IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 98
5641910

	BETWEEN	WESTERN INSTITUTE OF TECHNOLOGY AT TARANAKI Applicant
	AND	ANGELA PARR Respondent

Member of Authority:	M B Loftus
Representatives:	Hamish Kynaston and Ella McLean, Counsel for Applicant Angela Parr, on own behalf
Submissions Received:	26 September 2017 from both parties
Determination:	2 October 2017

COSTS DETERMINATION OF THE AUTHORITY

---

[1] On 8 August 2017 I issued a determination upholding WITT's claim Mrs Parr failed to comply with a provision contained in a mediated settlement she and WITT had concluded on 26 February 2014.[1] It resulted in a compliance order and the imposition of a penalty.

[2] Costs were reserved and WITT, as the successful party, now seeks a contribution toward those it incurred pursuing its claim.

[3] Normally the Authority will use a daily tariff approach when addressing a costs application.[2] The normal starting point is $4,500 per day and from there adjustment might be made depending on the circumstances.

---

[1] [2017] NZERA Wellington 73
[2] refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[4] The investigation took a day which, applying the tariff, would see a contribution in the order of $4,500.

[5] WITT is of the view I should, for various reasons, order a larger contribution. It asks the tariff be doubled. To that it seeks the addition of significant disbursements. The total sought is $13,643.61.

[6] In support of its claim WITT notes its actual costs are significantly greater than the contribution sought. It notes unsuccessful attempts to resolve the matter without having to resort to costly litigation and the fact Mrs Parr failed to respond to its approaches. It is submitted those failures unnecessarily increased its costs.

[7] The disbursements include the cost of the three handwriting experts WITT consulted in order to gather evidence it needed to try to enforce the 2014 agreement; the cost of a process server and the Authority's filing fee.

[8] Mrs Parr opens her response by asking why there should be a further financial imposition given the penalty imposed was *global*. She then says the substantive outcome was, at least in part, based on my having made incorrect assumptions. She claims the outcome was harsh and that should be taken into consideration.

[9] Mrs Parr refers to the fact costs should not be used to punish or as an expression of condemnation of the unsuccessful party's conduct except to the extent it unduly increased costs. Here she notes she was out of the Country at the time WITT initially sought a response which might have avoided litigation and upon her return was distracted by a serious injury to a close relative who needed her care. She refers to the fact she subsequently attended mediation but criticises WITT for its approach to that.

[10] Finally Mrs Parr asserts that being a superannuatant she is of limited means and has *no means to pay any further costs*.

[11] Mrs Parr's arguments as to why she should not be asked to contribute to WITT's costs do not persuade me. She says costs should not be used to punish other than to the extent they were unreasonably increased by a party's behaviour. She is correct but the punishment aspect was addressed via the penalty. It was *global* in that respect but did not address costs which are a separate consideration and normally follow the event.

[12] Turning to the other issues Mrs Parr raises. Any harshness or inaccuracy in the substantive determination should be addressed through a challenge. It is not a factor when considering costs but in any event I note the determination has not been challenged. Indeed I understand the penalty has been paid. The determination is what it is. It favours WITT totally.

[13] There is no evidence supporting the claim of impecuniosity. To that I add knowledge of the original settlement (details of which are suppressed[3]) and the fact Mrs Parr can still afford overseas vacations. That argument, as presented, carries no weight.

[14] That leads to a consideration of WITT's argument the tariff should be significantly increased. Essentially the argument is it was forced to litigate as Mrs Parr failed to respond to its attempts at resolution and her failure was unreasonable.

[15] Again, and as with Mrs Parr's arguments, I remain to be convinced.

[16] The evidence I heard during the substantive investigation supports the claim Mrs Parr was initially away and there were personal issues. When she turned her mind to the issues she engaged in mediation though I accept she was tardy in initially responding. It is not for me to question why the parties were unable to resolve their differences in mediation.[4] Suffice to say they didn't.

[17] Add to the weaknesses in WITT's prime argument why the tariff should be increased is the fact it became clear during the substantive investigation its goal was putting an end to what it saw as improper criticism. I got the distinct impression cost had, to some extent, become irrelevant. These factors lead me to conclude the normal daily tariff remains appropriate.

[18] Turning to the disbursements. The filing fee is a given but I have doubts about other elements. WITT stated in its submission it was not seeking to address legal costs incurred in trying to resolve the issue prior to filing.[5] While not legal costs the bulk of the cost of the three handwriting experts was also incurred during that period. Furthermore I doubt three reports were needed and costs were undoubtedly enhanced

[3] n 1 at [5]
[4] Section 148 of the Employment Relations Act 2000
[5] Submissions at [9]

by the fact it was not until original documents were provided a categorical view could be given by one of the experts. That was WITT's doing.

[19] These initial reports were, to me, part of ascertaining whether or not WITT even had an argument. It was a cost of business and the way these issues were argued makes it clear that had a deal been done those costs would not be sought.

[20] The only part of these costs I believe should be recognised was that incurred in having one of the experts attend the investigation, especially as her evidence essentially determined the outcome.

[21] The applicable invoice is for $796.55 and I conclude that should be recognised. Similarly I conclude the cost of the document server should also be recognised. By the time that was seen as necessary Mrs Parr was back in New Zealand. She could have at least acknowledged WITT's attempts to contact her and said she was otherwise engaged. She didn't, thus forcing WITT to adopt the approach it did. The relevant invoice is for $333.50.

[22] For the above reasons I conclude the disbursements toward which Mrs Parr should make a contribution total $1,201.61. I round that to $1200.00

Conclusion

[23] For the above reasons I order the respondent, Angela Parr, pay the applicant, Western Institute of Technology at Taranaki, the sum of $5,700.00 (five thousand, seven hundred dollars) as a contribution toward the costs WITT incurred in successfully pursuing its claim.

[24] Payment is to be made no later than 4.00pm on Monday 30 October 2017.

Mike Loftus
Member of the Employment Relations Authority