New Zealand Employment Relations Authority Decisions

Dryden v Mason Dairies Limited (Christchurch) [2016] NZERA 525; [2016] NZERA Christchurch 189 (20 October 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 189
5607361

BETWEEN (1) BROOKE DRYDEN and (2) JAZMIN WATSON Applicants

A N D MASON DAIRIES LIMITED Respondent

Member of Authority: David Appleton

Representatives: Ben Nevell, Counsel for Applicants

Gordon Paine, Counsel for Respondent

Submissions Received: 3 October 2016 from the Applicants

13 October 2016 from the Respondent

Date of Determination: 20 October 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination of the Authority dated 6 September 20161 the Authority found that both applicants had been unjustifiably dismissed by the respondent, but that they had not been unlawfully discriminated against by Mr Mason by reason of their sex. Remedies were awarded to the two applicants in relation to their unjustified dismissals.

[2] Costs were reserved, and the parties invited to seek to agree how they were to be dealt with. The parties have been unable to agree. This determination addresses costs therefore.

[3] The applicants seek a contribution towards their costs of $2,005.92 each,

which includes reimbursement of the Authority's lodgement fee of $71.56 and a $7

courier fee. This sum is the actual amount incurred by each applicant (who were

1 [2016] NZERA Christchurch 150

legally aided). Mr Nevell argues, however, that the starting point is to take 0.75 of the Authority's relevant daily tariff (which he erroneously states to be $4,500) and then to multiply the resulting sum by 1.3, recognising that there were two applicants represented jointly by one counsel. This calculation results in a total claimed award of $4,387.50, to be split equally between each applicant, and then reduced to actual costs incurred.

[4] Mr Paine submits that, as the Authority's determination is now the subject of a challenge to the Employment Court, the issue of costs should be stayed. He also argues that costs incurred beyond attendance of the applicants for half a day were incurred by compliance with the Authority's directions, and that those costs should therefore be paid by the Authority. He argues that the maximum that should be paid by the respondent is $2,250.

Discussion

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[6] The Authority is also bound to follow the well-known *Da Cruz2* principles, the following of which are relevant in this case:

a. There is discretion as to whether costs would be awarded and in what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

2 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808

d. Equity and good conscience are to be considered on a case by case basis.

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

f. It is open to the Authority to consider whether all or any of the parties'

costs were unnecessary or unreasonable. g. That costs generally follow the event.

h. That awards will be modest.

i. That frequently costs are judged against a notional daily rate.

j. 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.

Should there be a stay of the Authority's costs determination?

[7] The Authority does not, as a matter of practice, stay the determination of costs by reason of a challenge to the Employment Court. This is because it is appropriate for the Court to dispose of all matters relating to the challenge, including costs, knowing what the Authority's approach has been. The parties are also entitled to closure in relation to the Authority's investigation. I refer to footnote 1 of the Employment Relation Authority's determination *Sandilands v Chief Executive of the*

Department of Corrections3 for a list of determinations where the practice of dealing

with costs notwithstanding a challenge has been adopted.

Should the Authority pay part of the costs?

[8] I reject this argument as the Authority's directions resulted directly from

Mr Mason deciding not to travel to the Authority's investigation meeting because of

inclement weather. No roads were impassable that day as far as the Authority was

3 *Joanne Sandilands v Chief Executive of the Department of Corrections* 10 September 2009, WA

67A/09, 514026

aware. The directions were made solely in order to give Mr Mason the chance to respond to the evidence of the two applicants, notwithstanding his voluntary non- attendance.

Should costs be awarded to the applicants?

[9] I accept that costs should be awarded to the applicants as, although they did not succeed in their sex discrimination applications, they did succeed in their unjustified dismissal claims, which constituted a significant element of the Authority's investigation. This does not seem to be contested by the respondent.

What should be awarded?

[10] The starting point is the daily tariff. As the application of the applicants was lodged before 1 August 2016, the appropriate tariff is $3,500 a day4. The investigation meeting lasted from 9.30 to 11.00, which is one and a half hours. This is not half a day. However, I accept that, had Mr Mason attended on behalf of the respondent, the meeting would most likely have lasted half a day, and that the extra work carried out by Mr Nevell as a result of the Authority giving Mr Mason an

opportunity to comment on the evidence of the applicants is likely to have been of an equivalent time period. The starting point is therefore $1,750.

[11] Should there be an uplift to take into account that there were two applicants? I am persuaded that a modest uplift is warranted, on the basis that, had there been one applicant, the costs incurred would have been less. Equally, had two separate applications been lodged which could have been investigated separately, the costs would have been more. I accept that a multiplier of 1.3 is appropriate.

[12] Multiplying $1,750 by 1.3 equates to $2,275. Adding $78.56 disbursements to this equates to $2,353.56. Sharing this equally between the two applicants results in

$1,176.78 each. I believe that this is a just amount to award to each applicant.

Orders

[13] I order the respondent to pay to Ms Dryden the sum of $1,176.78 as a contribution towards her costs.

4 I refer to paragraph 4 of the Practice Note 2 of the Authority dated 30 June 2016.

[14] I order the respondent to pay to Ms Watson the sum of $1,176.78 as a contribution towards her costs.

David Appleton

Member of the Employment Relations Authority
