

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 4  
3016571

BETWEEN                      MARK ELIOTT  
   Applicant  
  
A N D                              COOKIE TIME LIMITED  
   Respondent

Member of Authority:        David Appleton  
  
Representatives:              Peter Maciaszek, Counsel for Applicant  
   Robert Thompson, Advocate for Respondent  
  
Submissions Received:        21 December 2017 & 15 January 2018 from Respondent  
   11 January 2018 from Applicant  
  
Date of Determination:        18 January 2018

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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[1] By way of a determination dated 28 November 2017<sup>1</sup> the Authority determined that Mr Elliott was not unjustifiably dismissed and did not suffer an unjustified disadvantage in his employment. Costs were reserved, and the parties directed to seek to agree how they should be dealt with. The parties have been unable to reach an agreement.

**The parties' submissions**

[2] The respondent seeks a contribution towards its costs based on the Authority's daily tariff, with a modest uplift. The investigation lasted one and a half days, and so the respondent seeks a contribution towards its costs in the sum of \$6,500, being \$4,500 for the first day, and \$1,750 for the second, half day, uplifted by \$250.

[3] Mr Thompson states that the reasons for the seeking of the uplift are as follows:

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<sup>1</sup> NZERA Christchurch 206

- a. the second, half day was needed because one of the witnesses in support of Mr Elliott (Mr Cox) was unable to attend on the day fixed for the investigation;
- b. that witness' evidence was not essential, and contributed little;
- c. Mr Elliott's wife gave evidence 'at the last minute', without having provided a witness statement; and
- d. Supplementary evidence was required to be provided by the respondent which involved further questioning of witnesses, but the evidence was not central to the personal grievance of unjustified dismissal.

[4] Mr Maciaszek in his reply refers to the leading cases on costs in the Authority, *PBO Ltd v Da Cruz*<sup>2</sup> and *Fagotti v Acme & Co Ltd*<sup>3</sup>. Mr Maciaszek submits that costs for one day of investigation only should be awarded because the majority of the second, half day was taken up with evidence about payment of a bonus, which was relevant to an issue of predetermination and credibility, but which the respondent's witnesses should have been able to have given on day one of the investigation. The other evidence was minor, and did not take up much time, and submissions could have been given at the end of the first day.

[5] Mr Thompson lodged submissions in reply. Whilst these were not directed, they are short and address what Mr Thompson regarded as a factual inaccuracy in Mr Maciaszek's submissions about the events leading to Mr Cox not being available to give evidence on the first day of the investigation meeting. I shall therefore allow them.

### **Discussion**

[6] There are two issues in contention:

- a. Whether one or one and a half days' costs should be awarded;
- b. If one and a half days' costs are to be awarded, whether there should be a \$250 uplift in respect of the second day's costs.

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<sup>2</sup> [2005] ERNZ 808

<sup>3</sup> [2015] NZEmpC 135

[7] The first point can be answered quite easily in my view. The first day of the investigation lasted from 9 am until 6 pm, around one and a half hours longer than normal. Therefore, even if it had not been necessary to have taken further evidence on the bonus issue, it would still have been necessary to have taken evidence from Mr Cox and to have heard submissions. That would have necessitated sitting for at least another 90 minutes, which in effect means a second day was necessary.

[8] In any event, the matter should have been set down for two days, as one day was clearly insufficient. The Authority will take responsibility for it not having been originally set down for two days.

[9] I am therefore satisfied that, on the basis that costs follow the event, the daily tariff for one and a half days' costs is the starting point for fixing costs.

[10] Should there be an uplift? Whilst the uplift sought is modest, and not unreasonable in itself, I am not satisfied that it is warranted. This is for the following reasons:

- a. An extra half day would have been necessary in any event, whether or not Mr Cox had been available on the first day, because of the volume of evidence that was heard. In addition, his evidence was relevant to (although not determinative of) one of the questions in issue, which went to an allegation of predetermination.
- b. Whilst Mrs Elliott's evidence was not preceded by a written brief, that failing did not add to the length of the investigation as Mrs Elliott's evidence was about the effect suffered by Mr Elliott and family as a result of being dismissed, and so the respondent was not able to contradict it. Her evidence was also, therefore, relevant in part.
- c. The evidence about the bonus would have taken longer if the respondent's witnesses had been in a position to remember on the first day of the investigation meeting what had transpired in any event.

[11] I conclude that a contribution towards the respondent's costs in the sum of \$6,250 should be paid by Mr Elliott.

**Order**

[12] I order Mr Elliott to pay to the respondent the sum of \$6,250 within 14 days of the date of this determination.

David Appleton  
Member of the Employment Relations Authority