

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 48/10  
5136402

BETWEEN                      WILLIAM GUTSELL  
   Applicant  
  
AND                              BURGESS & CROWLEY  
   CIVIL LIMITED  
   Respondent

Member of Authority:      Paul Montgomery  
  
Representatives:            Anjela Sharma, Advocate for Applicant  
   Graeme Downing, Counsel for Respondent  
  
Submissions Received:    24 December 2009 for Respondent  
   12 February 2010 for Applicant  
  
Determination:              5 March 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In its determination of the substantive issues, the Authority found for the respondent.

[2]     The parties have attempted to resolve the issue of costs but have been unable to do so. The representatives have provided their respective memoranda which I have studied and considered in determining costs.

[3]     The respondent submits its legal costs in respect of the Authority's investigation amounted to \$11,305.30. However, it seeks the sum of \$4,500 as a contribution to its costs. By its counsel, the respondent says the manner in which the applicant's case was conducted led to it incurring additional expenditure. Specifically, Mr Downing refers to allegations made in Mr Gutsell's statement of evidence, allegations not contained in the notification of the grievance nor in the

Statement of Problem. These late allegations required the calling of rebuttal evidence from a number of additional witnesses which escalated the respondent's costs.

[4] For the applicant, Ms Sharma submits that her client is a person of limited means who also provides for his superannuitant wife. Counsel submits the contribution sought would impact seriously on her client's financial position and in fact would be punitive. Ms Sharma urges the Authority to allow costs to lie where they have fallen.

[5] As was observed in the substantive determination, the applicant's evidence was simply not believable. The chances of his case surviving scrutiny by the Authority are akin to those of an egg surviving a fall from Nelson Cathedral's belltower. Mr Gutsell needed to evaluate his chances of success even as late as the exchange of statements of evidence. Instead, he chose to continue, attempting to bluster his way through the bulwark of a tightly constructed and documented defence. His decision to proceed has consequences and I find this is a case in which costs are to follow the event.

[6] The Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808, sets out the principles guiding the award of costs in the Authority. One principle expressed by the Full Court is:

*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.*

[7] This case is one to which the notional tariff approach applies. The Full Court in *PBO* (supra) said:

*We find there is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. ... The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.*

[8] Standing back and considering the costs associated with securing and documenting evidence in rebuttal, but also the financial situation of the unsuccessful applicant, I find an appropriate order for costs in this case to be \$2,600.

[9] The matter took approximately six hours of the Authority's time, or three quarters of a day. That would usually attract costs for the successful party of the order of \$2,250. The modest increase I have included is to compensate the respondent in part for costs relating to the evidence of staff present at key events and called to rebut the applicant's fanciful account of events.

[10] I order the applicant to pay the respondent the sum of \$2,600 as a contribution to what I find are its reasonably incurred costs.

[11] The representatives are to confer and agree on a time payment arrangement to enable the sum ordered to be paid in instalments.

Paul Montgomery  
Member of the Employment Relations Authority