IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 159
5343966

BETWEEN	EMMA FOX Applicant	
A N D	HEREWORTH SCHOOL TRUST BOARD Respondent	

Member of Authority:	James Crichton
Representatives:	Blair Scotland, Counsel for Applicant Stuart Webster, Counsel for Respondent
Submissions Received:	21 March 2013 from Applicant 9 March 2013 and 5 April 2013 from Respondent
Date of Determination:	2 May 2013

COST AND PENALTY DETERMINATION OF THE AUTHORITY

The application for penalty

[1] During the course of the preparations for the Authority's investigation of Ms Fox's claim of unjustified dismissal against Hereworth School, Hereworth School indicated its intention to seek the imposition of a penalty under s.134A of the Employment Relations Act 2000 (the Act). This was because of Hereworth School's various allegations that Ms Fox was obstructing and delaying the Authority's investigation into her employment relationship problem.

[2] The Authority declined to deal with the matter when it was first raised by Hereworth School but undertook to consider later.

Section 134A

[3] The Employment Relations Amendment Act 2010 by s.17 creates new s.134A of the principal Act.

[4] Section 134A is in the following terms:

> *134A Penalty for obstructing or delaying Authority investigation*
>
> *(1) Every person is liable to a penalty under the Act who, without sufficient cause, obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation (if required).*
>
> *(2) The power to award a penalty under sub-section (1) may be exercised by the Authority:*
>
> *(a) Of its own motion; or*
> *(b) On the application by any party to the investigation.*

[5] Both parties refer in their submissions to the four previous decisions of the Authority considering the application of s.134A.

The claim

[6] Hereworth School say that first, Ms Fox's refusal to attend the investigation meeting originally scheduled for May 2012 was not a genuine reason. Second, Hereworth School maintain that the refusal to not proceed for various reasons after the May date was vacated, were also not genuine reasons for deferral.

The response

[7] Counsel for Ms Fox submits that s.134A cannot apply unless the Authority is to conclude that the obstruction or delay occurred *without sufficient cause* and given the Authority's acceptance of the deferral at the time, it is difficult to see how the Authority could now impose a penalty having previously accepted the deferral of the May investigation meeting, whether or not the grounds for the deferral were specious.

[8] Submissions for Ms Fox also refer to the Authority's notice of direction dated 31 July 2012 in which the Authority indicated that the penalty application made by Hereworth School would be dealt with in the substantive determination.

Discussion

[9] The Authority is not minded to grant the application advanced by Hereworth School. In the Authority's judgment, the claim for a penalty pursuant to s.134A and the claim for costs by the successful party in effect overlap. The Authority has power in a costs setting environment, to reflect the behaviour of an unsuccessful party in making a costs award such that, if the Authority were to find that the behaviour of the unsuccessful party materially contributed to increasing the costs of the successful party, then that fact could sound in the costs award to be made.

[10] Furthermore, and notwithstanding those observations about the overlap between an ordinary costs award and a s.134A application, the Authority is attracted by the argument advanced by counsel for Ms Fox based as it is strictly on the wording of s.134A. That argument essentially is that if the Authority were persuaded that there was no merit in the argument advanced on behalf of Ms Fox at the time the argument was made, then presumably the Authority would have insisted on the matter proceeding. While there is some practical difficulty with insisting on an investigation meeting proceeding without the applicant being present to prosecute her case, the logic of that submission seems difficult to overlook.

[11] Further and finally, the Authority notes that it indicated in the 31 July 2012 notice of direction that it would deal with the s.134A application in the substantive determination and it failed to do so.

The claim for costs

[12] Hereworth School seeks a costs award of $28,000. That figure is arrived at by an enhanced daily tariff of $7,000 for three days of the investigation meeting together with an additional day at the same rate for the cancellation of the investigation meeting in May 2012.

[13] The basis for that significant claim is as follows:

(a) the respondent's early efforts to settle but were rebuffed;

(b) the sheer volume of material was significant;

(c) the factual matrix was challenging;

(d) Ms Fox raised a raft of matters which were not germane to her employment relationship problem with Hereworth School;

(e) there were personal attacks on witnesses for Hereworth School;

(f) there were also personal attacks directed at members of the Authority and in particular the Chief of the Authority together with approaches being made contemporaneously to the Chief Judge of the Employment Court;

(g) in consequence partly of the complaints about various Authority members dealing with the matter, there was an unreasonable delay in the matter being determined;

(h) because Ms Fox was represented by a lay advocate, he was "indulged" by the Authority and in particular given, so it is alleged, inappropriate latitude to cross examine which was prolix, argumentative and unhelpful.

The response

[14] In submissions filed for Ms Fox, various arguments in opposition to the views advanced on behalf of Hereworth School are put and the conclusion reached that if the Authority is minded to make an award of costs in favour of Hereworth School, the standard daily tariff amount of $10,500 for a three day investigation meeting ought to apply.

[15] Amongst other things, Ms Fox's submissions quarrel with the school's enhanced daily rate calculation, deny the relevance of the pre-hearing behaviour of the parties, and reject the contention that whatever the daily rate applied, any allowance is appropriate for the vacated investigation meeting in May.

Discussion

[16] The law on costs fixing in the Authority is well settled. Both parties have referred to the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. That decision, a judgment of the Full Bench of the Employment Court is the leading decision on the principles to be applied by the Authority in a costs setting environment.

[17] In addition, the Authority has regularly had recourse to the principles enunciated in an earlier decision of the present Chief of the Authority, Member Dumbleton in *Graham v. Airways Corporation of New Zealand Limited* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004). That decision identified three questions which the Authority should postulate in respect to costs setting. Those questions are:

- What are the actual costs?
- Are those costs reasonable?
- What percentage of those costs ought to be met by the unsuccessful party?

[18] It is trite law that costs usually follow the event and there is nothing in the present circumstances to suggest that a different outcome should apply in this case. As Hereworth School were successful, it follows that they are entitled to a contribution from Ms Fox, to their costs in the Authority.

[19] The Authority has traditionally applied a daily tariff approach to costs fixing and that approach has been specifically approved in the *Da Cruz* decision provided that it is applied by the Authority in accordance with principle and not arbitrarily. The current daily tariff is $3,500 per hearing day.

[20] That amount is more modest than would be the case for a hearing in a Court of record. Again, that is consistent with the Authority's jurisprudence and is another of the principles enunciated in *Da Cruz.*

[21] One of the consequences of the Authority's practice of keeping costs at a relatively modest level is that it is generally not considered appropriate to augment costs orders to take account of preparation time. The Authority has generally taken the view that the daily rate calculation ought to have subsumed within it an allowance for preparation time.

[22] However, the Authority has always started the process of cost fixing from the notional daily rate and been prepared to consider argument from the parties as to whether that daily rate ought to be augmented or diminished. In the present case, Hereworth School claim that it be augmented both in terms of the actual number of

hearing days and in terms of the rate per day. Conversely, Ms Fox concedes that if the Authority is minded to make a costs aware the sum of the notional daily rate multiplied by three, is the appropriate rate to fix.

[23] In the present case, the Authority is told that the school's total costs were around three times the amount sought as a contribution, presumably around $75,000. Were this a standard personal grievance with the standard amount of evidence and the usual collaborative approach adopted by most advocates in this jurisdiction, that would be a fee level which would test the bounds of reasonableness. However, given the approach taken by Ms Fox to the claim it would seem inevitable that a larger fee would be incurred by the successful respondent. That is not to say that the School was blameless in its approach to matters either; but the Authority's conviction is that the principal excesses were with the applicant.

[24] Moreover, the Authority can consider the reasonableness of the costs award sought by Hereworth School having regard to the various arguments used by the school to increase the daily rate and the numbers of days to apply, set off against Ms Fox's various arguments in opposition.

[25] Dealing first with the contention that four days rather than three should apply, the Authority is not persuaded that that argument has merit. The short point is that there was no investigation meeting in May 2012 and the only investigation meeting was the three day fixture in September 2012. The Authority is not persuaded that there is any particular logic in increasing the multiplier save for Hereworth School's arguments about the various ways in which Ms Fox's case and the way in which it was presented, contributed to increasing their costs.

[26] But in effect, that is a kind of double counting. If the Authority is persuaded that the way that Ms Fox presented her case increased the costs that Hereworth School was put to in defending its position, then the appropriate way to reflect those increases is by augmenting the daily rate rather than augmenting the daily rate **and** increasing the multiplier.

[27] And on the question of whether the way Ms Fox presented her argument contributed to Hereworth School's costs, the Authority has no doubt that the answer to that question is in the affirmative. It is apparent from the file and the interminable preparations that were necessary to bring the matter to a hearing that a large amount

of thoroughly irrelevant material was advanced by Ms Fox notwithstanding the efforts of the Authority to get her to focus on the employment relationship problem with Hereworth School. Complaints about the integrity of the Mediation Service of the Department of Labour (as it then was), and complaints or issues about a variety of other bodies all made the progressing of the personal grievance for unjustified dismissal, that much more difficult.

[28] It is true as the submissions for Ms Fox attest, that the Authority, in its substantive determination, did not dwell on the difficulties in getting the matter dealt with. But that does not alter the fact that there was a huge amount of material provided to the Authority and thus to the respondent, which was completely irrelevant to the Authority's remit of investigating employment relationship problems but which still had to be responded to in some way by Hereworth School. They are entitled to have that taken into account in the fixing of the daily rate.

[29] Furthermore, those difficulties in terms of the sheer volume of material being generated by Ms Fox are also similarly contributed to by the interminable process of trying to get this matter heard. There were various complaints made on Ms Fox's behalf about various members of the Authority so that there were a number of changes to the presiding member while the file was in its preliminary stages. There were complaints directed at members of the Authority, including the Chief of the Authority and the contemporaneous engagement with the Office of the Chief Judge of the Employment Court notwithstanding that there was nothing before the Court at that time. Again, the Authority must allow Hereworth School to have an additional allowance for the process of getting the matter to a hearing. This is because each time there is a further argument initiated by a party, the other party must respond and that response incurs time and therefore cost. It is trite law that a party who incurs cost as a consequence of the inefficient or irrelevant way in which the other party advances their case, is entitled to have that fact taken in to account if they are successful, as is the case here.

[30] Having said all that, the Authority must make clear that it does not accept counsel for Hereworth School's contention that Ms Fox's lay advocate was *indulged* by the Authority. In the Authority's opinion, it would be unjust and unfair not to give some latitude to a lay advocate. Hereworth School is entitled to its view that Ms Fox would have been better served by a legal practitioner but the law allows Ms Fox to

instruct whomsoever she pleases. The short point is that the Authority is not persuaded that the actual conduct of the three day investigation meeting was the cause of Hereworth School incurring more cost than it ought to have. Given the number of witnesses to be examined and the remoteness of many of them from the hearing in a physical sense, the hearing was always going to take three days. In that particular regard, the Authority notes that it was not just Ms Fox who attended the hearing remotely by video conference; two of the significant witnesses for the respondent were similarly involved with the hearing by video conference.

[31] The Authority accepts that hearing of witnesses via video conference and in particular having one of the advocates appearing by video conference is challenging, but with respect, it is more challenging for the Authority than it is for the parties. Notwithstanding those challenges the Authority was able to consider the evidence it heard, make decisions on the issues that it needed to, and issue a determination.

[32] Taking all those matters into account, the Authority is not persuaded this is a case where the standard daily rate should apply. The Authority is persuaded that the proper course is to double the daily rate because of the factors just referred to in this determination.

Determination

[33] The Authority's conclusion is that it is not appropriate to award a penalty under s.134A of the Act for reasons already set out in this determination.

[34] However, the Authority is persuaded that an award of costs ought to be made in favour of Hereworth School and that the appropriate award is one of $21,000. That amount is to be paid by Ms Fox to Hereworth School. As the Authority has just noted, that figure represents an increase on the daily rate of 100% from the base rate struck by the Authority. The increase is a reflection of the Authority's conviction that the costs incurred by Hereworth School were materially contributed to by the behaviour of Ms Fox in the preparations for the hearing both in terms of the sheer volume of irrelevant material filed and served and her approach to the whole investigation based as it seemed to be on quarrelsome objection to members of the Authority, witnesses put up by the other side, her various requirements about where she would or would not mediate or participate in the Authority's investigation and so on, all materially contributing to the costs incurred by Hereworth School.

[35] That being the position, the Authority is satisfied that a doubling of the usual daily rate is appropriate. Put another way, the Authority's conviction is that if Ms Fox had adopted the Authority's advice at an early stage and provided material only relevant to the personal grievance and took all practical steps to have an urgent investigation into her employment relationship problem without raising irrelevancies about who might hear the matter, where the matter might be heard, and the like, the costs to be paid on the same result would have been half the costs that apply now.

James Crichton
Member of the Employment Relations Authority