

BETWEEN

ALEXANDER AN
Applicant

AND

ACCESS NEW ZEALAND
INTERNATIONAL LIMITED
Respondent

Member of Authority: Eleanor Robinson
Submissions received: 5 February 2018 from Applicant
8 February 2018 from Respondent
Determination: 09 February 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] In determination [2018] NZERA Auckland 30 it was determined that the Applicant, Mr Alexander Renke, had not been unjustifiably dismissed by the Respondent, Access New Zealand International Limited (Access), however he had been unjustifiably disadvantaged by the late payment of his holiday pay.

[2] A penalty was also awarded in respect of Access' failure to comply with s 66 (4) of the Employment Relations Act 2000 which states that the employment agreement must state in writing the way the employment will end and the reasons for ending the employment that way.

[3] In that determination costs had been reserved in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so, and both parties have filed submissions in respect of costs.

[4] The matter involved a one day Investigation Meeting.

[5] The Applicant is seeking a contribution to his costs at the daily tariff rate.

[6] The Respondent submits that the established principle that costs should follow the event should apply in this case; highlighting that the Applicant failed to succeed on his primary claim that he had been unjustifiably dismissed.

[7] The Respondent further submits that the imposition of a penalty in respect of the failure to comply with s 66(4) of the Act, and the issue of the late payment of holiday pay are relatively minor and any reduction from the full amount awarded in its favour for costs should be relatively modest.

Principles

[8] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[9] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[10] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² as confirmed in *Fagotti v Acme & Co Ltd*.³

[11] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[12] It is also a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party’s conduct.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2015] NZEmpC 135 at [114]

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

Determination

[13] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. For a one day investigation meeting the tariff would normally equate to \$4,500.00.

[14] Costs normally follow the event and Access is entitled to a contribution towards its costs.

[15] I take into consideration the fact that Access was not wholly successful in the matter, and reduce the tariff accordingly.

[16] Within 28 days of the date of this determination, Mr An is ordered to pay Access the sum of \$3,750.00 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority