

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 170  
5564112

BETWEEN KEVIN GUTHRIE  
Applicant

A N D COMMISSIONER OF POLICE  
Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Counsel for Applicant  
Natalie Shaw, Counsel for Respondent

Submissions Received: 12 August and 2 September 2016, from the Applicant  
25 August 2016, from the Respondent

Date of Determination: 22 September 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Commissioner of Police is to pay to Kevin Guthrie costs in the sum of \$500.00 together with reimbursement of the filing fee of \$71.56. Leave is reserved for Ms Sharma to return to the Authority about the issue of travel expenses.**

**The substantive determination**

[1] In a written determination dated 14 July 2016<sup>1</sup>, the Authority found that the respondent had not complied with clause 3 of the record of settlement between the parties because the statement of service did not provide Mr Guthrie's actual length of service. The Authority did not make an order for compliance but gave the respondent a two week period to provide a statement of service that reflected the length of

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<sup>1</sup> [2016] NZERA Christchurch 110

service. The Authority found that the circumstances did not call for an award of a penalty.

[2] Costs were reserved and a timetable set if agreement could not be reached. The Authority has received submissions on behalf of the applicant and respondent with both parties wanting an award of costs in their favour.

### **The applicant's submissions**

[3] Ms Sharma submits that on 1 July 2016, the respondent put the applicant on notice that "if the Authority determines that Police has not breached clause 3 of the record of settlement as alleged he will be liable to Police for costs".

[4] She submits that given the findings of the Authority the applicant could reasonably anticipate the respondent would pay costs to him should the issue be determined in his favour.

[5] Ms Sharma submits that the situation was brought about by "the respondent's sloppy and careless approach and its refusal to acknowledge its own records that pointed to clear evidence of Mr Guthrie's commencement date". She submits with respect to the respondent placing reliance on paragraph [20] of the Authority's determination that this reference in the Authority's determination ignores the respondent's failure to address the applicant's concerns when he raised these directly.

[6] Ms Sharma refers to an attempt that she describes as "abysmal" at producing a relatively straightforward document for a statement of service between 20 January and 23 March 2016 and that it only being after proceedings were lodged that the original statement of service was amended but that the respondent was not prepared to amend the start date of the applicant to 1992.

[7] Ms Sharma submits that the applicant is seeking a higher threshold of costs because the respondent could have resolved the matter directly with the applicant at the outset. It was acknowledged by Ms Sharma that this matter took less than a full day. However the applicant is seeking a contribution of \$3,500.00 together with \$450.00 being the costs involved in making the costs application and the applicant's travel costs from Christchurch to Nelson along with the reimbursement of the Authority's filing fee in the sum of \$71.56.

## **The respondent's submissions**

[8] Ms Shaw on behalf of the respondent seeks a contribution towards its costs in the sum of \$1,750.00 together with the cost of travel to attend the Investigation Meeting in Nelson in the sum of \$384.70. In the alternative, Ms Shaw submits that costs should lie where they fall.

[9] Ms Shaw refers the Authority to the power to award costs under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) and the well-established principles set out by the Employment Court in *PBO Ltd (formerly Rush Security) v. Da Cruz*<sup>2</sup>. Ms Shaw submits that the applicant's application for a compliance order and for a penalty failed and that the only aspect of the Statement of Service that the Authority ordered Police to amend was the date the applicant commenced employment.

[10] Ms Shaw submits Police were willing to engage with the applicant on this matter. She submits that on 29 March 2016, Police wrote to the applicant offering to consider amendments to the Statement of Service and on 8 April 2016 offered to provide the applicant with a "Word" copy of the Statement of Service for him to propose amendments but received no response to this.

[11] On 31 May 2016, Ms Shaw submits Police further sought to engage the applicant and requested supporting information from him that he started with the Police in 1992 as Police records indicated he started in 1993 but no response was received to that invitation.

[12] Ms Shaw submits that the costs incurred by the applicant were due to the fact that he chose to progress the matter in spite of Police's efforts to resolve it informally and without the need for the Authority to intervene. Ms Shaw submits Police was at all times willing to resolve the matter in a low key way and therefore seeks costs or an order that costs lie where they fall.

## **Discussion**

[13] The power of the Authority to award costs is found in clause 15 of the second schedule to the Act. In *PBO*<sup>3</sup> the Employment Court set out principles appropriate to

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<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> Ibid

the Authority and consistent with its functions and powers for considering costs. Relevant principles are that the Authority has discretion as to whether costs are 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 although conduct which increases costs can be taken into account. Costs generally follow the event and awards are frequently judged against a notional daily rate which at the time was \$3,500.00.

[14] The applicant had limited success following the Investigation Meeting but the respondent says the same result could have been achieved much earlier by discussion without the need for an Investigation Meeting. Ms Shaw and Ms Sharma have very different views about that.

[15] I intend to approach the exercise of my discretion as to costs on this basis. The applicant was not initially provided with a Statement of Service in accordance with the record of settlement because of some oversight. The applicant instructed Ms Sharma. He incurred some legal costs at that point to achieve compliance with the record of settlement for the provision of a Statement of Service regardless of how the matter came to the Police's attention at that time. After service of the statement of problem Police offered to resolve the matter and an amended Statement of Service was provided but the applicant did not agree with the length of service based on the commencement date of employment.

[16] In assessing costs I find that the applicant achieved only limited success and that there were attempts to resolve the matter by Police before the Investigation Meeting which could have possibly avoided the need for an Investigation Meeting.

[17] I do not find that there should be an award of costs in favour of the Police or that costs should lie where they fall because the applicant was put to some initial cost in obtaining compliance with the record of settlement as set out in [15] above which I find in fairness I should weigh in the exercise of my discretion.

[18] The Investigation Meeting was about one and a half hours in duration. A full day assessed on the basis of the daily tariff is six hours so proportionally that would be an award of \$875.00. I find an award should be reduced for the above reasons including the limited success to \$500.00. I did not adjust that figure upwards for the preparation of submissions as to costs. The provision of a cost submission is usually

assessed as part of the daily tariff and I see no reason on this occasion to depart from that.

[19] Ms Sharma has sought travel expenses for the applicant from Christchurch to Nelson in the sum of \$120.00 and reimbursement of the filing fee. I accept reimbursement of the filing fee is appropriate. I understood from the applicant's statement of evidence that he resided in Nelson. I accept that could simply be an error or that I may have been mistaken. I give Ms Sharma leave to return about any travel expenses to the Authority.

### **Determination**

[20] Commissioner of Police is to pay to Kevin Guthrie costs in the sum of \$500.00 together with reimbursement of the filing fee in the sum of \$71.56. Leave is reserved for Ms Sharma to return to the Authority about any travel expenses.

Helen Doyle  
Member of the Employment Relations Authority