

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 1A/10  
5145529

BETWEEN                      MARK JOSEPH CROWE  
   Applicant  
  
AND                                GREENBURN DAIRY FARM  
   LIMITED  
   Respondent

Member of Authority:      Philip Cheyne  
  
Representatives:            Mark Crowe, the Applicant in person  
   Linda Penno, Advocate for Respondent  
  
Submissions Received:    3 February 2010 from the Respondent  
   No reply from the Applicant  
  
Determination:              18 March 2010

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**DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 15 December 2008 I dismissed Mr Crowe's claim for interim reinstatement and reserved costs. In a further determination dated 7 January 2010 I dismissed Mr Crowe's substantive personal grievance claim and reserved costs for the parties to lodge and serve memoranda subject to a specified timetable. I now have a memorandum from the respondent but nothing from Mr Crowe.

[2]     During the interim reinstatement application Mr Crowe was represented by counsel who he disengaged sometime after the release of that determination and who was granted leave to withdraw. Mr Crowe then represented himself for the substantive investigation. After the meeting but before the release of the determination the Authority received an email from counsel advising that he was instructed to receive the determination when available. Accordingly the determination was sent to counsel on 7 January 2010. Subsequent email traffic

indicates that counsel may have lost contact with Mr Crowe but I will treat Mr Crowe as having notice of the determination and the timetable for any cost's submissions.

[3] The short point is that Mr Crowe lost his application for interim reinstatement, was made aware of the potential impediment to any substantial success on his substantive claim and then comprehensively lost that substantive claim. The respondent is now claiming *full costs* (\$13,757.54) or alternatively two days at a daily tariff of \$4,500.00 per day.

[4] I should make a brief comment about the *full costs* claim. It includes GST but should not since Greenburn Dairy Farm Limited will be a GST registered entity. It also includes the time involved in counsel's attendances for mediation. The Authority's usual approach is not to include mediation costs for present purposes.

[5] I do not think it appropriate to award indemnity costs. Mr Crowe was entitled to put the justification of his dismissal to the test as he did. There was nothing in the way that the matter was handled by counsel or by Mr Crowe that caused additional or unnecessary costs to the respondent. The proper approach is to assess costs in accordance with *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.

[6] In *Chief Executive of Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73 the Employment Court indicated that \$3,000.00 per day is a fair starting point for assessing costs on a daily tariff basis. That position was supported in *Johnson v Gilligan Business School Ltd* 3 April 2009, Travis J, AC14/09. I adopt that starting point here.

[7] There is good reason to increase the daily tariff for the interim reinstatement part of the matter. It was dealt with under conditions of urgency and the employer had to assemble a number of affidavits at short notice from witnesses (including those involved in the dismissal decision) in rural communities away from counsel's base. That no doubt caused extra time for counsel and a substantial fee for the use of a service agent. I will adopt counsel's suggestion that \$4,500.00 is appropriate for that part of the investigation. However, I do not accept that there should be a similar uplift for the substantive meeting. Much of the work in preparation of statements was already done. The meeting took less than a day because Mr Crowe's challenge to his dismissal was principally based on the idea that he was defending himself and that the

admitted assault was not during his working day. In these circumstances I find that \$3,000.00 is an appropriate award.

[8] There is nothing to establish that Mr Crowe cannot meet an award of costs.

[9] Mr Crowe is to pay costs of \$7,500.00 to the respondent.

Philip Cheyne  
Member of the Employment Relations Authority