

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 228
5529241

BETWEEN JANINA ANN EWING
Applicant

A N D WAIMEA WEEKLY LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Steven Zindel and Jessica Gully, Counsel for Applicant
Jenny Bates and Steven Page, Advocates for Respondent

Submissions Received: 23 November and 13 December 2016 from the Applicant
12 December 2016 from the Respondent

Date of Determination: 21 December 2016

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

**A I order Waimea Weekly Limited to pay to Janina Ewing costs in
the sum of \$8000.00 and reimbursement of the filing fee of \$71.56.**

[1] In my determination dated 28 October 2016 I found the applicant had made out her grievances of unjustified disadvantage and unjustified dismissal and remedies were awarded.

[2] I reserved the issue of costs and set a timetable for an exchange of submissions. I have received submissions from both parties and will proceed to determine the issue of costs.

The applicant's submissions

[3] Mr Zindel sets out that the daily tariff for Employment Authority cases is \$3,500 per hearing day and there is discretion for departure from the daily tariff. He submits that the case was "*factually quite dense*" and the written material detailed.

[4] Mr Zindel submits that there were reasonably complicated pleadings, a number of witness, intricate submissions and a large bundle of documents. There were no issues, he submitted, conceded by the respondent and a number of defences raised as to the applicant's conduct.

[5] Mr Zindel refers to the issue of holiday pay claimed to be owing to the applicant. He submits that the applicant was, in the end, able to concede the issue of holiday pay and that there had been an overpayment with little time wasted on that matter by the Authority. Mr Zindel submits that counsel records 859 emails in his client folder in relation to this case.

[6] The applicant was legally aided. The bills attached to the submissions for legal aid reflect costs of \$16,396.42, which are GST and disbursements inclusive, with some additional time over the last three months.

[7] Mr Zindel refers to a mediation which was set down for 25 February 2015 not proceeding owing to the respondent's lack of availability and then a reconvened mediation in April.

[8] The hearing time Mr Zindel sets out was 7 hours of investigation on the first day and 6.5 hours on the second. He submits that with legal aid costs at approximately \$17,000 and legal aid traditionally well under the market rate, a figure between \$7,000 and \$17,000 could be realistically arrived at so the award of costs in favour of the applicant would be \$11,000. Mr Zindel submits that is restrained, but would lead to the applicant being less out of pocket in relation to repayment of legal aid.

The respondent's submission

[9] The respondent submits that the dense nature of the case was due to the number of witnesses and length of the applicant's submissions. The respondent submits that many of the matters raised in the statements of evidence did not feature in the Authority's determination.

[10] The respondent does not accept that it provided inconsistent figures for the holiday pay which created more work. It says that the payroll information that was provided was able to be fully reviewed by the applicant and from that it was found that the respondent had overpaid the applicant's leave.

[11] The respondent submits that 859 emails seem excessive and emails between it and its employment adviser and its advisor and Mr Zindel were only a fraction of that number.

[12] The respondent does not accept that the delays that occurred with mediation were other than genuine and agrees to pay the ordinary tariff for the two days of the investigation meeting but does not agree with the request for \$11,000. The respondent says that there should be a deduction from the tariff for the holiday pay issue.

Determination

[13] The Authority in assessing costs is exercising a discretion whether costs will be awarded and in what amount. The discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful parties conduct although conduct which increases costs can be taken into account in increasing or reducing an award. Costs generally follow the event and awards in the Authority are often modest and judged against a notional daily rate.¹

[14] I find that the applicant as the successful party is entitled to costs and the appropriate starting point for an assessment of costs in this matter is the daily tariff which based on two full days of investigation at \$3,500 per day is \$7000.

[15] I now consider in the exercise of my discretion whether there are any factors that should result in an increase or decrease of that amount.

[16] The legal aid costs of \$16,346.42 includes the cost of attendance of mediation which is not usually recoverable. I do not find the sort of circumstances that may attract an award in this case for mediation attendance.

[17] There were a large number of witnesses called by the applicant. I accept the submission of the respondent that not all of what was in the statements of evidence was found to be relevant but the respondent was put to some expense in responding to the allegations. Initially it appeared that there may be some doubt whether the investigation meeting would be able to be conducted within the two days. The Authority with the assistance of both parties and their representatives was able to

¹ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

focus and narrow the issues in light of the material period of time which resulted in the evidence being able to be dealt with within the two day period. There were no issues or conduct at the investigation meeting by the parties or their representatives that increased costs. I do not increase the tariff on the basis of witness numbers or any factual complexity.

[18] I find it fair in the exercise of my discretion to take into account that there was a bundle of documents prepared and that submissions were provided after the investigation meeting. That there was a bundle saved time during the investigation meeting. The submissions from parties in a not altogether straightforward case were detailed and helpful. I find it appropriate that there should be an uplift of \$1200 to the daily tariff to reflect that degree of preparation and additional cost for those matters.

[19] The holiday pay issue did not occupy any measurable time at the investigation meeting. It was conceded to by the applicant saving time on that issue but it did require addressing by the respondent and it is fair that there should be a deduction of \$200.

[20] I allow the disbursement of \$71.56 for the filing fee.

[21] I find that a fair and reasonable contribution to costs is the sum of \$8000 together with reimbursement of the filing fee of \$71.56.

[22] I order Waimea Weekly Limited to pay to Janina Ewing the sum of \$8000 being costs and reimbursement of the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority