

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 19
5620406

BETWEEN FIRST UNION INC
Applicant

A N D KAIKORAI SERVICE CENTRE
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Peter Cranney and Grace Liu, Counsel for Applicant
Peter Churchman QC, Counsel and Neil McPhail,
Advocate for Respondent

Submissions Received: 25 November 2016, from the Applicant
21 October and 29 November 2016, from the Respondent

Date of Determination: 30 January 2017

COSTS DETERMINATION OF THE AUTHORITY

**A I order First Union Inc to pay to Kaikorai Service Centre Limited
the sum of \$525 costs.**

Discontinuance of the employment relationship problem

[1] The applicant lodged a statement of problem with the Authority to resolve a dispute about collective bargaining seeking a compliance order requiring the respondent to bargain and settle wages in the collective agreement and a determination that the current individual employment agreement is of no effect to the extent that it is contrary to the Employment Relations Act 2000 (the Act) together with costs.

[2] A statement in reply was lodged on 22 April 2016 in which it was not accepted amongst other matters that there was a legal obligation under the Act for a collective agreement to cover wages or that individual employment agreements signed are of no legal effect. The respondent indicated in the statement in reply that it remained ready to bargain over matters other than those where proposals had already been fully responded to. The respondent indicated that the parties had not attended mediation because the applicant had simply issued the proceedings.

[3] A perusal of the administration file confirms there were emails between an Authority officer and representatives for the applicant and respondent about whether the parties were prepared to attend mediation. Both parties confirmed that they were willing to participate in mediation and the matter was referred to the Mediation Service of the Ministry of Business Innovation and Employment. On or about 13 July 2016, the Authority was advised that the matter between the parties did not settle at mediation.

[4] No further steps were taken. On 15 September 2016 a new application was lodged between the same parties under file 5641452 for fixing the provisions of a collective agreement under s 50J of the Employment Relations Act (the Act) 2000.

[5] The Authority Officer asked for clarification as to what should happen with this file and whether it could be closed. The Authority officer was advised on 28 September 2016 by Ms Liu that the second case “*supersedes and replaces*” the first one and therefore the first one is to be discontinued.

[6] On 29 September 2016, Mr McPhail communicated with the Authority officer and advised that in respect of the discontinuance of file 5620406 the respondent requested the question of costs be reserved.

[7] Submissions were received about the issue of costs.

The respondent’s submissions

[8] The respondent in its submissions says that it incurred costs of \$8,740.40 for preparation of a statement in reply and attendance at mediation and that, where there was a unilateral withdrawal of proceedings, costs should follow the event. Invoices are attached to the application for costs.

[9] The Authority is referred to the principles to be applied in a costs setting in *PBO Ltd v. Da Cruz*.¹ Some reliance has been placed on the Employment Court judgment in *RHB Chartered Accountants Ltd v Rawcliffe*.² Mr McPhail submits that on challenge from an Authority determination, the Court in that matter awarded costs to the plaintiff following discontinuance of proceedings by the applicant and included the costs incurred for attending mediation as part of the costs award. There is also reference to an Authority determination in *NZ Guardian Trust Ltd v Mayne*³ where costs were awarded in relation to mediation after discontinuance of the matter in the Authority. Mr McPhail submits that unlike in *Mayne* mediation did not influence the applicant to withdraw but rather fresh proceedings were lodged and the present proceedings discontinued. He submits that mediation has proven ‘*fruitless and unnecessary*’ and an award of costs should be made for attendance at mediation.

[10] The respondent seeks a contribution towards its costs in the amount of \$5,750 and a contribution towards preparation of the costs memorandum of \$650 plus GST.

The applicant’s submission

[11] The applicant submits that the application for costs is inappropriate because the new application covered the same if not identical material to that set out in the first application with the main difference being a change in remedies.

[12] Ms Liu submits that the second proceeding could have been filed as an amendment to the first but little turns on that and that the appropriate course is to determine costs at the same time as any costs in file 5641452.

[13] The applicant submits that the only steps taken were to lodge a straightforward and simple statement in reply and attend mediation voluntarily which took less than an hour and for which costs are not recoverable.

[14] It is submitted that the costs matter can be adjourned and dealt with in due course.

¹ [2005] 1 ERNZ 808

² [2012] ERNZ 51

³ [2015] NZERA Auckland 113

Determination

[15] The principles in *PBO Limited*⁴, a judgment of the full Court of the Employment Court, to the Authority's approach to costs have been reaffirmed by the full Court of the Employment Court in *Fagotti v Acme & Co Limited*.⁵ It was stated in *PBO* at [44] that the Authority is able to set its own procedure and has since its inception held to some basic tenets when considering costs. These include that there is discretion as to whether costs are awarded and in what amount and the discretion is to be exercised in accordance with principle and not arbitrarily. Costs should not be used as a punishment but conduct increasing costs unnecessarily can be taken into account and costs generally follow the event. Costs are often judged against a notional daily rate which at the time the application was lodged was \$3,500.

[16] I will start by considering the submission that the application for costs on this matter can be adjourned and dealt with at a later date with any issue of costs arising from file number 5641452. The second application may have been approached differently but the end result is that the application in file number 5620406 has been discontinued and is at an end. Costs generally follow the event and the Authority should, I find, consider whether an issue of costs arises as a result.

[17] There are three identifiable elements to the costs claimed by the respondent. The first is preparation of a statement in reply. The second is attendance at mediation and the third is preparation of the costs memorandum in the sum of \$650 plus GST. I shall consider them separately.

Preparation of a statement in reply

[18] Invoice 16138 is for costs incurred for the preparation of the statement in reply and other communication/correspondence at or before that time. It is in the sum of \$2,294.25 (GST inclusive). The statement in reply is not a lengthy document but I accept was a step that had to be taken by the respondent after consideration of the matters raised in the statement of problem. A contribution toward the costs of the preparation of the statement in reply can be considered in an award of costs.

⁴ *PBO Limited* above n 1

⁵ [2015] NZEmpC 135, (2015) NZELR 1

Mediation

[19] Invoice 16233 is for mediation and related costs and is in the sum of \$4,515 together with disbursements including travel costs. One of the distinguishing factors from *Rawcliff* is that the parties in this case attended mediation voluntarily. Even accepting that mediation would probably have been directed had the parties not agreed, there were different circumstances in *Rawcliffe*. The parties in that matter were directed to undertake mediation in circumstances where the Court concluded it was difficult to see how it could resolve the grievance given their objection that they were not properly named as respondents in the Authority proceedings. In *Mayne* the Authority Member considered costs for mediation but was not persuaded in the absence of any issues of bad faith conduct the circumstances required a change “*to the general, although not automatic, approach of leaving parties to bear their own costs of mediation.*”⁶

[20] Bargaining involves ongoing discussion and meetings. It is less easy to conclude in those circumstances that mediation in relation to the discontinued proceedings was unnecessary and without benefit. It is not a similar matter to that in *Mayne* because there is an ongoing aspect.

[21] A contribution toward the cost of mediation will not be considered in this matter. The parties are to bear their own costs for mediation.

Memorandum for costs

[22] I will consider a contribution toward the costs of preparing the memorandum of costs which was a step necessary to take to have costs considered at an earlier point than would usually be the case.

Determination

[23] The starting point to assess any cost award in this matter is the applicable daily tariff of \$3,500. There needs then to be an adjustment to reflect that only limited steps were taken in this matter. The matter was discontinued before preparation and consideration of statements of evidence, attendance at an investigation meeting and submissions.

⁶ Above no 3 at [12]

[24] In the exercise of my discretion I find an appropriate award is 15% of the daily tariff which is the sum of \$525.

[25] I order First Union Inc to pay to Kaikorai Service Centre Limited the sum of \$525 for costs.

Helen Doyle
Member of the Employment Relations Authority