms Ironside advised in her letter that the offer was not made on a without prejudice basis because it was proposed to present the letter as evidence to the Authority of her client's attempts to settle the matter.

[14] Ms Sharma responded to the offer by letter dated 21 November 2008 advising that her client wished to have the matter determined by the Authority.

[15] There was however a further email sent to Ms Sharma from Ms Ironside dated 24 November 2008 and headed *without prejudice save as to costs* which set out that the respondent was prepared to meet the terms contained in Ms Sharma's letter of 18 November, being \$1,500 compensatory payment, \$1,000 in costs and a written apology. These conditions were it was provided in the letter to be recorded in a record of settlement under s.149 of the Employment Relations Act 2000.

[16] Ms Sharma responded to Ms Ironside settlement proposal in an email dated 25 November 2008 and advised that her client's instructions were to proceed to the Authority for a final determination.

[17] Settlement proposals do form part of the matters which the Authority can consider in the exercise of its discretion with respect to costs.

[18] I take the following matters into account. The investigation meeting was on 1 December 2008, which was only eight days after the final offer was provided by Ms Ironside and was made against a background where Ms Sharma had made it clear in her earlier letter of 21 November 2008 that Mr Perkin wished to proceed to an investigation meeting. Ultimately Mr Perkin was awarded more by way of a compensatory payment than was contained in the settlement proposal because he would be entitled to an award of costs.

[19] I am not persuaded that in exercising my discretion as to costs I should not make an award at all in favour of the applicant. I see no reason in this matter to depart from the usual principle that the successful party is entitled to an award of costs.

[20] I do however have regard to the settlement proposal to the extent that had the applicant accepted the offer contained in the email of 24 November 2008, which was the same basis on which he was prepared to settle a few days earlier, he would have been saved the additional cost of attending an investigation meeting and provision of submissions.

[21] The investigation was conducted within one day. There were no unduly complex matters of fact or law. There were a number of witnesses. I do not find that there should be a full award of costs and I have already expressed my concern over the basis for that submission by Ms Sharma and the failure to provide all the relevant correspondence to the Authority

[22] In all the circumstances I think a suitable starting point for costs would be the sum of \$2,500 which I intend to reduce by \$500 taking the settlement proposal into account and in particular the fact that that offer had been acceptable to the applicant a few days prior. Mr Perkin should also receive his filing fee of \$70. That is a total award of \$2070.

[23] I order Nick McCabe to pay to Harold Perkin the sum of \$2,000 being costs and \$70 towards the cost of the filing fee.

Helen Doyle
Member of the Employment Relations Authority