IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 24
5422513

	BETWEEN	COLIN WIGHTMAN Applicant
	A N D	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Tim Cleary, Counsel for Respondent
Submissions Received:	4 February 2014 from Respondent 5 February 2014 from Applicant
Date of Determination:	11 February 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination dated 21 January 2014, the Authority determined that Mr Wightman had not been unjustifiably constructively dismissed, but that he had suffered an unjustified disadvantage in his employment in one respect, for which he was awarded $500 in compensation under s. 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Costs were reserved, and the parties have been unable to agree how costs are to be dealt with as between themselves.

[2] The respondent has served and lodged a memorandum of counsel in which it seeks a contribution of $3,500 towards the legal costs incurred by it in defending Mr Wightman's claims. Mr Wightman, in turn, seeks an order that costs should lie where they fall.

[3] The respondent argues that the outcome of the Authority's investigation represents a largely unsuccessful personal grievance claim by Mr Wightman. It also states that the respondent was put to additional legal expense because Mr Wightman failed to provide a statement of evidence, as directed, but instead provided documents which were a mix of factual allegations, hearsay, and legal submissions, which made it difficult for the respondent's witnesses to respond to the various matters so raised.

[4] The respondent seeks a contribution of $3,500 on the basis of the current daily tariff normally applied in the Authority for a defended investigation meeting. The investigation lasted one and a half days, but the respondent discounts the $5,250 it would otherwise seek in order to reflect Mr Wightman's moderate success. The respondent also seeks reimbursement of the costs of copying documents for the production of a common bundle in the sum of $204.24.

[5] Mr Wightman states, in reply, that

a. he represented himself because the respondent has not paid ACC support which he says he is due from the company;

b. both parties had partial success;

c. no prior Calderbank offer was made by the respondent;

d. the respondent committed a number of procedural breaches prior to, at and after the investigation hearing; and

e. he incurred costs and expenses to the tune of $7,612.50.

[6] I address the parties' submissions below, but first set out the *Da Cruz* principles governing the setting of costs awards in the Authority (*PBO Ltd (formerly Rush Security Limited) v Da Cruz*, [2005] 1 ERNZ 808)*:*

a. There is a discretion in the Authority as to whether costs would be awarded and 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 is 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.

Partial success?

[7] Whilst Mr Wightman did succeed in one of his claims of disadvantage, he failed in all others, which included an unjustified constructive dismissal claim, an application for reinstatement, an allegation of breach of contract and allegations of bullying by a supervisor. I agree with Mr Cleary's submission that, when viewed overall, Mr Wightman was largely unsuccessful in his claims. I am therefore satisfied, subject to what I say below, that costs should follow the event, and that Mr Wightman should make a contribution to the respondent's legal costs.

Additional legal expense incurred by the respondent?

[8] Mr Cleary does not stipulate in what amount the respondent incurred extra expense, but I do accept that Mr Wightman's failure, without explanation, to

provide a written statement of evidence is likely to have required the respondent (or at least Mr Cleary) to have had to carefully trawl through each document provided by Mr Wightman to see how it supported the claims he had made. I can consider this submission no further, though, in the absence of further costs information from Mr Cleary but do not believe it is necessary to do so in any event given the relatively modest amount of costs sought by the respondent.

Mr Wightman represented himself

[9] The reason given by Mr Wightman for representing himself is not relevant to this determination as the allegations made by him in respect of ACC were not the subject of the Authority's investigation. In any event, I cannot see how the fact of Mr Wightman representing himself supports his contention that costs should lie where they fall.

No prior Calderbank offer was made by the respondent

[10] It is entirely a matter of discretion whether a respondent makes an offer to settle prior to the Authority's investigation. Any failure to do so cannot reduce the respondent's right to a contribution to its costs where it has been successful. Indeed, if the respondent had made such an offer, Mr Wightman may have faced an application for costs from the respondent in a higher amount than he now faces.

Procedural breaches by the respondent

[11] Mr Wightman raises a number of alleged breaches of process by the respondent:

a. New evidence was not received from the respondent until the day before the hearing;

b. The new evidence contained documents that breached client confidentiality;

c. Witness statements were entered into the bundle from people who did not attend the investigation meeting;

d. Mr Wightman was not notified of witnesses who were the subject of witness summons;

e. Mr Cleary sent in to the Authority prejudicial material after the conclusion of the investigation meeting.

[12] The starting point in assessing Mr Wightman's argument is the principle derived from *Da Cruz* that costs are not to be used as a punishment or as an expression of disapproval, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award. Paragraph 15 of Schedule 2 of the Act contemplates that, consistent with the Authority's equity and good conscience jurisdiction, a wide view can be taken of the expenses of an applicant in person, possibly including loss of income while engaged in the proceedings. Mr Wightman was unrepresented at the investigation meeting, but prices his own professional time at $100 an hour, amounting to a total of $5,800, including preparation. It is not clear whether this hourly rate represents lost income.

[13] In any event, consistent with the Da Cruz principle articulated above, Mr Wightman's submissions regarding breaches of process are only relevant if they increased his costs and expenses and/or caused the investigation to have lasted longer than would otherwise have been necessary. I examine each alleged breach as follows:

a. That new evidence was not received from the respondent until the day before the hearing. I accept that this is true. However, Mr Wightman does not explain how this increased Mr Wightman's costs, or increased the length of the investigation meeting unnecessarily and I am not convinced that it did.

b. That the new evidence contained documents that breached client confidentiality. I understand this to be a reference to the respondent disclosing documents which may well have been records of confidential conversations between Mr Wightman and his union representative, which may therefore have been subject to professional privilege. I believe that consent should have been sought from the Authority by the respondent prior to these documents being disclosed.

It is not possible or appropriate to determine at this stage whether or not these documents should have been disclosed, but considering that, over all, the evidence of the writer of those documents (Mr Topp) took only 30 minutes to hear, the effect was negligible in the overall time taken to conduct the investigation meeting.

c. That witness statements were entered into the bundle from people who did not attend the investigation meeting. I do not understand this point. However, even if true, without further information as to how this caused Mr Wightman to incur expenses or for the investigation meeting to have been prolonged unnecessarily, I do not believe this argument is relevant.

d. That Mr Wightman was not notified of witnesses who were the subject of witness summonses. This may be true. However, this would not have caused Mr Wightman to have incurred expenses or for the investigation meeting to have been prolonged unnecessarily as he did not seek an adjournment, and I did not consider that one was necessary in the circumstances.

e. That Mr Cleary sent in to the Authority prejudicial material after the conclusion of the investigation meeting. I believe this is a reference to Mr Cleary sending in to the Authority a copy of a document that Mr Wightman had attempted to circulate to employees of the respondent after the Authority's investigation, but prior to the determination being issued. However, as Mr Wightman sought reinstatement, I believe that it was relevant for Mr Cleary to have sent the document in as the fact of Mr Wightman having circulated the material had a bearing on that question of reinstatement. As it turned out, reinstatement was not relevant as the Authority did not find that Mr Wightman had been unjustifiably dismissed.

[14] Overall, whilst there were some infelicities in the way that the respondent conducted itself in the proceedings, I do not believe that any of them justify a reduction in the amount of costs to be awarded to it.

Conclusion

[15] I conclude that it is appropriate for Mr Wightman to make a contribution to the legal costs of the respondent, and that the sum sought, $3,500, is a fair and reasonable amount in all the circumstances.

Disbursements

[16] No invoice has been produced to support the assertion that the respondent incurred copying costs in the sum of $204.24. Nevertheless, I am prepared to accept this statement at face value. However, as the copying was to produce a common bundle, from which both parties and the Authority benefited, it is fair, in my view, for the respondent and Mr Wightman to share equally the costs of producing it. I therefore believe that Mr Wightman should pay $102.12 towards this cost.

Order

[17] I order Mr Wightman to pay to the respondent the sum of $3,500.00 as a contribution to its legal costs, together with a further $102.12 towards its disbursements.

David Appleton
Member of the Employment Relations Authority