

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 158A/07
5035779

BETWEEN Irene Marian Callen
Applicant

AND Marie's Early Childhood
Learning Centre Limited.
Respondent

Member of Authority: Ken Raureti

Representatives: Richard Mark for Applicant
Marie Sanderson for Respondent

Submissions received: 20 June 2007 from Applicant
23, 24, & 25 June 2007 from Respondent

Determination: 4 July 2007

COSTS DETERMINATION OF THE AUTHORITY

[1] A determination of this matter was issued on 24 May 2007. Ms Callen was successful in her unjustifiable dismissal claim, and partly successful in her arrears of wages claim. Costs were reserved and the parties were requested to attempt to resolve the issue between them. They have been unable to resolve the matter.

[2] Mr Mark filed submissions with the Authority, indicating that Ms Callen's actual costs up to and including the investigation meeting in Whangarei amounted to \$5,683.69 (incl. GST). He further indicates that an additional \$1,400.00 (excl. GST) has been recorded in unbilled time since the investigation meeting. The unbilled time includes time recorded in relation to a further conference call on 5 April 2007, and a continuation of the investigation meeting by conference call with further witnesses on 3 May 2007. Mr Mark has not provided a summary breakdown as to how the total costs were incurred.

[3] Mr Mark is seeking \$3,500.00 as an award of costs based roughly on 66 percent of the applicant's solicitor/client costs, or alternatively an award of \$3,600.00 on the basis of a notional reasonable costs allowance of \$1,500.00 per day (for two days) and a multiplier of three to take into account preparation time. In both situations, Mr Mark has factored a 20% reduction from the amount sought to account for Ms Callen's blameworthy conduct reflected in the substantive determination.

[4] Ms Sanderson submits that both Ms Callen, and herself (as Director of MECLC Ltd) were in the wrong on occasions, and in the right on other occasions, in other words, she says they were both successful and both unsuccessful. Ms Sanderson indicates that she has no financial resources either personally, or through her company. Ms Sanderson's chartered accountant (Slater & Company) says that for the year ended 31 March 2006, the company had a taxable loss of around \$40,000.00 and it is expected that there will be a similar loss in the financial year ending 31 March 2007. Ms Sanderson says she is on the sickness benefit from which she receives \$175.00 per week, and that neither she, nor her company are in any position to negotiate costs. She says that this matter has been at considerable cost to her in terms of time, money and health. Ms Sanderson believes that overall it would not be fair and equitable if an award of costs was made in favour of Ms Callen.

[5] I have had regard for the submissions of both parties. The Authority's discretion to award costs is set out in Clause 15 of the Second Schedule of the Employment Relations Act 2000. The principles guiding the Authorities discretion are set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;

- That frequently costs are judged against a notional daily rate;
- 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.

[6] No supporting documentation or evidence to substantiate the respondent's financial circumstances was presented to the Authority. Ms Callen succeeded in her personal grievance claim; I am not persuaded to depart from the general rule that costs should follow the event therefore Ms Callen is entitled to a contribution to her costs. Costs awards in the Authority are modest. In exercising the Authority's discretion to award costs, Marie's Early Childhood Learning Centre Limited is ordered to pay Ms Callen \$2,500.00 as a contribution towards the costs she has incurred.

Ken Raureti

Member of the Employment Relations Authority