

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 7
5369354

BETWEEN CAZNA WAAKA
Applicant

AND CITY LINE (N.Z). LIMITED
trading as VALLEY FLYER
Respondent

Member of Authority: Michele Ryan

Representatives: Kevin O'Sullivan, Advocate for the Applicant
Susan Jane Davies and Natalie Pilcher, Counsel for the
Respondent

Submissions Received: On 15 November 2012 for the Applicant
On 22 November 2012 for the Respondent

Determination: 17 January 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 23 October 2012 I found that the applicant, Ms Waaka, was unjustifiably disadvantaged and unjustifiably dismissed from her employment with the respondent, City Line (NZ) Ltd t/a Valley Flyer. Ms Waaka received compensation for the unjustified dismissal although this sum was then reduced by 50% for contributory conduct. Costs were reserved.

[2] The Authority has received submissions as to costs from Mr O'Sullivan, Secretary of the Wellington branch of the New Zealand Tramways Union, who represented Ms Waaka during the Authority's investigation.

[3] Mr O'Sullivan seeks total costs of \$3,394.21. Costs were estimated at \$2,000. for preparation and \$800 for attendance at the investigation. Disbursements of \$151.56 (inclusive of the filing fee), plus GST on the total sum are sought.

[4] Mr O’Sullivan says the principle that costs follow the event is applicable in the circumstances and that the costs were reasonably incurred. He asks that this sum be awarded to the New Zealand Tramways Union.

[5] The respondent opposes the application for costs. It submits that in the circumstances of this matter costs should lie where they fall.

The law

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[7] The approach as to how the Authority should assess costs is well settled. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*¹ the Employment Court referred to a number of principles which give guidance to the Authority when it considers costs. I have applied those principles in my assessment as to costs.

[8] The Court affirmed the Authority’s power to award costs as discretionary and that awards of costs are modest. The discretion to award costs should be exercised in a principled manner and not arbitrarily. The Court noted at [46]:

We find there is nothing wrong in principle with the Authority’s tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case.

...

The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority’s modest approach to costs.

Discussion

[9] The usual approach of the Authority is to assess costs using a notional daily tariff of \$3,500 per day of investigation.

¹ [2005] ERNZ 808

[10] The Authority has discretion to raise or lower the tariff depending on the circumstances of the matter.

[11] A long standing principle is that costs follow the event and where there are no circumstances that militate against that principle, a successful party may anticipate a reasonable contribution towards costs.

[12] I do not accept the submission that Ms Waaka's contributory conduct towards her dismissal should result in a proportional reduction of an award of costs. In *Singh v Sherildee Holdings Ltd t/a New World Opotiki*² the Court found that "There is no established principle to this effect" and declined to adjust the award on this basis.

[13] The applicant's contributory conduct to the situation which led to her personal grievance reflected in a reduction to compensation she would have otherwise received and the Authority is not entitled to take into account the same behaviour when assessing costs³.

[14] Ms Waaka was unsuccessful in obtaining remedies for lost wages or an order for reinstatement. The evidence produced in relation to those claims moderately increased the length of time taken to investigate the matter and I regard these as factors which may tend towards a reduction to the daily tariff.

[15] Against an order for costs, the respondent submits that Ms Waaka was represented by a union official. It says in these circumstances Ms Waaka's costs were covered by her union fees and therefore are minimal.

[16] The fact that Ms Waaka was represented by a paid union official does not preclude an award of costs. Unions may recover costs in cases where they support their members in litigation⁴.

[17] In *Murphy and Routhan t/a Enzo's Pizza v van Beek*⁵ the Court articulated the general rule that a party who is not represented by law practitioners cannot recover anything for that party's time and trouble in attending to the litigation. However it noted that this was not an absolute rule and that there were exceptions to it. These include awards of costs in relation to the time spent by in-house solicitors, union

² EmpC Auckland AC53A/05, 26 October 2005

³ *White v Auckland District Health Board* [2008] ERNZ 635 at [51]

⁴ *IHC New Zealand v Scott* AC 45A/06

⁵ [1998] 2 ERNZ 607

advocates and other representatives in preparing for cases in recognition that the unsuccessful party should contribute to the paid time of its opponent's representative.

[18] I recognise that the costs structure for providing representation by an official in a union setting is likely to be lower as compared to engaging external counsel.

Determination

[19] The investigation meeting took a full day and was not complex in nature. The applicant was only partially successful in her claims.

[20] I consider it appropriate to award a modest contribution towards costs and expenses incurred by Ms Waaka's union representative.

[21] In the circumstances of this matter and in accordance with the principle that costs should follow the event, pursuant to Section 15 of Schedule 2 of the Employment Relations Act I order the respondent to pay the applicant the sum of \$750.00 plus \$71.56 for the filing fee.

[22] I note that these costs and expenses, although made in favour of the applicant, may be used to appropriately reimburse the union, if those arrangements are agreed between them⁶.

Michele Ryan
Member of the Employment Relations Authority

⁶ *O'Malley v Vision Aluminium Ltd* (No 3) [1992] 2 ERNZ 1043