

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

5118387
CA119/09

BETWEEN WARREN ANTHONY BUSH
 Applicant

AND MARLBOROUGH LINES
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Brian Fletcher, Counsel for Applicant
 Luke Radich, Counsel for Respondent

Submissions received: 17 February and 12 March 2009 from Applicant
 11 March 2009 from Respondent

Determination: 31 July 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In the Authority's substantive determination, Mr Bush succeeded in his claim of unjustified dismissal, and after the application of a 20% deduction for contributory conduct, received remuneration of \$8,546.80 gross and compensation of \$4,000. Costs were reserved and the respective counsel have attempted to resolve the costs issue but have been unsuccessful. It now falls to the Authority to determine the costs in these proceedings.

The principle

[2] The matter of costs is discretionary. That discretion must be exercised in a principled, not arbitrary, manner having regard to all the issues.

Calderbank offers

[3] The respondent made two genuine attempts to settle the applicant's grievance. Its offer of 18 June 2008 inclusive of \$2,000 contribution to Mr Bush's costs, was \$17,706. Exclusive of costs, the Authority awarded Mr Bush a total of \$12,564.80.

The difference is \$5,141.20. In the light of that difference, counsel for the respondent contends that costs ought to be awarded in the respondent's favour as the offer was made on a without prejudice save as to costs basis.

Analysis and discussion

[4] A principal issue in Mr Bush's declining the settlement offers was his insistence, following the clear second drug test, that he needed to clear his name in respect of the use of methamphetamine, an illicit substance.

[5] Counsel for the respondent submits that the existence of receipts and labels for the purchase of Sinutab came to light only on receipt of Ms Hook's statement of evidence by the respondent. Mr Radich, not unreasonably, submits that had that evidence been tendered earlier *the respondent clearly would have been more willing to accept the applicant's stated position that the positive test result was caused by Sinutab and not an illicit drug.*

[6] In the absence of that material evidence, which was submitted late, the respondent was entitled to maintain a cautious stance in respect to any agreed wording of a reference for Mr Bush, which reference was sought as part of a settlement arrangement between the parties prior to the Authority's investigation.

[7] Mr Bush was dissatisfied with the respondent's proposed reference, and in particular the reference to a *positive result for amphetamine-class drug* in spite of the respondent's draft going on to say *it [the respondent] would state this could have been a result of an over-the-counter medication and does not necessarily indicate Mr Bush had consumed an illicit drug.*

[8] The Authority, on the evidence before it, understands why Mr Bush found this proposed statement unacceptable. However, it must also take into account at the time the parties were attempting to resolve the issues between them, the respondent had not been provided with any evidence of the date and proof of purchase of the Sinutab.

[9] I am of the view had this information been provided to the respondent in the course of the resolution discussions, the respondent was most probably open to modifying the structure of the reference to be provided.

[10] The respondent submits that *about 75%* of its costs were incurred after the 18 June offer was rejected. Mr Radich submits those costs should not have been incurred and the responsibility for the bulk of the respondent's costs lies with the applicant and his *intransigent attitude*. On the basis of the figures provided by the respondent's counsel, a further \$5,000 in costs was incurred following Mr Bush's declining of the offer.

[11] The principled approach to discretion when determining costs requires the Authority to ensure that the judgment in favour of an aggrieved party is not rendered nugatory in a costs setting.

[12] The usual approach to costs is that a successful party is entitled to a contribution to costs reasonably incurred in accordance with the principles enunciated in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. In that decision, the Employment Court made it clear that costs are not to be used as a punishment nor as an expression of disapproval of the unsuccessful party's conduct. The same applies to a successful party. For example, see *White v. Auckland DHB* [2008] NZCA where the Court of Appeal confirmed the blameworthy behaviour that results in the reduction of remedies for a successful grievance is not relevant when assessing costs.

[13] Against this, I must also take into account the applicant's declining a reasonable offer of settlement, at least in monetary terms.

Determination

[14] Having considered counsels' submissions with care and also the principles enunciated in the cases referred to above, and also mindful of the late provision of information regarding the use of Sinutab by the applicant at the relevant time, I award the applicant the sum of \$2,500 as a contribution to his reasonably incurred costs. Further, I award disbursements in the sum of \$285.

Paul Montgomery
Member of the Employment Relations Authority