IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 176
3022451

	BETWEEN	PHILIP DE BUYZER Applicant
	AND	WATTS & HUGHES CONSTRUCTION LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Peter Cahill, Advocate for Applicant Lynda Mathieson, Counsel for Respondent
Submissions Received:	Applicant's submissions 26 October 2018 Respondent's submissions 27 November 2018
Determination:	30 November 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A I order Watts & Hughes Construction Limited to pay to Philip de Buyzer the sum of $3,500 towards costs.

[1] The Authority in its determination dated 25 October 2018 found that the applicant was unjustifiably dismissed by the respondent and made awards for reimbursement of lost wages and compensation. The Authority dismissed the respondent's counterclaim.

[2] The issue of costs was reserved and a timetable set for an exchange of submissions. Submissions have now been received from both parties.

Applicant's submission

[3] Mr Cahill submits that Mr de Buyzer has incurred total costs of $13,460 including GST. He relies on the principles for awarding costs in the Authority as set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[1] and reaffirmed in *Fagotti v Acme Limited.*[2]

[4] Mr Cahill submits a contribution of $3,500 towards Mr de Buyzer's costs is appropriate. He has arrived at that taking into account that the investigation meeting was less than one day and the finding that there was contribution of 25%.

The respondent's submission

[5] This respondent has challenged the determination. Initially Ms Mathieson wanted the Authority to stay any determination of costs until the challenge had been dealt with. The usual practice of the Authority where there is a challenge is to determine costs. That means that the Employment Court will have before it all matters for determination.

[6] Ms Mathieson subsequently provided submissions about costs. She submits that the respondent has suffered significant financial disadvantage because of the recruitment of Mr de Buyzer and the recruitment fee that was paid. Further that if Mr de Buyzer had disclosed an accurate employment history he would not have been employed and that the respondent took steps by having a 90 day trial period to prevent the situation that arose.

[7] She submits that Mr de Buyzer should be responsible for his own costs on that basis.

Determination

[8] The Authority may under clause 15 of schedule 2 of the Employment Relations Act 2000 ("the Act") order any party to pay to any other party such costs and expenses as the Authority thinks reasonable.

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[1] *PBO Limited v de Cruz* [2005] ERNZ 808 at [44].
[2] *Fagotti v Acme Limited* [2015] NZEmpC 135.

[9] The exercise of the discretion to award costs is to be undertaken in accordance with principle and not arbitrarily. Awards in the Authority are modest and frequently assessed on the basis of a notional daily rate.

[10] The applicant was successful in this matter. The usual principle is that costs follow the event and I see no reason to depart from that principle in this matter. The matters Ms Mathieson refers to as to why there should be no award were the subject of the counterclaim that was unsuccessful. They are not strictly relevant at to costs as they go to merits but I have set them out as they are obviously important to the respondent. I record a principle of costs is that they are not to be used as a punishment.

[11] The notional daily tariff in the Authority is $4,500 for the first day of hearing and $3,500 for each subsequent day of the same matter.

[12] Mr Cahill in his submissions refers to the Authority investigation meeting concluding at approximately 3.30pm. My minute book reflects a conclusion time of 2pm.

[13] An appropriate starting point in this matter is the notional daily tariff for a one-day investigation meeting of $4,500. Mr Cahill seeks a contribution towards costs of $3,500 in part on the basis that the meeting was less than a full day.

[14] He also refers to contribution as a factor that has been taken into account. The Court of Appeal in *White v Auckland District Health Board*[3]concluded that the Employment Court was in error when it took into account the appellant's contributory conduct to decline to award costs. It is clear from the Court of Appeal judgment that remedies and costs should be treated separately as discrete issues. Contribution therefore should not feature in an assessment of costs.

[15] The Authority needs to consider whether $3,500 is a fair and reasonable contribution in the above circumstances where it appears contribution has been taken into account. To what degree is unclear. I am not, however, in the exercise of my discretion persuaded that $3,500 is not a fair and reasonable contribution towards costs. This being so particularly in circumstances where the suggested contribution towards costs is made on behalf of the applicant.

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[3] *White v Auckland District Health Board* [2008] ERNZ 635 at [52]

[16] I order Watts and Hughes Construction Limited to pay to Philip de Buyzer the sum of $3,500 being a contribution towards costs.

Helen Doyle
Member of the Employment Relations Authority