

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 167A/10
5166999

BETWEEN CAREY WALTERS
 Applicant

A N D TULLOCH TRANSPORT
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Joseph O'Neil, Counsel for Applicant
 Linda Penno, Representative for Respondent

Submissions: 22 September 2010 from the Respondent
 6 October 2010 from the Applicant

Determination: 19 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 27 August 2010 I dismissed Mr Walters' personal grievance claim of unjustified dismissal. Costs were reserved. I now have memoranda from the parties. This determination resolves the question of costs in the Authority.

[2] I will treat the matter as having taken a day's investigation time even though the meeting lasted about an hour and a half less. We had a shorter than usual lunch break and the parties at their request provided written submissions after the meeting rather than making submissions during the meeting.

[3] Tulloch Transport was wholly successful. There is no reason to depart from the usual rule that costs should follow the event.

[4] I am told that the respondent's legal costs total \$9,559.38 (excluding GST) on an hourly rate basis but I have not been given any breakdown of the work done. In

response, the applicant says that the time spent was more than double what would be reasonable for this matter. For the reasons that follow I intend to approach the assessment of costs here on a daily tariff basis so it is not necessary to canvass the reasonableness of the respondent's costs other than to be satisfied (which I am) that reasonable costs well exceed the award to be made.

[5] There is a submission that I should award only 66% of the assessed daily tariff and I am referred to *Chief Executive of the Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73 to support that approach. In *Tawhiwhirangi* the Court observed that costs in the Authority generally are not assessed by reference to a starting point of 66% of actual and reasonable costs. By comparison that is the usual approach of the Employment Court supported by cases such as *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA). Accordingly I do not accept counsel's submission.

[6] The claim for the respondent is for costs of \$4,500.00 on a daily tariff basis because of Mr Walters' refusal to accept any wrongdoing on his part and because he persisted before the Authority with an explanation for his conduct (the yellow line defence) that he never raised with his employer during the disciplinary meetings.

[7] To increase costs because of a party's denial of culpability would be wrong in principle because it would amount to punishing them. Here, Mr Walters was entitled to advance the view that he had done nothing wrong or contrary to his employment obligations by using the personal grievance process to challenge the employer's justification for dismissing him. In other cases employers deny lack of justification for such decisions. A finding in a particular case of justification or the lack of it is not a reason to increase or reduce costs.

[8] It is not uncommon for an employee to include in their personal grievance claim an explanation for their conduct that was not given during the disciplinary process or to recast or modify an explanation that was referred to. Similarly, employers commonly in seeking to justify dismissals include information or allegations that were not raised during the disciplinary process or were peripheral or formulated differently. The relevance of such material depends on all the circumstances of the case. Here, Mr Walters claimed to have mentioned during the disciplinary meetings his view that the yellow road markings that he crossed over while driving were of no legal effect because they did not comply with relevant

standards. I found that one aspect of the yellow line defence was mentioned before the dismissal but the more sophisticated point about it being a legal nullity was first mentioned in correspondence shortly after the dismissal. The issue required investigation and findings from the Authority. Although he was found to be wrong, Mr Walters should not be punished by increased costs for the position he took in the proceedings.

[9] A standard award on a daily tariff basis for this uncomplicated matter would be \$3,000.00. The matter was dealt with expeditiously by counsel.

[10] The only point for further consideration is the submission that Mr Walters financial position is such that he cannot afford an award greater than \$2,500.00. I have not been provided with any evidence to establish Mr Walters' financial circumstances. In light of that I decline to make any adjustment to the daily tariff as assessed.

[11] Mr Walters is to pay the respondent \$3,000.00 in costs.

Philip Cheyne
Member of the Employment Relations Authority