

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 229
5470726

BETWEEN

DEBORAH CLIFF
Applicant

A N D

THE BAY OF PLENTY
DISTRICT HEALTH BOARD
Respondent

Member of Authority: T G Tetitaha

Representatives: W Reid, Advocate for the Applicant
G Bingham, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 22 June 2015 from the Applicant
29 June 2015 from the Respondent

Date of Determination: 5 August 2015

COSTS DETERMINATION OF THE AUTHORITY

- A. The respondent is ordered to pay the applicant \$5,250.00 towards her actual legal costs.**

Employment relationship problem

[1] The Authority in its substantive determination dated 11 June 2015¹ held Ms Cliff was unjustifiably dismissed, declined to grant reinstatement, ordered lost remuneration equivalent to one week's lost wages less PAYE, to be reduced by 50% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000 (the Act) and ordered the respondent to pay compensation of \$2,500 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Act. Costs were reserved.

¹ *Deborah Cliff v. The Bay of Plenty District Health Board* [2015] NZERA Auckland 168

[2] Ms Cliff seeks an award of costs of \$7,000 on the basis of the Authority's daily notional tariff of \$3,500 per day. Her actual costs incurred were \$10,080.

Issues

[3] The following issues are to be determined:

- a. What is the starting point for assessing costs?
- b. Are there any factors that warrant adjusting the notional daily tariff?

What is the starting point for assessing costs?

[4] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs². The current notional daily tariff is \$3,500. This matter involved a one and a half day investigation meeting given the second day concluded early. The starting point for assessing costs is therefore \$5,250.

Are there any factors that warrant a reduction in the notional daily tariff?

[5] The respondent submits were it not for the behaviour of the applicant the disciplinary process that led to the dismissal would not have been commenced. It submits that it was the applicant's causative behaviour that gave rise to the proceedings and the Authority should exercise its discretion to order that costs lie where they fall. Alternatively a reduction of 50% should be given to recognise the fact the applicant did not gain reinstatement.

[6] Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.³

[7] Contributory conduct has already been taken into account in the reduction of remedies. Accordingly no further reduction for contributory conduct shall be made for costs as well.

² *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16]

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808 (*EmpC*) at [35]

[8] The nature of the case may also influence costs, including the Authority ordering that costs lie where they fall in certain circumstances.⁴ Traditionally costs may lie where they fall in cases involving a novel issue of law or matter of public interest. There is nothing in the nature of this case which would require me to order that costs lie where they fall. Costs follow the event⁵.

[9] Although Ms Cliff may have been unsuccessful in reinstatement, she was successful overall. The evidence about reinstatement was a small part of the oral evidence only and in my view did not unnecessarily elongate the hearing to warrant any reduction in costs.

[10] Accordingly there are no factors which warrant a reduction in costs.

Are there any factors justifying an increase in costs?

[11] The applicant seeks an increase of 1,750 to reflect the direction for written submissions. The daily notional tariff addresses this issue. There are no factors justifying any increase in costs.

Outcome

[12] Accordingly the Bay of Plenty District Health Board is ordered to Deborah Cliff the sum of \$5,250 towards her legal costs.

T G Tetitaha
Member of the Employment Relations Authority

⁴ See above at footnote 3.

⁵ See n3.