

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

2013 NZERA Christchurch 42  
5301496

BETWEEN

KARYN CUMMING  
Applicant

A N D

ABSOLUTE INSURANCE  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Stephen Zindel, Counsel for Applicant  
Scott Fairclough, Counsel for Respondent

Submissions Received: 13 December 2012 from Applicant  
17 January 2013 from Respondent

Date of Determination: 4 March 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1] The Authority issued a determination on the merits dated 12 October 2012. The applicant (Ms Cumming) was awarded compensation for an unjustified dismissal but the amount was reduced by 50% by reason of her contribution.

[2] Costs were reserved.

**The application for costs**

[3] Ms Cumming seeks a contribution to her costs in the sum of \$14,000 plus \$324.17 by way of disbursements. The Authority is advised that the total amount invoiced to Ms Cumming for legal services in this matter amounts to \$16,918.02 together with the disbursements figure of \$324.17, already referred to by the Authority.

[4] Because Ms Cumming was legally aided, she cannot claim more in costs than the total amount of aid approved for payment to her.

[5] Ms Cumming makes the observation in her costs submissions that the remedies awarded were comparatively insignificant when measured against the costs incurred to achieve that result and she has an expectation that the amount she will be required to repay of legal aid will be in excess of the \$5,000 she was awarded by way of compensation. It is suggested that it would be unjust for Ms Cumming not to get some benefit from her successful prosecution of her grievance.

[6] Counsel for Ms Cumming urges on the Authority the proposition that this is a case where there ought to be some significant uplift in costs, beyond the traditional daily tariff approach or even the two thirds of costs incurred formula.

[7] One of the reasons for advancing that view is the extensive delays in getting the matter brought on for hearing which Ms Cumming attributes to the respondent (Absolute).

[8] Then the Authority is told that there were attempts to settle the matter, first in mediation and latterly in an alternative dispute resolution forum proposed by Absolute. The point is made that on each of these occasions, preparation work was required even although neither resulted in settlement.

[9] Further and finally, Ms Cumming's submissions make the point that as counsel is being remunerated exclusively on a legally aided rate, and therefore on a basis which those submissions describe as "*minimal*", it is appropriate for "*a greater proportion of the costs incurred on her behalf*" to be contributed to by Absolute.

### **The response**

[10] Absolute contends first that there is an argument for costs to lie where they fall. This proposition is essentially based on the fact that Absolute acknowledged that the dismissal was unjustified so "*... the hearing before the Authority was in effect a hearing as to quantum*".

[11] Further, Absolute maintains that the reason the parties were unable to settle matters before hearing was because Ms Cumming had unrealistic expectations.

[12] Moreover, Absolute says that Ms Cumming's approach to the litigation was confused and materially contributed to the costs incurred. In particular, the Authority is reminded that there were initially six separate personal grievances raised in her pleadings although she had to concede that only one of those personal grievances could proceed because none of the others had been raised within time. In addition, it is contended that much of the evidence for Ms Cumming concerned the other grievances rather than the one that was still alive.

### **The law**

[13] The relevant law on costs fixing in the Authority has been helpfully set out by the Employment Court in *PBO Ltd v. Da Cruz* [2005] ERNZ 808 and it is unnecessary to summarise the Court's conclusions here.

[14] In addition, the Authority has regularly derived assistance from applying the principles enunciated in a decision of the present Chief of the Authority, Member Dumbleton, in *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004). That decision postulated a three-step approach in evaluating applications for costs. The first step was the identification of the actual costs incurred by the successful party, the second was a consideration of whether, in all the circumstances, those costs were reasonable, and the third was the determination of what proportion of those costs ought to be met by the unsuccessful party.

### **Determination**

[15] The Authority is not attracted by Absolute's contention that costs should lie where they fall. It is the case that Absolute quite properly acknowledged that the dismissal of Ms Cumming was unjustified, but that did not obviate the need for there to be a hearing on quantum and that hearing obviously occupied time, time which had a cost to each party. On the basis of the usual legal principle that costs follow the event, Ms Cumming is entitled to look to Absolute for a contribution to her costs.

[16] The next question the Authority needs to address is the quantum of those costs incurred by Ms Cumming. The total bill has been disclosed and the Authority must consider whether the amount billed is reasonable in all the circumstances. This was not a complex case and it ought not to have incurred the level of cost that it did. To be fair to counsel for Ms Cumming, it is plain that the file went through a number of

legal hands before settling with the present counsel. Also, by way of balance, the Authority must make the point that Ms Cumming's various claims, the bulk of which were not justiciable, cannot have helped. But the job of experienced counsel is to focus the case around the achievable and not to allow the advancing of arguments which are never going to be allowed to proceed.

[17] In terms of the reasonableness of the fees charged, this was a stock standard personal grievance with little or no factual complexity. It was self-evident that Ms Cumming had been unjustifiably dismissed; the only question was one of quantum and the amount of contribution that needed to be taken into account. Given the threat to another staff member and the refusal to fulsomely withdraw and apologise, the contribution percentage was always going to be high. It is difficult to see how any of those matters have been adequately factored into the prosecution of this claim where, on the face of it, a large amount of public money has been spent arguing an absolutely straightforward case which would always produce a relatively low level of compensation because of the high level of contribution.

[18] What then should Absolute contribute to Ms Cumming's costs? The Authority accepts that Ms Cumming's prosecution of her claim was overly complex, particularly in respect of the pleading of six grievances, only one of which could proceed.

[19] Furthermore, on usual principles, Ms Cumming cannot look to mediation costs and other proper attempts to settle matters as a basis for inflating her claim for costs. The Authority's practice is typically to exclude costs incurred in those fora.

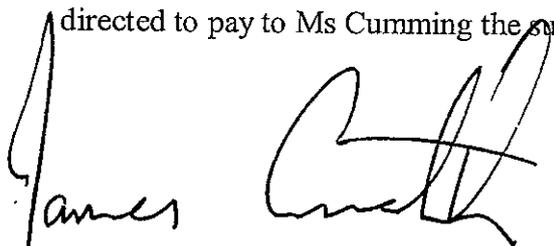
[20] Nor is the Authority much attracted by the argument that because counsel was remunerated at legal aid rates, the amount that Absolute should pay in total is larger. It can hardly be right that because Ms Cumming happens to be legally aided, and is successful, that her unsuccessful employer ought to make a greater contribution to her costs than would have been the case if she had not been legally aided. It is not Absolute's fault that Ms Cumming was legally aided and the Authority fails to see why the usual principles applied in a cost fixing environment ought not to apply here. The issue with the fees incurred by Ms Cumming is not the rate paid per hour for the services rendered but rather the total cost of these services.

[21] Nor is the Authority attracted by Absolute's contention that because Ms Cumming had 50% contribution applied to the compensatory figure awarded to her, the same percentage should reduce the costs award made in her favour. That is not in accordance with the Authority's jurisprudence. The Authority traditionally applies the rules relating to costs fixing irrespective of questions of contribution.

[22] In all the circumstances, the Authority feels the only proper course is to deal with the matter on the daily tariff basis. The matter took a day and a half and applying the usual daily tariff rate, that would produce a starting figure of \$5,250.

[23] The Authority acknowledges that there were delays in this matter, but is not satisfied that those delays ought all to be sheeted home to Absolute. By the applicant's own submissions, it is apparent that her matter was dealt with by a number of legal practitioners. Furthermore, the file was caught up in the Authority's offices as a consequence of the devastating Christchurch earthquake and the Authority is satisfied that much of the delay in getting this matter heard was a function of the Authority's own difficulties in providing any sort of service after the loss of its Christchurch offices in that seismic event. The Authority can only regret the delay but it is a delay that these parties share with many others. In all the circumstances, the Authority is not persuaded that the delays that are able to be attributed to Absolute do anything other than balance the delays that might be attributed to Ms Cumming. In the Authority's opinion, the principal reason that the matter took so long to be heard was because of the Authority's difficulties in Christchurch in providing any service at all.

[24] Looking at the matter in the round, the Authority is not persuaded that there should be any departure up or down from the daily tariff calculation. Absolute is directed to pay to Ms Cumming the sum of \$5,250 as a contribution to her costs.



James Crichton  
Member of the Employment Relations Authority

