



New Zealand Employment Relations Authority Decisions

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Emmerson v Northland District Health Board (Auckland) [2017] NZERA 72; [2017] NZERA Auckland 72 (17 March 2017)

Last Updated: 29 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 72
5583207

BETWEEN LINDA EMMERSON Applicant

A N D THE NORTHLAND DISTRICT HEALTH BOARD

Respondent

Member of Authority: T G Tetitaha

Representatives: S Henderson, Counsel for the Applicant

S Hornsby-Geluk, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: No submissions from Applicant

26 October 2017 from Respondent

Date of Determination: 17 March 2017

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Linda Marie Emmerson is ordered to pay the Northland District

Health Board \$8,500 as a contribution towards its costs. Employment relationship problem

[1] The applicant was unsuccessful in her personal grievance of unjustified dismissal and application for leave to raise claims of unjustified action causing disadvantage out of time.¹

[2] The respondent now seeks an order for costs. Its actual costs were

\$166,661.62.²

¹ *Emmerson v. Northland District Health Board* [2016] NZERA Auckland 322

² Tax invoices for Dundas Street and WMRK Lawyers dated 22 September 2015 to 14 March

2016 attached to respondents memorandum of costs.

Extension of time

[3] This costs decision has been delayed through the Registry's administrative oversight. The respondent sought costs on 4 October 2016 by memorandum within the prescribed timeframe set out in the determination. Unfortunately the Authority officer overlooked referring the matter to the Member for determination within the three month time limitation for issuing determinations.³

[4] The costs application was referred to me on Monday 13 March 2017. This was following an email inquiry from the respondent's lawyer regarding the outstanding costs decision and attaching a copy of the Courts Minute relevant thereto.

[5] The Chief of the Authority has determined there are exceptional circumstances and granted leave to issue this determination out of time pursuant to s.174C(4) of the Act.

What is the starting point for assessing costs?

[6] At the time this matter was filed in the Authority, the applicable notional daily costs tariff was \$3,500. Matters lodged in the Authority from 1 August 2016 are subject to the increased daily tariff of \$4,500.4

[7] This matter took eight hearing days. Accordingly, the starting point for a costs award is \$28,000.

Are there any factors that warrant uplifting the notional daily tariff?

[8] Costs are discretionary, follow the event, moderate and may be increased where an unsuccessful party's conduct unnecessarily increases costs.⁵ There are several aspects of the applicant's conduct of her case that is alleged to have unnecessarily increased costs. This conduct includes:

(a) Prolix pleadings requiring directions for further particulars at a teleconference;⁶

³ [Section 174C\(3\)](#) of the [Employment Relations Act 2000](#) (the Act).

⁴ Practice Note 2 Costs in the Employment Relations Authority para.4

⁵ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819 at [44]

⁶ Minute dated 8 March 2016.

(b) Non-compliance with directions to file further information about the unjustified disadvantages⁷;

(c) Adjournment of the January 2016 hearing date due to allegations raised during the applicants evidence at hearing about the conduct of the then respondent counsel during the disciplinary process⁸; and

(d) An unsuccessful application for removal to the Employment Court⁹.

Prolix Pleadings

[9] The requirement to file further particulars in respect of her pleadings did not require the respondent to file any further information. Those further particulars were helpful because they confined the unjustified disadvantage claim to alleged bullying from Drs A and B. It was helpful as it reduced what were potentially a number of disadvantages into one for determination. I make no increased costs award for this conduct.

Non-compliance with directions

[10] This occurred in respect of the directions to file further particulars about the unjustified disadvantages. There would have been costs to the respondent of receiving my Minutes and seeking directions to file particulars. A modest increase in costs is warranted for this conduct.

Adjournment of January 2016 hearing

[11] The entirety of the January hearing was not necessarily "wasted costs". The hearing enabled Ms Emmerson to give the majority of her evidence. As a result her Counsel made appropriate concessions at the teleconference on 8 March 2016 to enable her claim to become more focused for the subsequent hearing.

[12] However her last minute allegations about the conduct of then respondent

Counsel, David Grindle, did unnecessarily increase costs. It resulted in the respondent paying duplicated costs and having to instruct new Counsel. They were

⁷ *Emmerson v. Northland District Health Board* (supra) at para.[31] and Minute dated 8 March 2016.

⁸ Minute dated 8 March 2016.

⁹ *Emmerson v. Northland District Health Board* [2016] NZERA Auckland 186

also required to pay the costs of Mr Grindle attending to give evidence. This does require a more substantial uplift in costs to

reflect the costs to the respondent.

Unsuccessful Application for removal

[13] The respondent seeks an award of half the applicable daily notional tariff which appears appropriate.

[14] Having considered the above factors, it is appropriate to uplift the daily notional tariff by \$2,000 to \$5,500. The applicable number of hearing days is 8.5 taking into account the unsuccessful removal application. Accordingly costs are increased to \$46,750.

Are there any factors that warrant reducing the notional daily tariff?

Applicants Impecuniosity

[15] A party's ability to pay costs was a relevant consideration as a matter of equity and good conscience in reducing costs payable.¹⁰

[16] The applicant has filed a statutory declaration as to financial position dated 21

June 2016. She had overdrawn her bank account by \$1,500. She has no assets in her personal name. She had liabilities of \$80,000. Her sole income was a WINZ benefit of \$275 per week. I understood from her evidence this was a sickness benefit. She was receiving treatment from a psychologist for anxiety and stress. She was not at the time assessed as able to return to work. Her expenses were stated at \$435 per week but I understand she lives with her partner BM. I assume she shares the household expenses (food electricity and rent) with him. This did not provide any income. She is no longer registered as a medical practitioner. I understood from her evidence at hearing she had no paying work. Rather she assisted her partner in his business.

[17] Although I do not have more current information on the applicant's financial status it is more likely than not it remains unchanged. I note from a recent Court Minute¹¹ there is an application for legal aid. I am satisfied Dr Emmerson would have difficulty meeting an award of costs of \$46,750.

¹⁰ *Shepherd v Scan Audio New Zealand Ltd* [1999] NZEmpC 205; [1999] 2 ERNZ 374 at

¹¹ Employment Court Minute dated 10 February 2017.

[18] Where an inability to pay costs has been established the Courts have reduced costs in a variety of ways:

- the reduction of costs by approximately 50%;¹²
- reduction of costs to \$1,000 from an \$11,000 starting point;¹³
- reduction of costs to \$3,000 from an \$55,000 starting point;¹⁴
- setting costs in the Authority at a daily notional tariff of \$1,000 per hearing day (\$2,000 total) reduced from starting point of \$11,000.¹⁵

[19] There is a recent decision of the Court where no costs award was made.¹⁶ This is distinguishable from the current situation because that involved the late filing of a notice of discontinuance as opposed to costs following hearing.

[20] Ms Emmerson has filed a *de novo* appeal. The respondent has sought security for costs. The equities between these parties can be met by imposition of a reduced costs award.

[21] Taking these matters into account I have determined to reduce the applicable daily tariff to \$1,000 per hearing day or \$8,500 total costs.

[22] Linda Emmerson is to pay the Northland District Health Board \$8,500 as a contribution towards its costs.

TG Tetitaha

Member of the Employment Relations Authority

¹² *Shepherd v Scan Audio New Zealand Ltd* [1999] NZEmpC 205; [1999] 2 ERNZ 374 at

¹³ *Burns v Media Design School Ltd* EmpC Auckland AC40/09, 17 November 2009 at [15].

¹⁴ *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92, (2012) 10 NZELC 79-010.

15 *Koia v Attorney-General (No 2)* [2004] NZEmpC 97; [2004] 2 ERNZ 274 at [13].

16 *Nathan v C3 Ltd* [2016] NZEmpC 160 at [20].

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