

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch  
192  
5335047

BETWEEN                      MICHAEL JUKES  
   Applicant  
  
A N D                              SEALORD GROUP LIMITED  
   Respondent

Member of Authority:      M B Loftus  
  
Representatives:              Stephen Thomas, Advocate for Applicant  
   Peter Kiely and Mere King, Counsel for Respondent  
  
Submissions Received:      28 June 2013 from Respondent  
   9 July 2013 from Applicant  
  
Date of Determination:      12 September 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      On 3 May 2013 I issued a determination regarding questions Mr Jukes raised about his holiday pay. I concluded all was in order and nothing was owed to Mr Jukes.

[2]      Costs were reserved and Sealord, as the successful party, now seeks a contribution toward those it incurred in defending the claim.

[3]      Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[4]      The investigation took a day and its length would, applying the above formula, see in a contribution in the order of \$3,500.

[5]      Sealord, having incurred significant costs, seeks a contribution of \$10,500.

The claim reflects the above formula (paragraph 3) applied to three days – one for the hearing and two for preparation.

[6] The claim for preparatory time is justified with reference to decisions of the Authority where preparatory effort has justified an increase to the *tariff* (for example *Kennedy v Air New Zealand* ERA Auckland AA65/06, 7 March 2006) and those of the Court recognising a rule of thumb of two days preparation for each day of hearing (for example *Chief Executive of the Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73 (EC)).

[7] Comment is then made that this case required significant preparation resulting from a need to troll archived records going back to 1987.

[8] The applicant accepts the tariff approach (*Da Cruz*) is both the norm and appropriate. He also recognises costs in the Authority can increase as a result of preparatory effort but, with reference to *Carter Holt Harvey v EBIIWU* [2011] NZEmpC 13, suggests such an approach should only be applied in particularly complex matters. It is argued this was not complex and any difficulties that arose were the result of the respondent's record keeping. It is also argued that *Carter Holt v EBIIWU* superseded the *Corrections v Tawhiwhirangi* rule of thumb with a significantly lower multiplier.

[9] Notwithstanding the concession regarding the tariff approach Mr Thomas argues cost should either lie where they fall or the tariff be significantly reduced as this was a test case (*NZ Labourers IUOW v Fletcher Challenge Ltd* [1990] 1 NZILR 557) and account should be taken of the respondents conduct and, in particular, a failure to adhere to timetables set by the Authority. This criticism refers to the late production of witness statements and supporting documents, along with a claim the respondent's position continued to change until the day of hearing.

[10] Taking the respondent's submission first. While it is clear preparation may be recognised as a justification for increasing an award, I cannot say I am convinced to do so by the arguments tendered. I am not aware of the Court's two for one approach being applied in the Authority since *Da Cruz* ushered in wide acceptance of the tariff approach. Similarly I am not convinced the documentary needed to be fully research back to 1987 as the event giving rise to the claim (an amendment to the Holidays Act) occurred in 2003.

[11] Turning to the applicants reply, and in particular the argument cost should lie where they fall or at least be significantly reduced. Again I am not swayed by the supporting arguments.

[12] While there was interest from Mr Jukes colleagues evidenced by the fact some came to watch, I struggle to conclude this was a test case. Mr Jukes was unable to quantify his claim and as was reflected in paragraphs 1 and 3 of the substantive decision the claim was based on an ill-defined suspicion something was amiss.

[13] Indeed, I conclude this lack of specificity will have led to an increase in the respondent's costs as the uncertainty will undoubtedly have meant that it had to ensure it covered a range of potential issues. It also meant it was no surprise the respondent was reviewing its approach and that justified amendments thereto not, though, that I considered the alterations significant.

[14] There is also the suggestion the respondent's conduct justifies a reduced award. I think not. The failure to adhere to timings was minor and did not affect the conduct of the investigation. If anything the process was assisted by the well indexed and comprehensive bundle of documents Mr Thomas criticises the late delivery of and I have already commented that the lack of specificity in the claim justified continued reconsideration of its approach by the respondent.

[15] When I consider the above I conclude the tariff should be increased though not for the reasons argued by the respondent.

[16] I therefore order Mr Jukes to pay Sealord Group Limited the sum of \$5,000 (five thousand dollars) as a contribution toward costs.

M B Loftus  
Member of the Employment Relations Authority

