

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 152/09
5128008

BETWEEN Brian Eden
 Applicant

AND Rutherford & Bond Limited
 Respondent

Member of Authority: Denis Asher

Representatives: Mr Eden represented himself
 Geoff O'Sullivan & Nikkii Flint for the Company

Submissions received: By 18 September 2009

Determination: 9 October 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] By email dated 26 August 2009 Mr Eden advised he no longer wished to pursue a personal grievance against the Company. An investigation into the employment relationship problem was scheduled for the following day, Thursday 27 August 2009.

The Company's Costs Claim Summarised

[2] In its submission received on 2 September 2009 the Company said amongst other things that an 11-th hour withdrawal of proceedings should not bar a

cost order as a significant, i.e. full, portion of cost had already been accrued by that point.

- [3] As Mr Eden had released his representative prior to attending mediation in this matter his reference in his email of 26 August 2009 to withdrawing his grievance because “*enough expenditure has been spent on lawyers*” can only refer to the Company’s costs.
- [4] Mr Eden clearly intended to put the Company to unnecessary expense without having to follow through with the hearing.
- [5] On the basis of Mr Eden’s conduct the applicant unnecessarily added to the Company’s costs. A significant contribution to its costs should therefore be made, i.e. Mr Eden should be ordered to pay 60% of the costs incurred by the Company in preparing for the scheduled hearing.
- [6] The Company’s actual costs totalled \$11,880.70 GST inclusive. The work carried out was necessary and the cost is reasonable.

Mr Eden’s Response Summarised

- [7] In his submissions Mr Eden said that the Company was given the option to attend mediation again but chose not to. He rejects the applicant’s assertion his intention was to put the Company to unnecessary expense. Mr Eden says his comment about expenditure on lawyers relates to the whole process that began in August 2008.

Findings

- [8] The Authority’s discretion with which to award costs is now well settled and typically follow the event: *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.
- [9] Mr Eden’s withdrawal came at the last minute. He says he reached that decision as a result of the Authority declining his request on 26 August for an adjournment on the ground he needed time to review new evidence. As I explained at the time (my email of the same date refers) I declined Mr Eden’s application on the ground that the new evidence was not relevant to the

Company's decision to dismiss him and – consistent with the provisions of s. 103A of the Employment Relations Act – the Authority's investigation would be focusing on the justifiability of the respondent's decision to dismiss in terms of the circumstances at the time of its decision.

- [10] I therefore do not accept the basis of Mr Eden's claim that, "*It was the response from (the Authority) on the 26th August that convinced me to withdraw my application*" (his submission dated 10 September 2009 refers) as there was nothing new in my summarising the statutory requirement applying to this employment problem. The hurdles facing Mr Eden and the Company's positions were unchanged.
- [11] However, while no doubt vexing to the Company, I am not persuaded it can be fairly and reasonably concluded that Mr Eden's intention was to put the Company to unnecessary expense (par 7 of the respondent's submissions received 2 September 2009). I do accept that Mr Eden's conduct namely, without good reason, delaying until the last minute his decision to withdraw has added to the costs incurred by the respondent and it is appropriate he should meet the consequences by a higher than normal costs award.
- [12] Having regard to the above a costs award of \$4,500 for the investigation is appropriate in all the circumstances.

Determination

- [13] Mr Eden is to pay the Company as a contribution to its fair and reasonable costs \$4,500 (four thousand and five hundred dollars).

Denis Asher

Member of the Employment Relations Authority