

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 18  
5338612

BETWEEN                      JUDITH JONES  
   Applicant  
  
A N D                              PACT  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              David Carruthers, Counsel for Applicant  
   Barry Dorking, Counsel for Respondent  
  
Submissions Received:      12 December 2011 from Applicant  
   18 November 2011 from Respondent  
  
Date of Determination:      30 January 2012

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**Introduction**

[1]     The Authority issued its determination on the substantive matter on 19 October 2011. In that determination, the respondent (Pact) was completely successful in resisting the application of the applicant (Ms Jones).

[2]     Costs were reserved.

**The claim for costs**

[3]     Counsel for Pact seeks a substantial contribution to its costs in a range between \$9,000 and \$14,250, plus disbursements in any case amounting to \$1,275. Pact's argument for such a significant award is based on the contention that Ms Jones' claim was always frivolous and vexatious in that she could never hope to succeed given the concessions that she had already made in respect of the matter.

[4]     In responding to the statement of problem filed by Ms Jones, Pact, as well as filing a statement in reply, made an application for the proceedings to be struck-out.

It did this in reliance on Ms Jones' concessions, in particular Ms Jones' concession that the disciplinary procedure adopted by Pact was a fair and just one. Pact argued that, in those circumstances, the only question for the Authority to answer was whether Pact was justified in reaching the substantive conclusion that it had. The question was not whether Ms Jones had acted in the way alleged, but whether Pact had a reasonable belief that she had.

[5] The Authority determined that Pact should not be put to defending the claim until the Authority was satisfied that Ms Jones was determined to proceed, understood the risks of proceeding and could properly advance the prosecution of her claim. Accordingly, the Authority met separately with Ms Jones and her counsel on 14 July 2011 at Greymouth. The Authority was satisfied that Ms Jones wished to proceed, understood the risks, and had a proper basis for prosecuting her claim as a consequence of that meeting in Greymouth. Accordingly, an investigation meeting was convened in the normal way.

[6] However, because the application to strike-out was made by Pact, the Authority was at pains to ensure that Ms Jones understood the extra risk that she ran in the costs environment if she were unsuccessful. This was because, having put the respondent employer to the defence of the claim, it having sought to have it dismissed without incurring additional cost, Ms Jones had to accept a greater costs burden than would otherwise be the case.

[7] Notwithstanding that, Ms Jones, through counsel, denies that she ought to be responsible for a greater than usual share of costs and proposes only that she contribute the usual daily tariff of \$3,000. For Ms Jones, it is suggested that she had a viable argument, that she was entitled to bring her claim in the Authority and that she ought not to be penalised in costs.

## **Discussion**

[8] Certainly it is an established principle that costs should follow the event. In principle then, Pact is entitled to make an application for costs as the entirely successful party.

[9] However, it is also well established principle in costs fixing that costs should not be used as a punishment of an unsuccessful party and it could be considered that

Ms Jones was effectively being penalised if she were subject to a costs award greater than the norm, by reason of the effect of the strike-out application.

### **The legal principles**

[10] The principles that the Authority ought to apply in a costs setting are well set out in the decision of the Full Court *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[11] In addition, the Authority regularly applies the principles enunciated by the present Chief of the Authority in *Graham v. Airways Corporation of New Zealand (2004)* 7 NZELC 97. In that case, the Authority enunciated three principles which it proposed should be considered in the costs setting environment. These principles were:

- (a) Establishing the costs incurred by the successful party;
- (b) Establishing whether the costs incurred were reasonably incurred; and
- (c) Establishing what percentage of those costs ought to be met by the unsuccessful party.

### **Determination**

[12] Applying the principles in *Graham*, the Authority is told that Pact incurred total costs of around \$22,000 in resisting Ms Jones' claim. On the face of it, that would be an unusually high fee to incur for a straightforward personal grievance, as this was. However, the remoteness of the head office of Pact (in Dunedin) from the workplace (the West Coast) may have some impact on the fee incurred. The Authority is not provided with a breakdown of the costs incurred and that being the position, is not in a position to make anything other than the general comment it has.

[13] Given the foregoing observations, the Authority is not in a position to make any useful comment about whether the fee was reasonable or not and can really only determine the matter on the basis of the usual principles.

[14] This was a matter dealt with by the Authority in barely half a day. There were other ancillary attendances because of the way in which the Authority chose to investigate the matter, but taken together with the actual hearing time, the total would still not exceed a normal working day. On the face of it then, if the daily tariff were to

be applied in the present case, and no other factors need to be taken into account, a contribution to Pact's costs in the order of \$3,000 together with the reasonable disbursements claimed by Pact, would be appropriate.

[15] However, because Pact sought to "*short circuit*" this matter by applying to have it struck-out, Pact argues that it is entitled to a greater award than would otherwise be the case because, in essence, it has been put to the extra cost of resisting a claim which it says had no merit.

[16] Certainly, it is true that Ms Jones was put on notice that, by determining to proceed with her claim, as was described earlier in this determination, there was a risk that if she was unsuccessful, she would have to meet a greater share of the costs of Pact than would normally be the case.

[17] In the present circumstances, the Authority is not persuaded that the nature of the claim brought by Ms Jones, and the resisting of it, is so unique or complex as to justify the application of cost fixing principles other than the commonly used daily tariff approach. That then, in the Authority's view, must form the basis for this costs fixing exercise with the "base" tariff of \$300, as already enunciated. However, Pact is right to ask for an additional allowance because it was put to proof in the matter rather than having it struck-out at first instance. The Authority determines that that additional amount should be in the sum of \$2,000.

[18] It follows that Ms Jones is to pay to Pact the sum of \$5,000 as a contribution to Pact's costs together with a further sum of \$1,275 to reimburse Pact for disbursements reasonably incurred by Pact in the defence of Ms Jones' claim.

James Crichton  
Member of the Employment Relations Authority