

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 166  
5380074

BETWEEN                      ADEBIMPE GEORGE  
   Applicant  
  
AND                              SILVER FERN FARMS  
   LIMITED  
   Respondent

Member of Authority:      David Appleton  
  
Representatives:            Tunde George, Advocate for the applicant  
   Tim Cleary, Counsel for the respondent  
  
Submissions received:      17 July 2013 from the respondent  
   22 July 2013 from the applicant  
  
Determination:              14 August 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The applicant is ordered to pay to the respondent the sum of \$3,500 as a contribution to its costs.**

[1] By way of its determination dated 25 June 2013, [2013] NZERA Christchurch 115, the Authority dismissed the personal grievances of Mrs George and reserved costs. The Authority ordered the parties to seek to agree how costs were to be dealt with between them, but they have been unable to do so. Accordingly, each party has served and lodged its respective submissions by way of memorandum.

[2] The respondent seeks a contribution of \$7,000 to its costs, based on two days' of investigation meeting. This sum represents a relatively small proportion of the total costs incurred by the respondent in defending the claims of Mrs George, which Mr Cleary states amount to \$25,476 excluding GST and disbursements.

[3] Mrs George seeks an order that costs fall where they lie, on a number of grounds. Before examining Mrs George's arguments, I shall briefly summarise the principles adopted by the Authority in considering the award of costs against a party.

*The Da Cruz principles*

[4] Costs are awarded in the Authority in accordance with the provisions of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ENZ 808. The principles governing the setting of costs awards in the Authority as set out in *Da Cruz* include:

- a. There is discretion as to whether costs would be awarded, and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience is to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[5] Costs incurred by a party seeking a contribution from another party must have been reasonably incurred.

*Mrs George's arguments*

[6] The first argument that Mrs George deploys is that she has filed a challenge to the Authority's determination in the Employment Court. This argument can be dismissed without the need for close examination on the basis that it has been the standard practice of the Authority for a number of years to deal with costs, notwithstanding any challenge to the Court, so that all matters before the Authority can be treated as having been disposed of and at an end. Obviously, either party may challenge in the Employment Court the Authority's determination on costs.

[7] Mrs George's second argument is that it is not reasonable and just to award costs against her. She then refers to the late introduction by the respondent of a defence to the disadvantage claim of abandonment of employment. However, this defence was introduced after the Authority granted Mrs George consent to pursue that grievance following the respondent's challenge that the Authority lacked the jurisdiction to consider the grievance on the assertion that it was out of time. Therefore, the respondent was not obliged to reveal this defence until it was sure that it had a case to answer. I do not, therefore, believe that this argument justifies no award of costs being made.

[8] Mrs George also states that her claims were legitimately and fairly pursued, and necessary to affirm her rights to the principles of natural justice. Whilst I agree that she had a perfect right to bring her claims to the Authority, inherent in that right is the risk that, if she failed in her claims, she could have an award of costs made against her. That is the principle of costs following the event. Whilst this principle is not invariably followed, it is standard practice and I see no reason to depart from it in this case.

[9] Mrs George then cites from a case heard by the Australian Competition Tribunal (*Duke Eastern Gas Pipeline Pty Ltd* (2001) ATPR 41-827) the thrust of which is that the power to award costs should be exercised sparingly, not to discourage participation in the review process. Of course, there are many more apposite authorities to refer the Employment Relation Authority to on the matter of costs, and I am satisfied that the spirit of the argument identified in the Australian

case is properly encompassed by the principles of *Da Cruz*, which I shall bear in mind in determining this matter.

[10] Mrs George also attempted to refer to an event or events that occurred at mediation, but these references, which should not have been included, were removed from her submissions before the details came to my attention.

[11] Mrs George then makes reference to her being unable to secure another job since her dismissal, and states that she has gone back to study to improve her prospects. Whilst Mrs George does not give any details of her financial situation, I am mindful of the likelihood that she will find it difficult to pay even a moderately substantial costs order, given the fact that she is not working, has not done so for some time, and has three young children. Whilst a successful party should not be deprived of costs in the absence of seriously blameworthy conduct in provoking, conducting or prolonging the litigation (*Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40 (EmpC)) the Authority should bear in mind a party's ability to pay when fixing any award against it. I shall consider this below when determining the costs that Mrs George should pay.

[12] Mrs George also states that she had no legal representation throughout the process and cites another Australian case (*Xiros v Fortis Life Assurance Ltd*, (2001) 162 FLR 433) in which no costs were ordered against an unsuccessful unrepresented party, who was not able to make an *apposite assessment of the strengths and weaknesses of his case*. However, Mrs George is being unduly modest, as she and her husband made a very good attempt to present the facts and legal arguments. Whilst not ultimately successful, on their face she had an arguable case, especially in respect of the disadvantage claim.

[13] As for Mrs George's final principal argument, that she raised significant issues of public interest which may serve as a precedent to people unsure of their rights as work accident victims, I must respectfully disagree, in the sense that, whilst Mrs George's situation had some somewhat unusual elements, no unusual legal principles were uncovered. In many ways, it was an investigation into fairly standard unjustified dismissal and disadvantage claims.

**Determination**

[14] Mr Cleary in his short written submission asks for \$7,000 costs on the basis that the Authority held two separate investigation meetings. He relies on the standard notional daily tariff of \$3,500, which often forms the basis of costs awards in the Authority.

[15] However, although the investigation meetings were held on two separate days, each lasted no longer than half a day. Whilst I recognise that Mr Cleary had to travel to Ashburton from the North Island on each occasion, he does not bring this to bear in his submissions.

[16] I believe that the just and fair approach to take in this matter, bearing in mind the probable limited resources of Mrs George, without being possessed of any details, is to award costs at the standard daily rate on the basis of one full day's investigation meeting; namely \$3,500. This notionally recognises the work done by the respondent in successfully defending the claims whilst protecting Mrs George from a costs award that she may well be unable to pay.

**Order**

[17] I order Mrs George to pay to the respondent the sum of \$3,500 as a contribution to its costs.

David Appleton

Member of the Employment Relations Authority