

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 279A/09
5070812

BETWEEN MS X
 Applicant

AND BAY OF PLENTY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Marija Urlich

Representatives: Brett Cunningham, Counsel for Applicant
 Mark Beech and Shima Grice, Counsel for Respondent

Submissions received: 22 September 2009, from Applicant
 5 October 2009 from Respondent

Determination: 12 November 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 14 August 2009 (AA279/09) Ms X's personal grievance claim of unjustified disadvantage was successful and remedies made in her favour. Costs were reserved. Memoranda have been filed setting out the parties' respective positions in respect of costs.

Submissions

[2] Mr Cunningham submits the Authority should, taking into account the following factors, make an award of costs in Ms X's favour of \$40,000 (plus GST) plus disbursements of \$2379.49 (plus GST):

- (i) Circumstances of the case
 - the applicant's costs have been significant;
 - the applicant's claim was a straightforward contractual entitlement;

- the principles enunciated in *PBO v Da Cruz*, relevant in particular discretion is to be exercised in accordance with principle and not arbitrarily, conduct which unnecessarily increased costs can be taken into account to inflate or reduce an award, the nature of the case can influence costs.

(ii) Conduct – delay and other issues

- conduct from date of filing (June 2007) applies;
- the respondent unreasonably delayed the setting down of this matter until December 2007 due to the unavailability of counsel;
- in late November the respondent applied for an adjournment and stay of the investigation on the basis of scope of the inquiry;
- it was necessary for the applicant to file an amended statement of problem to emphasis the scope of the inquiry;
- the applicant's view was confirmed when the evidence was filed and the Authority made orders limiting the scope of the inquiry;
- huge amount of time and delay was caused by the respondent's insistence that causation needed to be considered;
- points were unnecessarily taken.

(iv) Importance of the case

- the case was important to the applicant; she was unwell and sought reinstatement of her primary income;
- the respondent would not face this situation again as it had renegotiated the terms of the relevant collective employment agreement.

(v) Actual costs

- Ms X's actual billed costs total \$81,284.72 (plus GST) with disbursements of \$2379.49 (plus GST).
- The costs billed were reasonable given the protracted nature of the proceedings, the extensive documents involved and the need to file evidence over different times throughout the period of proceedings.

[3] Mr Beech submits if a costs award is warranted then the usual notional daily rate should be reduced by 50% and further reduced to an award of no more than \$5000 for the following factors:

(i) Delay

- Delays were attributable to the applicant's conduct – withdrawing from one mediation and attending another with counsel without notice to the respondent;
- the applicant's actions in lobbying for an OSH prosecution and the consequent necessity for the respondent to apply for a stay in proceedings introduced further delay.

(ii) Causation

- The applicant placed the question of causation before the Authority;
- The two issues were split – causation and the capping of sick leave - by direction of the Authority on 9 April 2008.

(iii) Level of success

- The applicant was not wholly successful in that she did not receive awards for all compensation and damages sought.

(iv) Other matters/Points taken at hearing

- These were not relevant to the questions before the Authority or concerned trivial issues which were dealt with within the investigation.

(v) Importance of the case

- Read with the outstanding personal grievance and the issue of causation, before the Authority until April 2008, this case was important to the respondent.

(vi) Actual costs

- The actual costs incurred by the applicant are unknown and excessive.

Determination

[4] *PBO Ltd v Da Cruz*¹ sets out the appropriate principles to be applied by the Authority in exercising its costs discretion.

[5] Ms X's claim before the Authority was substantially successful. It is usual that costs follow the event and I find that an award of costs in her favour is warranted in this matter. The parties' attempts at mediation and the application for stay of proceedings are not factors for consideration in the setting of costs.

[6] The investigation of this employment relationship problem was very time consuming in terms of preparation and the meeting time required. I accept this was by necessity for the following reasons; the numerous procedural steps required to advance the investigation of this matter, the complexity introduced in teasing out the causation issues from the sick leave issue and the volume of evidence traversing the long history leading to the parties' dispute over the payment of sick leave.

[7] These elements warrant a higher than usual notional daily rate which I set at \$5000 per day. In setting a total costs award this notional daily rate should be multiplied by four, the number of hearing days involved.

[8] The claim for disbursements concerns the usual administrative costs for courier, travel, filing fee and copying. Given the amount of documentation before the Authority and the long procedural history I accept the amount was validly incurred.

[9] **Bay of Plenty DHB is ordered to pay \$20,000.00 to Ms X in costs, plus disbursements of \$2379.49, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.**

Marija Urlich

Member of the Employment Relations Authority

¹ [2005] 1 ERNZ 808