

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 139
5554893

BETWEEN JAMES MICHAEL SEXTON
 Applicant

A N D MANUKA HILL 2003 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Steven Zindel and Abigail Goodison, Counsel for
 Applicant
 Ian Duncan, Advocate for Respondent

Submissions Received: 3 July 2017 from Applicant
 No submissions from the Respondent

Date of Determination: 14 August 2017

COSTS DETERMINATION OF THE AUTHORITY

A Manuka Hill 2003 Limited is ordered to pay to James Michael Sexton costs in the sum of \$4,250 together with reimbursement of the filing fee in the sum of \$71.56.

Substantive Determination

[1] In my determination dated 19 June 2017 I found in favour of the applicant that he was entitled to be reimbursed for some days incorrectly deducted from his annual leave entitlement. I did not uphold an unjustified action causing disadvantage grievance in respect to the obligation to pay for power. I found that Mr Sexton was unjustifiably dismissed from his employment and made awards for compensation and reimbursement for moving costs.

[2] I reserved the issue of costs and set a timetable for an exchange of submissions. The applicant's costs submissions were received within the timeframe set out in the determination of 3 July 2017 however no submissions have been received by the respondent.

The applicant's submissions

[3] Ms Goodison on behalf of the applicant in her submission as to costs refers to the full Court judgment in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹ which confirms that the Authority is able to set its own procedure and that it has held to some basic tenets when considering costs. The full Court of the Employment Court in *David Fagotti v Acme & Co Limited*² was not satisfied that the broad principles stated by the full Court in *Da Cruz*³ should be departed from or even altered.

[4] The applicant is legally aided and Ms Goodison attaches bills that have been provided to legal services. The invoices for the applicant from Mr Zindel's office are in the sum of \$7,585.72 (including GST). Ms Goodison refers to previous counsel's bill of \$9,231.05 for invoices submitted to legal services.

[5] Ms Goodison refers in her submissions to telephone conferences with the Authority on 6 October 2016, 27 February 2017, and 9 March 2017 and the respondent's late filing of its statement in reply and evidence. Ms Goodison submits that the delay in filing the statement in reply from 28 July 2016 when the statement of problem was lodged until 21 October 2016 should be reflected in any cost award.

[6] Further Ms Goodison submits that the respondent's statement of evidence was not received by the timetabled date. Another telephone conference was convened on 27 February 2017 to discuss that and on 9 March there was a further conference to discuss the provision of financial information and confidentiality.

[7] The investigation meeting itself occupied about six and a half hours and the daily tariff at that time was \$3,500. Ms Goodison refers to provision by the applicant of an 86 page bundle of documents and written submissions which were provided at the conclusion of the investigation meeting. Ms Goodison submits that with legal aid costs at \$7,585.72 including GST and with the previous bill of \$9,231.05 a figure in between \$4,000 - \$8,000 for costs should be arrived at.

Determination

[8] There is a discretion as to whether costs are awarded and if so in what amount. The discretion is to be exercised in accordance with principle and not arbitrarily.

¹ *PBO v Da Cruz* [2005] ERNZ 808

² *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at 114

³ Above n 1 at [44]

Some of the principles held by the full Court in *PBO*⁴ to be applicable to the Authority in exercising that discretion include that costs generally follow the event. The successful party is usually entitled to a contribution toward his or her costs. The successful party in this case was the applicant. The most significant claim was that the applicant had been unjustifiably dismissed.

[9] Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct but conduct that increases costs unnecessarily can be taken into account in inflating or reducing an award.

[10] Ms Goodison in her submission has referred to earlier fees incurred by the applicant with another counsel. The Authority is unaware of what those fees were incurred for and whether some were for attendance at mediation. Mr Zindel's firm was instructed when the statement of problem was lodged with the Authority in this matter. My focus must be on the costs incurred and invoiced to legal services by the applicant from the point the statement of problem was lodged in the sum of \$7,585.72.

[11] I find that it is appropriate to start in the exercise of my discretion with the daily tariff which was \$3,500 at the time. The investigation meeting occupied one full day. I have then considered whether there should be any adjustment up or down to the daily tariff.

[12] The applicant was not completely successful but he did have success with his main claim which took the most time at the investigation meeting and was the main focus of the evidence.

[13] There were some delays on the part of the respondent. The statement of problem was lodged on 28 July 2016 and served on the respondent. Mr Duncan then requested an extension to lodge and serve a statement in reply and an extension was granted until 16 September 2016 however no statement in reply was received by that date.

[14] The first case management conference was held on 6 October and a direction made that the respondent was to lodge and serve a statement in reply by no later than close of business 7 October 2016. The matter was also set down for an investigation meeting and a timetable set for an exchange of statements of evidence

⁴ Above n 1 at [44]

[15] No statement in reply was received by the timetabled date from the 6 October 2017 case management conference. There was some cost for the applicant as a result of the delay. His counsel contacted the Authority and Mr Duncan by email concerned about the failure to meet the timetable and then there was a further failure by the respondent to lodge and serve statements of evidence within the required timeframe. Mr Zindel in his communication noted that there may be cost implications for the failure to comply with the timetable. A further case management conference was held on 27 February 2017 to deal with these issues.

[16] A further case management conference was then held on 9 March 2017 shortly before the investigation meeting about the provision of financial information which could have been avoided with a more timely supply of statements and documents as timetabled.

[17] I find that there was a failure by the respondent on several occasions to comply with the timetable and directions made. I accept that this increased costs for the applicant as there was additional communication and attendance on case management conferences required as a result.

[18] I find it would be fair and reasonable to increase the daily tariff by \$750 and award total costs in the sum of \$4,250 together with the filing fee incurred by the applicant in the sum of \$71.56.

[19] I order Manuka Hill 2003 Limited to pay to James Michael Sexton the sum of \$4250 costs and disbursement in the sum of \$71.56.

Helen Doyle
Member of the Employment Relations Authority