Determination Number: AA 330A/05
File Number: AEA 77/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Ngarimu Daniels (Applicant)
AND	Maori Television Service (Respondent)
REPRESENTATIVES	Ken Mair for Applicant Eska Hartdegen for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
COSTS SUBMISSIONS RECEIVED	12 October and 4 November 2005
DATE OF DETERMINATION	15 December 2005

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] Following the investigation and the issue of a determination to the parties, a question of costs has not been resolved by them and consequently Ms Daniels has applied to have the Authority decide the amount she should recover. Maori Television Service (MTS) has responded to the application, acknowledging that in principle at least $8,000 may be awarded.

[2] Memoranda from the parties have assisted me in this exercise. So too has the recent release by the Employment Court of its decision in *PBO Ltd v Da Cruz*; AC 2A/05, unreported, 9 December 2005. The Full Court in its judgment set out a number of principles that are appropriate when the Authority is determining any question of costs before it. They are as follows;

> *There is a discretion as to whether costs should be awarded and what amount.*
>
> *The discretion is to be exercised in accordance with principle and not arbitrarily.*
>
> *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
>
> *Equity and good conscience is to be considered on a case by case basis.*
>
> *Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increase costs unnecessarily can be taken into account in inflating or reducing an award.*
>
> *It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.*

That costs generally follow the event.

That without prejudice offers can be taken into account.

That awards will be modest.

That frequently costs are judged against a notional daily rate.

The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[3] In this case I find two factors to be of particular importance in fixing costs. First, Ms Daniels actual costs (which include significant disbursements as well as her advocate's fees) far exceed the total monetary award she recovered from her claim. Second, the admissions, concessions and similar acknowledgements that were fairly and usefully made during the course of the investigation meeting by MTS through Mr Mathers its CEO, showed that an investigation by the Authority was largely unnecessary and that Ms Daniels should not have been forced to go through that process. Instead the attitude that was eventually displayed by MTS should much earlier on have been harnessed and worked to bring resolution to this case, thereby minimising the financial and other cost to both parties.

[4] I do not accept the submission that Ms Daniels must be made to account in any costs award for the longer than usual investigation meeting that took place. Generally it is the Authority and not either of the parties that has overall control over the time that an investigation meeting will need to run for. This case is no exception and I am quite satisfied that given the parties, the nature of the employment relationship problem and particularly the need to try and preserve an on-going relationship, the time needed to resolve the problem was the time the investigation actually took.

[5] Since the investigation meeting and the issue by the Authority of its determination, MTS and Ms Daniels have resumed performance of the employment. The value of that continued employment should be seen long term by MTS as outweighing the pure economic cost of every last hour of time and every last dollar it spent for that outcome to be achieved.

[6] When the investigation meeting started Ms Daniel's total monetary claim was for $30,000. When it finished, after nearly seven days of meetings, she asked the Authority to lift the cap on her award. The amount awarded to her was $16,000.

[7] Ms Daniels actual costs have been nearly $50,000, excluding GST. They have swallowed up the $30,000 amount of her original claim and, even more so, the $16,000 amount she actually recovered. In my view given the result of this case it would be quite inequitable and unconscionable for the costs award to now leave her with an overall deficit. This situation is addressed by one of the principles in the *Da Cruz* case to be applied by the Authority to achieve a just result.

[8] Itemised disbursements from Mr Mair were $8,470, of which $5,570 was spent on air fares and the cost of car travel. As Mr Mair resides in Wanganui several trips to Auckland were required. The cost of his transportation and accommodation seems reasonable. It has been submitted for MTS that an advocate having the particular skills and empathy required for this case could have been retained locally by Ms Daniels. Maybe that is so, but she was entitled to have a representative and to have one of her choice. It is usual to award disbursements in full provided they are reasonable for the travel, accommodation and other services acquired and I see no reason to depart from that approach in this case.

[9] The disbursement items a. to d. of Mr Mair's schedule, are to be paid by MTS to Ms Daniels in full.

[10] The balance of the costs is for advocacy fees of about $40,000. They include $2,400 for the work Mr Mair did on the urgent injunction application. Although finally it did not need to proceed, some of the cost associated with the application is recoverable in principle. Ms Hartdegen takes no issue with Mr Mair's hourly charge-out rate of $240 and neither does the Authority. That rate is within the market range charged by other skilled and experienced professional employment law advocates.

[11] On the basis of about seven days of investigation meeting time - with each day occupying at least eight hours – plus the same number of days for preparation and then using an hourly rate of $240, total notional reasonable costs are $26,880. To cover the injunction application as well, I have used seven days instead of the slightly lesser actual number. Because, as I have found, the investigation meeting could have been avoided by MTS, a higher percentage of those total notional reasonable costs should be awarded, and because of the need to preserve for Ms Daniels at least some of the compensation awarded to her, I consider the full award of $26,880 is justified in the particular circumstances of this case.

[12] Although this represents $3,840 per day and is therefore above the average rate for investigation meetings of one or two days duration, I consider the exceptional nature of this case justifies an award of above what might be regarded as the notional tariff. Being about 72% of actual costs however, the award is not so great as to provide a total indemnity.

[13] Accordingly, Ms Daniels is to be paid $8,470 towards disbursements and $26,880 towards advocacy fees. The total of $35,350 does not include GST. MTS is ordered to pay that sum pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton
Member of Employment Relations Authority