IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 324
5302466

	BETWEEN	LEONIE FAULKNER Applicant
	AND	SECRETARY FOR JUSTICE Respondent

Member of Authority:	Alastair Dumbleton
Submissions Received	10 May 2011 1 June 2011
Determination:	22 July 2011

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 11 April 2011 the Authority (Member James Wilson) found in favour of the applicant Ms Leonie Faulkner when it resolved personal grievance and other claims investigated.

[2] Three grievances raised by Ms Faulkner were established. They were that while in an employment relationship with the Secretary of Justice and working in that Ministry she was:

- discriminated against as a result of taking part in a lawful strike;
- disadvantaged by the employer's unjustified actions in revoking her entitlement to paid sick leave; and
- constructively dismissed.

[3] Ms Faulkner was unsuccessful with claims for damages and penalties, and reinstatement as sought by her was not ordered either as it was considered impracticable.

[4] The question of costs was reserved by the Authority in its determination to enable the parties to try and reach agreement, failing which, submissions were to be made. The parties have not been able to decide the issue for themselves and it must now be determined.

[5] There is no dispute about the Authority's investigation and how that proceeded, or about the nature of the case including its factual and legal complexity. The investigation concluded with a two day meeting at which evidence was taken and submissions were made by counsel Ms Stewart for the applicant and Mr Sheriff for the respondent.

[6] There is also no dispute about the legal principles of costs awards in the Authority. In this regard both counsel have referred to the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. The guiding costs principles confirmed by the full bench of the Employment Court in that case have been set out in their submissions.

[7] The written submissions of both counsel in relation to all relevant aspects of this costs issue are quite extensive, running to 11 pages for Ms Faulkner and 9 pages for the Secretary, with attachments to both sets. As well as that material the Authority has had the benefit of reading the comprehensive 18 page determination of the Authority.

[8] I do not repeat any of that information in detail but I note there is no possibility of reconciling to any degree the views of the parties as to how costs should reasonably be apportioned in this case. The Secretary for Justice does however concede he should make some contribution to Ms Faulkner's costs.

[9] For the entire investigation, including GST her entire costs were $56,689. In addition she was charged disbursements of $2,062. With that outlay she recovered monetary awards of $42,294. There remains an issue between the parties as to whether she is entitled to a further amount of lost wages of about $4,000.

[10] As a contribution to Ms Faulkner's actual costs $42,000 is sought on her behalf, as well as recovery of full disbursements of $2,062.

[11] For the Secretary for Justice it is submitted that costs to a maximum of between $3,450 and $5,175 may be awarded to Ms Faulkner.

[12] Submissions have addressed the effect of *Calderbank* offers made by both parties during the course of the investigation. On 21 September 2010 the Secretary for Justice offered Ms Faulkner $15,000 to fully and finally resolve all matters in issue between the parties. She was given a choice as to how that sum was to be allocated, whether as to costs, remuneration, or a combination of the two.

[13] Ms Faulkner made two offers to settle. The first of these, made the day after the respondent's offer, was for $41,534 and the second was made a few days before the investigation meeting for $36,534.

[14] Mr Sheriff in his submissions has noted that the applicant's offers included a significant component under s 123 of the Employment Relations Act 2000, under which compensation may be awarded for hurt feelings, humiliation and distress. The intention appears to have been to receive the settlement sums sought of $15,000 and $20,000 on a non-taxable basis. The Authority ultimately awarded Ms Faulkner $10,000 compensation.

[15] The applicant's approach to costs is that investigation time including the meeting and preparation should be taken as four days, although the meeting itself took only two days. A daily rate should be applied but one well above the usual tariff of around $3,000, at $8,000 per day, to reflect the way the investigation unfolded and aspects of the respondent's conduct. To $32,000 (4 X $8,000) it is submitted a further $10,000 should be added to reflect the respondent's rejection of reasonable *Calderbank* offers made. The total is then reached of $42,000, which is the amount sought, and also disbursements of $2,062.

[16] The approach of the respondent is to apply a daily tariff of $2,500 to $3,000 per day of the investigation and also an amount for about half a day of preparation between $1,250 and $1,500. From that two-fifths of the total should be deducted to reflect the applicant's success with only three of her five claims for remedies. On that basis it is submitted that a proper costs award is confined within the range of $3,450 to $5,175 (GST inclusive).

[17] There is nothing I find about this particular case and the conduct of the investigation into it that requires a departure from the usual approach of applying a daily rate to the number of days of investigation meeting. The daily rate is not to be applied inflexibly and a significant adjustment upwards on the tariff of $3,000 is

needed to take into account the applicant's reasonable offers to settle, particularly the second offer of $36,534. In fact the applicant recovered about $7,000 more than that figure. The extent of the adjustment should also reflect Ms Faulkner lack of success with all her claims for remedies.

[18] I consider that an adjusted daily rate of $7,500 is appropriate and for two meeting days total costs awarded are $15,000. In addition, Ms Faulkner is entitled to the full amount of disbursements claimed which appear to me to be reasonably incurred.

Determination

[19] Exercising the discretion of the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act, the Secretary for Justice is ordered to pay costs of $15,000 and disbursements of $2,062 to Ms Leonie Faulkner

Prohibitive costs in employment disputes

[20] This is an appropriate case for the Authority to draw attention again to views expressed by the Court of Appeal in *Transmissions & Diesels Ltd v. Matheson* [2002] 1 ERNZ 22. In that case an applicant had incurred actual costs of about $135,500 in successfully bringing claims to the Employment Court under the Employment Contracts Act 1991. The applicant was awarded as a contribution to costs $65,000 but after a successful appeal that amount was reduced to $40,000. For an outlay in legal costs of $135,500 the applicant recovered distress damages of $35,000 and costs of $40,000. (There was also a separate award made to cover the fees of an expert witness).

[21] The concerns of the Court about the cost of going to law with employment disputes were expressed as follows, particularly in the last sentence:

> *[28] In closing, we repeat the observation in* Victoria University of Wellington v. Alton-Lee *(CA 294/00, Judgment 30 July 2001, para.[65] that the parties and those practising in this field should always have in mind the importance of conducting litigation with proper focus on the issues and what is truly at stake and on the containing of costs. In short, as a matter of proportionality, litigation in this field should not become so expensive as to unreasonably deter parties in employment disputes from exercising their rights.*

[22] Although the Court of Appeal made those observations in the context of a trial by adversarial process before a superior court, the same general views must surely apply under the Employment Relations Act where it is intended that disputes which are not resolved between the parties themselves or in mediation are to be resolved at a low level through an investigative process. The nature of that process should in itself mean less expenditure in legal costs, given that the Authority is under an obligation to actively investigate employment disputes rather than referee a trial process.

[23] Although urging control and moderation in relation to the cost of resolving employment relationship problems before it, the Authority must also acknowledge that representation is a matter of choice for a party and so to is the decision whether to expend more on legal costs than the total amount likely to be recovered.

A Dumbleton
Member of the Employment Relations Authority
(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000.)