

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 9
5448438

BETWEEN AMY WALKER
Applicant

A N D GAEL and PETER WATSON
Respondents

Member of Authority: David Appleton

Representatives: David Feist, Advocate for Applicant
Phil Butler, Advocate for Respondents

Submissions Received: 22 December 2014 from Applicant
23 January 2015 from Respondent

Date of Determination: 29 January 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 8 December 2014¹ the Authority found that Ms Walker had been unjustifiably dismissed, and was awarded remedies, subject to a reduction for contribution. Costs were reserved, and the parties directed to seek to agree how they should be disposed of. It appears that they have been unable to do so, and so this costs determination disposes of that matter.

[2] Mr Feist, on behalf of the applicant, seeks the sum of \$3,500, which amounts to the standard daily tariff in accordance with which the Authority often awards costs. However, he states that the applicant has only been charged \$2,811.05 by her advocate.

[3] Mr Butler, understandably, objects to an award of \$3,500 in costs, given that that sum would exceed the sum charged to the applicant by her representatives. The fundamental purpose of awarding costs in the Authority is to enable the successful

¹ [2014] NZERA Christchurch 205

party to recover a proportion of his or her costs incurred in bringing or defending proceedings. It is not to enable the successful party (or their advocate) to make a profit out of a costs award. I can, therefore, reject without further analysis the application for a costs award of \$3,500. The question remaining is, what is the appropriate sum to award?

The legal principles to apply when determining costs in the Authority

[4] The Authority's power to award costs is set out in paragraph 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

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.

[5] Mr Butler referred in his submissions to the very well-known principles which the Authority must take into account when determining how legal costs and expenses should be dealt with, and which are set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. These principles include the following:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct

which increased costs unnecessarily can be taken into account in inflating or reducing an award.

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] Mr Butler contends that both parties had their successes and failures. Whilst this is an arguable proposition, I am satisfied that the applicant succeeded materially in her claim and that costs should therefore follow the event. I do not believe that Mr Butler is seriously arguing otherwise.

[7] Mr Butler makes the point that the applicant's representative did not confirm that the applicant was not pursuing a disadvantage personal grievance until the investigation meeting itself. Whilst Mr Butler does not state how much his client incurred in costs by way of Mr Butler having to prepare to defend an unjustified disadvantage personal grievance that had been strongly hinted at in the statement of problem and supporting documentation² (which ostensibly consisted of a number of elements) I accept that the costs award to the applicant should be scaled back as a result of this very late withdrawal of this part of the applicant's claims.

[8] Mr Butler states that the applicant's representative asked for a contribution towards costs in the sum of \$1,500 soon after the Authority's determination was released. He does not say why this offer was not accepted by him, but it clearly was not (or it was withdrawn before acceptance) and so I do not accept that this offer can

² The applicant, by way of her representative of the time, had been directed to confirm whether she was pursuing such a claim by no later than 8 weeks before the investigation meeting, but had failed to do so.

now be relied upon by the respondent in arguing that costs should be limited to \$1,500.

[9] Mr Feist states in his submissions that the investigation lasted a full day. This is incorrect, and it actually lasted between 11am and 2.30 pm, almost exactly half a day. In view of the fact that the respondent is likely to have incurred additional costs because of the very late confirmation that she was not pursuing an unjustified disadvantage personal grievance, I believe that it would not be just to award \$2,811 to the applicant. I believe that it would be just to award the sum of \$1,750, being the standard tariff for an investigation meeting lasting half a day.

Order

[10] I order the respondent to pay to the applicant the sum of \$1,750 by way of a contribution to her costs.

David Appleton
Member of the Employment Relations Authority