

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 273
5334611

BETWEEN IAN GRANT CARROLL
Applicant
AND COMMUNITY LIVING
TRUST
Respondent

Member of Authority: K J Anderson
Representatives: G O'Brien, Counsel for Applicant
G Steele, Counsel for Respondent
Submissions received: 19 April 2013 from Respondent
Nil from Applicant
Determination: 02 July 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 22 March 2013¹ the Authority found that the dismissal of Mr Carroll was justified. The parties were invited to resolve the issue of costs but have not done so. Submissions on costs have been received from the respondent. If the applicant wished to respond he was required to do so by 3 May 2013. On 12 June 2013, without any request for an extension of time to file submissions, Mr O'Brien (for the applicant) informed that he had only now received instructions from Mr Carroll to file costs submissions and that he would do so within "the next 7 days" that is, by 19 June 2013. The respondent (via Ms Steele) objected to an extension of time being allowed. In response to that objection, Mr O'Brien informed on Friday, 14 June 2013 that he would have costs submissions "ready on Monday" that is, 17 June 2013. No submissions have been received for the applicant, despite the latitude that has been allowed by the Authority.

¹ [2013] NZERA Auckland 99

[2] The respondent, Community Living Trust (the Trust) submits that it has incurred total costs of \$11,766.82 (including GST), plus disbursement costs of \$1,462.50 relating to the witness expenses associated with Mr Richard Edgehill, a consulting psychologist engaged by the Trust. Mr Edgehill was Mr Carroll's clinical supervisor at the material times but he was not an employee of the Trust; hence the cost of his professional fees, relating to him being a witness during the investigation of the Authority, was incurred by the Trust. The Trust is seeking full indemnity of the costs incurred in defending the claims of Mr Carroll, or "a proportion" of those costs.

[3] The submissions for the Trust acknowledge the tariff based approach of the Authority and the principles set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.² The Authority is also referred to a number of past determinations of the Authority and judgments of the Employment Court, in support of a higher award of costs than the current base daily tariff adopted by the Authority: \$3,500. It is urged that the usual tariff should be increased to \$8,000 for the one day of proceedings in this case. In support of this proposition the submissions for the Trust (summarised) refer to:

- (a) Deficiencies in the content of the statement of problem which had to be corrected by the applicant and interpreted in order for the respondent to prepare an appropriate response in defence of Mr Carroll's claims;
- (b) Allegations from the applicant of predetermination and a flawed process adopted by the Trust; but no evidence of such provided by the applicant;
- (c) A failure by the applicant to provide supporting documents relating to his claims and the respondent having to obtain such;
- (d) The applicant's claims relating to his loss of valued relationships and tertiary training opportunities;
- (e) A change in the applicant's representation without making this clear to the respondent; and
- (f) Documents and submissions not being provided in a timely manner.

[4] While it is accepted that there are certain circumstances that justify an increase (or a decrease) in the daily tariff applied by the Authority, there is nothing particularly unusual or novel about the facts of this case that would justify increasing the tariff from \$3,500 to \$8,000. However, I accept the further submission for the Trust that Mr

² [2005] ERNZ 808

Carroll's claim of unjustifiable dismissal was "obviously without merit" and I have no hesitation in expressing the view that any reasonable risk assessment would have come to this conclusion. While Mr Carroll was entitled to contest the decision of the Trust to dismiss him, one would have expected him to have advanced an arguable case at least. The failure by Mr Carroll to do that must be reflected, to some extent, in his contribution to the costs incurred by the Trust. I conclude that the usual tariff that would apply of \$3,500 should be increased to \$5,000.

[5] There is the matter of the disbursement claim by the Trust for the fees incurred due to the involvement of Mr Edgehill. I note that Mr Edgehill's invoice is for 11.25 hours of his time at \$130 per hour for "Preparing documentation". Without further explanation it is very difficult to assess what this means. Nonetheless, a witness statement was produced by him and he gave very relevant evidence about matters related to his clinical supervision of Mr Carroll, including the professional care of the couple associated with the unfortunate circumstances surrounding the dismissal of Mr Carroll. Given the nature of Mr Edgehill's evidence and making an assessment of how much time would be involved for him to prepare that, I conclude that 6 hours would be more reasonable. Therefore, the disbursement amount should be \$780 ($\130×6) and that is the sum that should reasonably be recovered from Mr Carroll.

Determination

[4] The matter of an award of costs to any party to the proceedings is at the discretion of the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000. For the reasons set out above, it is appropriate that Mr Carroll should make a reasonable contribution to the costs incurred by the respondent. Mr Carroll is ordered to pay to Community Living Trust the sum of \$5,000 and a further \$780 as disbursements: a total sum of \$5,780.00.

K J Anderson
Member of the Employment Relations Authority