

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 122
5435392

BETWEEN ROBERT AARON WHITE
 Applicant

A N D TELECOM NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Mark Henderson (Counsel) and Geraldine Biggs
 (Advocate) for Applicant
 Emma Butcher, Counsel for Respondent

Submissions Received: 15 July 2014 from Applicant
 25 July 2014 from Respondent

Date of Determination: 12 August 2014

COSTS DETERMINATION OF THE AUTHORITY

- A. Telecom New Zealand Limited is to pay to Robert Arron White the sum of \$3,900 costs together with disbursements in the sum of \$88.81.**

The substantive determination

[1] The Authority in its determination dated 25 June 2014 found the applicant was entitled to reimbursement of lost commission, holiday pay and interest on the sum of lost commission. The amount of lost commission and holiday pay were quantified in a determination dated 14 July 2014 as \$38,095.70 and \$3,047.66 respectively. Interest was awarded on those amounts.

[2] The Authority did not find the applicant raised his personal grievance alleging unjustified actions causing disadvantage within the 90 day statutory timeframe nor that such delay was occasioned by exceptional circumstances. Costs were reserved in the determination dated 25 June 2014 and it was clarified in the determination dated 14 July 2014 that costs would be determined when submissions were lodged.

[3] Submissions have now been provided on behalf of both parties as they have been unable to agree costs.

[4] The applicant's employment relationship problem with the respondent was investigated with that of another applicant, Gregory Allott on two consecutive days. The issues were very similar and dealing with the matter in this way saved time because witnesses were only required to give their evidence once. There was one agreed bundle of documents and joint submissions were provided.

The applicant's submissions

[5] Mr Henderson and Ms Biggs refer in submissions to the full Court judgment in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 and the principles recognised in *PBO* to be consistent with the functions and powers of the Authority.

[6] Actual costs and disbursements incurred by the applicant were \$18,032.76. Invoices were attached to the submissions. Costs were incurred on the basis of charge out rates inclusive of GST of \$330 for Mr Henderson and \$220 for Ms Biggs. Time was discounted in various invoices. There was no claim for time corresponding with the applicant about his redundancy and relating to the timing to the personal grievance in the 18 July 2013 which leaves a balance for actual costs of \$17,158.99.

[7] It is submitted that a higher than usual tariff amount should be awarded to the applicant in this case because of the complexity of the case where there was the need for the applicant to obtain detailed contractual and financial documentation about his claim. Further, it was submitted that information requested during a telephone conference with the Authority on 18 November 2013 was not able to be provided until 28 January 2014 notwithstanding an agreement to provide that information by 15 December 2013.

[8] It is submitted that financial documents in the agreed bundle (AW docs.1, 2 and 3) were provided without any information as to their significance and meaning.

After that information had been provided, it is submitted that the applicant and respondent entered into detailed correspondence regarding the relevant financial and contractual documentation and claiming rules in letters written between January and March 2014 significantly reducing the length of time otherwise to address these issues at the investigation meeting.

[9] Reference was made to the withdrawal of a claim that the applicant's revenue achievement had been calculated on the basis of revenue generated by him over 4.25 months rather than 12 months. The respondent's financial manager clarified this but it is submitted not until during the investigation meeting. There was reference to the length of the agreed bundle of relevant documents amounting to 200 pages, the applicant's first statement of evidence of 33 pages and joint legal submissions, amounting to 35 pages.

[10] The second matter relied on is that whilst costs associated with mediation are not usually awarded an allowance should be made in relation to this matter. The applicant requested the respondent attend mediation in correspondence from his lawyers dated 27 May 2013 but the respondent did not accept that the personal grievance was raised in time and would not comment further on mediation until information about that was provided. On 5 July 2013, the applicant provided information as to why he asserted the grievance was raised within time and asked again whether the respondent would confirm it would attend mediation but no reply was received.

[11] On 22 July 2013, the applicant wrote and advised that proceedings would be lodged with the Authority as no response had been received. Proceedings were duly lodged in October 2013. A statement in reply was lodged on 4 November 2013. In its statement in reply, the respondent agreed to attend mediation regarding the claims raised in relation to Wages Protection Act 1993, the Fair Trading Act 1986 and estoppel. The applicant submits that in those circumstances it is entitled to recover costs for mediation.

[12] On 24 March 2014 an offer was made by the applicant on a without prejudice save as to costs basis for the sum of \$30,000 lost remuneration, \$2,000 compensation and \$2,000 by way of a contribution toward legal costs. The offer was not accepted by the respondent and the matter proceeded to an investigation meeting on 1 and 2

April 2014. It submitted that the offer was reasonable, the applicant was awarded considerably more than the offer and therefore it should be taken into account in the award of costs.

[13] The submissions also refer to further costs being incurred when documents were produced pertaining to the written approval of the re-win target change and consideration of the IGG document after the investigation. Costs were incurred with respect to consideration of the IGG document and the respondent's additional statements of evidence and taking instruction for and preparation of a joint supplementary brief of evidence lodged on behalf of the applicant.

[14] The applicant seeks an award of costs in the sum of \$12,000 including GST and disbursements which is \$8,950 before the *Calderbank* offer and \$3,050 afterwards. In submissions there is reference to a reduction having been made to reflect the applicant was unsuccessful in his claim regarding the raising of his personal grievance within the statutory timeframe and a deduction of 10% has been made.

The respondent's submission

[15] Ms Butcher notes the lodging of the statement of problem took place in October 2013 but costs are claimed from before that time. She submits that the respondent co-operated with the applicant's request for information and the delay with provision was because of the extent of the information sought and the time to retrieve it. Further information sought was provided and on 14 March 2014 counsel for the applicant confirmed that it was satisfied the information was being provided.

[16] Ms Butcher submits that there should be no costs award in relation to any mediation issues because when the statement of problem disclosed alternative causes of action other than the grievance, the respondent immediately agreed it would attend mediation and that its earlier refusal was not unreasonable.

[17] Ms Butcher submits that at the time the offer to settle was made, all the work for the investigation meeting had been done by both parties, the applicant had prepared its evidence and work was being completed for the agreed bundle. The respondent was still to finalise and file its witness statements and these had been prepared by that time. The offer was open for four days.

[18] Ms Butcher also submitted that the respondent had acted consistently with a group of employees in a manner that it considered to be lawful after provision of legal advice. Ms Butcher submitted it had been explained that the respondent genuinely believed in its position and that to significantly compromise by way of settlement would amount to inconsistent treatment of its employees and that it was important to have a determination of the position it had taken rather than compromise this.

[19] She submits that the respondent accepts the applicant's legal costs as presented are reasonable but some costs arose prior to proceedings being filed, and should not therefore be considered.

[20] The respondent accepts that it should make a contribution to the applicant's costs but that the daily tariff of \$3,500 should be applied in this case with a reduction as the respondent successfully defended the personal grievance claim. Ms Butcher submits the case was not one of particular complexity and while the applicant relied on a number of causes of action, this was essentially a straightforward personal grievance and/or wage arrears claim which she submits were supported by the fact that the claim was able to be dealt with in one day.

[21] Ms Butcher does not accept that the documents referred to by Mr Henderson and Ms Biggs as AW 1, 2 and 3 were provided without explanation as to their meaning or significance and attaches to her submissions an email to Ms Biggs dated 28 January 2014 about the documents.

[22] Ms Butcher submits that the claim should have been brought as either personal grievances or wages arrears recovery and that the introduction of estoppel and claims under the Wages Protection and Fair Trading Acts were unnecessary and caused the respondent to be put to additional cost of having to respond with legal argument on the claims. The Authority did not need to refer to the alternative causes of action. Furthermore, the respondent relies on the withdrawing of a claim by Mr White during the investigation meeting after both parties were put to the additional expense of having to answer that claim. Ms Butcher submits it was a fundamentally untenable claim from the outset and was only recognised in the course of Mr White giving his evidence.

[23] Ms Butcher submits that there was no conduct on the part of the respondent that increased costs unnecessarily. She submits the respondent approached the case

responsibly and worked cooperatively with the applicant and the Authority to ensure costs were kept to a minimum.

[24] Ms Butcher submits that the costs awarded to the applicant should be the sum of \$3,000 taking into account the reduction of his unsuccessful personal grievance claim.

Determination

[25] Two full days were required to investigate the employment relationship problems of the applicant and Mr Allott.

[26] The applicant is entitled to a contribution towards his costs.

[27] *PBO* confirms that there is discretion for the Authority as to whether costs are awarded and in what amount. That discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. If there is conduct though which increased costs unnecessarily this can be taken into account. Awards in the Authority for costs will be modest and frequently judged against a notional daily rate now recognised as \$3,500.

[28] An appropriate starting point in this case is the daily tariff of \$3,500 for a one day investigation meeting. From there it is necessary to consider the submissions and whether there should be adjustment and the daily tariff increased or decreased.

[29] There is a claim for a contribution towards the costs incurred in attending mediation. There have been some cases where costs incurred in respect of mediation have been found to be recoverable. It is unusual though for an award to be made. A respondent is often reluctant to attend mediation if it considers a personal grievance has been raised within the statutory time frame. The respondent did indicate in its statement in reply its preparedness to attend mediation in respect of the alternative claims. I am not satisfied that this is the sort of case where costs relating to mediation should be taken into account to increase the award of costs.

[30] I then turn to whether the nature of the applicant's case should result in an increase to the daily tariff. The daily tariff is applied on the basis of being inclusive of both preparation and the investigation meeting itself. The claim about the

retrospective adjustment of the sales target was not complex legally or factually. The claim about the re-win deductions had a degree of factual complexity in terms of understanding what was done and why it was done. Disclosure was important therefore for issues of liability and quantum. The respondent I find co-operated with the disclosure requests and although there was some delay I am not satisfied that it justifies an increase to any costs award. There was more front end work but the time of the actual investigation was reduced. I find a limited increase is justified and fair for the re-win claim as that front work was more extensive than in other cases. The daily tariff should be increased by \$500.

[31] One relevant document was omitted by mistake from the common bundle. The provision of that at a later time did cause some additional expense to the applicant and justifies an upward increase to the daily tariff of \$400.

[32] I find the withdrawal of a claim by the applicant to be a cost neutral issue. That is because I accept that Mr White was unsure from the documentation about that claim until evidence was given on that matter. There was some explanation about the documents AW 1, 2 and 3 and that matter does not require any adjustment to costs.

[33] The offer to settle in the nature of a Calderbank offer was made five working days out from the investigation meeting and was open for four days. The parties had by that point undertaken most of the preparation for the meeting.

[34] On a purely monetary assessment the applicant achieved more by proceeding to an investigation meeting five days later than he offered to settle for. He offered to settle for \$30,000 for lost commission just before the investigation meeting but was awarded over \$41,000 under this head of claim. Costs incurred after the offer was made were \$3,050. Taking these factors into account I do not place weight on the without prejudice save as to costs offer dated 24 March 2014 in exercising my discretion as to costs.

[35] There should be some adjustment to costs as the applicant was unsuccessful with respect to his personal grievance. A decrease to the daily tariff in the amount of \$500 is appropriate.

[36] I intend to only award expenses to the extent that they are payments to third parties. I have assessed the various invoices on that basis and two disbursements fall

into that category. The first is the filing fee to the Authority of \$71.56 as shown in invoice 30 October 2013 and the second is the courier fee of \$17.25 shown in invoice 9 April 2014.

[37] In conclusion from a starting point for costs of \$3,500 and allowing for an increase of \$900 and a decrease of \$500 there is to be an award of costs to the applicant in the sum of \$3,900 together with disbursements of \$88.81.

[38] I order Telecom New Zealand Limited to pay to Robert White the sum of \$3,900 costs together with disbursements in the sum of \$88.81.

Helen Doyle
Member of the Employment Relations Authority