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Warren Skerret Investments Limited v Broad (Christchurch) [2011] NZERA 475; [2011] NZERA Christchurch 97 (4 July 2011)

Last Updated: 10 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 97

5312456

BETWEEN

WARREN SKERRETT INVESTMENTS LIMITED Applicant

A N D

DONALD BROAD
Respondent

Member of Authority:

Helen Doyle

Representatives:

Rob Towner, Counsel for applicant Peter Churchman, Counsel for Respondent

Applicants submissions 9 June 2011 Respondents submissions 31 May 2011

Date of Determination: 4 July 2011

DETERMINATION OF THE AUTHORITY ON COSTS

[1] The Authority granted an adjournment of investigation meeting dates set for 2 and 3 June 2011 at the request of the applicant in Dunedin. The application was vigorously opposed by the respondent. I indicated that I intended to fix costs on the application for adjournment and timetabled accordingly for an exchange of submissions. I have now received submissions from Mr Churchman and Mr Towner.

Respondent's submissions

[2] Mr Churchman submits that all of the matters relied upon by the applicant in support of the application for adjournment were matters foreseeable and then ignored by the applicant. Mr Churchman states in his submission the issue as to whether the applicant was the correct party was drawn to the applicant's attention promptly after the statement of problem was lodged - one of the grounds relied on for adjournment was that an application was to be made to join a third party. Mr Churchman submits that to wait for a matter of days until the evidence from the applicant was due to decide that it needed documents from a non party was *outrageous*.

[3] Mr Churchman submits that the applicant sought a significant indulgence from the Authority for an adjournment at the last moment and that this has resulted in significant wasted expenditure. He set out that this includes; his work and the work of the instructing solicitor preparing the matter for the anticipated hearing; cancelling the arrangements as to travel and accommodation of counsel and witnesses made; reviewing the memorandum filed by way of application for adjournment;

preparing and responding by way of memorandum in opposition; participating in a telephone conference with the Authority regarding the adjournment; reviewing the decision and making submissions on costs.

[4] The time spent was set out as below:

- Respondent's solicitor 2.5 hours at his charge out rate of \$250 per hour comes to \$625.00 plus GST.
- Respondent's counsel 10.2 hours at an hourly rate of \$400 that is \$4,080.00 plus GST.

[5] Mr Churchman submits that following the approach of Judge Travis in *Prins v Tirohanga Rural Estate Group* AC 54/03 6 October 2003 where 25% of costs sought were awarded on an adjournment. On that basis Mr Churchman submits an appropriate contribution by way of costs would be 25% or \$1,176.25 plus GST.

Applicant's submissions

[6] Mr Towner set out the reasons for the adjournment. They were an intention to seek an order requiring production of various documents from the respondent's current employer that has now been lodged and served; one of the applicant's key witnesses was unexpectedly unavailable to counsel from late March; there was an intention to apply for joinder of another company and that application is now lodged and served and finally the applicant wished to make changes to the amended statement of problem including its damages claim.

[7] Mr Towner refers to the principles relevant to the Authority's consideration of costs set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005]

ERNZ 808 and that the daily tariff around \$2,500 to \$3000 is appropriate to the Authority's modest approach to costs. He suggests that the Employment Court and High Court judgements referred to by Mr Churchman should be treated with caution because of the different policy considerations that apply in the Authority.

[8] Mr Towner does not accept the criticism about the last minute nature of the adjournment. He submits it was three and a half weeks prior to the investigation meeting and two weeks prior to when the respondent would have been required to file his statements of evidence. He does not accept that there was a significant amount of wasted work in the circumstances and say that the majority of fees incurred related to the adjournment application and not the substantive proceeding. He took objection to the strong language used about the adjournment and said that the applicant's application was not *outrageous* rather than the Authority considered it justified.

[9] Mr Towner submits taking into account the relevant principles and Authority determinations together with the facts of the case a contribution to costs in the sum of \$300 is in order.

Determination

[10] Not all preparation undertaken by the respondent would be wasted preparation and Mr Churchman recognised this in his submission and the amount sought for costs. I do accept though as stated by Judge Travis in the *Prins* case that *there would be an element of preparation lost and the need for counsel to reacquaint himself with the documentation and evidence for the delayed hearing.*

[11] This has to be balanced with the circumstance in this case where the adjournment was requested before both parties statements of evidence were due to be lodged.

[12] The joinder application was only one of the reasons for the adjournment however I accept that the potential need to join this company as a party to the proceedings was raised by the respondent's counsel at an early stage however not acted on at that time.

[12] Authority cost awards are frequently modest but have moved with the times and the need to award a realistic contribution toward representative's costs. For example it is now recognised that the daily tariff is usually \$3000 and there have been awards of up to \$3,500.

[13] In the exercise of my discretion I consider it fair in making a cost award that takes into account the work required on the adjournment application including the memorandum of opposition to the adjournment prepared and lodged and attendance on a telephone conference with the Authority. I also take into account work required for changing travel and accommodation arrangements and an element of preparation involved that will be wasted because of the adjournment. In considering these matters I have regard to the fact that this was an application made close to the dates set for investigation that had been in place for some time. This matter was set down for two days and the subject matter was more complex than many cases that come before the Authority. I have also had regard to the fact that the application preceded the lodging of statements of evidence and that much of the preparation will not be wasted time.

[14] In all the circumstances of this case I consider a fair award to be \$600.

[15] I order Warren Skerrett Investments Limited to pay to Donald Broad the sum of \$600 being costs on the adjournment.

Helen Doyle

Member of the Employment Relations Authority

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