IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 185
5371343

	BETWEEN	SAPPHIRE HOSE Applicant
	A N D	ALLAN WEBB Respondent

Member of Authority:	James Crichton
Representatives:	Hamish Burdon, Advocate for Applicant Garth O'Brien, Counsel for Respondent
Submissions Received	28 May 2012 from Applicant 28 May 2012 from Respondent
Date of Determination:	31 May 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority issued a determination on the substantive matter on 11 May 2012. Ms Hose's personal grievance claim for disadvantage was successful and the Authority awarded her remedies.

[2] Costs were reserved.

The application for costs

[3] Ms Hose, through her advocate, seeks an award of costs in the sum of $3,000. The total fees incurred by Ms Hose amounted to $4,882.55 inclusive of GST and disbursements.

[4] Ms Hose's submissions point out that counsel for Mr Webb made no genuine attempt to resolve the matter of costs by agreement, pre-empting those discussions by filing submissions in the Authority before negotiations between the parties had even

got properly under way. Nothing turns on that. In the absence of agreement, the Authority is ready, willing and able to fix costs and if parties are not prepared to engage with each other, then that is what must happen.

[5] Ms Hose also complains about counsel for Mr Webb alleging there is something inappropriate about the fees claimed by Ms Hose's adviser because the latter was not a lawyer. Ms Hose is quite right to take this point. There is a longstanding tradition in the employment jurisdiction, not just allowing but actually encouraging lay advocates to appear. Parties regularly appear in the Authority without any representation, and do so very ably in many cases. But the short point is that if a successful party has engaged representation (whether a legal practitioner or not), that representative is entitled to charge fees and, in the absence of agreement, it is the Authority's role to determine the reasonableness or otherwise of those fees. Certainly, there is nothing in the jurisprudence which would encourage the Authority to differentiate between representatives because one is a qualified solicitor and one is not. What representatives charge (whether practitioner or otherwise) is a matter for them and the normal marketplace constraints.

[6] As Ms Hose's representative correctly observes in her submissions, the longstanding tradition in the employment jurisdiction for lay representatives to appear is enshrined in the statute and there is nothing uncommon or inappropriate about such a form of representation.

The response

[7] Counsel for Mr Webb suggested in correspondence with Ms Hose's representative that an award of perhaps $300 might be appropriate and focuses his submissions on the contention that since the representative for Ms Hose was not a legal practitioner, different principles should somehow apply to the fixing of costs. As the Authority has already observed in this determination, there is nothing in the jurisprudence to justify a differing approach from the Authority by reason only of the nature of the professional background of the advocate. The test the Authority applies must apply equally to both representatives, irrespective of their profession.

[8] Submissions for Mr Webb also contend that the preparation for the investigation meeting was limited because the Authority directed that no briefs of

evidence were to be filed and of course the investigation meeting took less than half a day.

The law

[9] The relevant law on cost fixing in the Authority is well settled. The Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 provides an admirable summary of that jurisprudence. That decision is relied upon by the advocate for Ms Hose in submissions made on her behalf.

[10] Relevant principles to be discerned from that judgment include the precepts that costs in the Authority will typically be modest, reflecting the non-adversarial environment, that costs would usually follow the event, and that it is appropriate for the Authority to apply a daily tariff to cost fixing. In addition, costs are also a discretionary remedy.

[11] In a decision of the present Chief of the Employment Relations Authority, *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004), the Authority postulated a three step approach in evaluating applications for costs. The first step was the identification of the actual costs incurred by the successful party, the second was a consideration of whether, in all the circumstances, those costs were reasonable, and the third was the determination of what proportion of those costs ought to be met by the unsuccessful party.

Determination

[12] Applying *Graham* to the present case, we know that Ms Hose has incurred total costs in the matter of around $4,800. That amount includes a sum of $636.85 for GST which is not traditionally part of costs awarded together with amounts for photocopying and phone calls which again are not typically separately provided for in a costs environment. Travel costs, on the other hand, can be specifically provided for in a costs fixing setting.

[13] The next issue from *Graham* is the establishing of whether or not the costs incurred are reasonable. The Authority is satisfied that the costs incurred are reasonable. A normal *"run of the mill"* personal grievance in a country area away

from the main areas of metropolitan costings, would, in the Authority's view, typically be around the $5,000 mark.

[14] That leaves the final question of how much of the total costs incurred by Ms Hose ought to be reimbursed. Ms Hose did not receive a large award of compensation and because she had borrowed a significant sum from her employer, Mr Webb, the Authority set that amount off against the compensation Ms Hose was entitled to. In addition, Ms Hose was not entitled to any wages because during the period that she has not worked as a consequence of the personal grievance, she has been unwell. That has been confirmed by various medical certificates and so she has not been able to work and therefore cannot be entitled to wages. In addition, the Authority noted that as she was a casual employee, conceivably she would not have had work during the period in question in any event.

[15] Those observations simply go to make the point that, although Ms Hose was absolutely successful in her claim, for a variety of reasons for which she was blameless, the fruits of her success have been very modest. It follows that the amount of money that she will have to meet her obligations to her representative is limited and indeed even if she were to pay for her representative all of the balance of the compensation that she is due to from Mr Webb, she would still have to find over three-quarters of the amount in fees to clear her debt to her representative. Those factors are appropriate to take into account in considering the award to be made.

[16] The Authority traditionally applies a daily tariff approach to appearances before it. On the footing that this matter took about half a day, the starting point is $1,750, the Authority having recently determined that the daily rate tariff starting point is to be $3,500. The only remaining question is whether that amount ought properly to be added to or taken away from in the present case. The Authority is not persuaded that either party materially added to the costs of the other by arguing the case in an inappropriate way.

[17] As the Authority has noted above, Ms Hose was completely successful in her claim but, for various reasons which do not bear at all on the nature of her claim, she received very little reward from the Authority for her success and is now faced with legal costs which greatly exceed the quantum awarded her in her successful prosecution of her personal grievance. In those circumstances, the Authority thinks it proper to add a small component to the base figure already arrived at of $500 taking

the total contribution to costs to a figure of $2,250. In addition, there should be reimbursement of the travel costs incurred by Ms Hose's representative which amounts to $189.60.

[18] Mr Webb is to pay to Ms Hose a contribution to costs in the amount of $2,250 together with reimbursement of actual travel expenses in the sum of $189.60.

James Crichton
Member of the Employment Relations Authority