

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 48
5419752

BETWEEN

JUDITH LEE
Applicant

A N D

AUCKLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: T G Tetitaha

Representatives: P Golden, Advocate for Applicant
P Chemis, Counsel for Respondent

Submissions Received: 20 January 2014 from Applicant
21 January 2014 from Respondent

Date of Determination: 11 February 2014

COSTS DETERMINATION OF THE AUTHORITY

A. The Auckland District Health Board is ordered to pay to Judith Lee the sum of \$3,500 as a contribution toward her legal costs.

Employment relationship problem

[1] Judith Lee seeks an award of costs following her partially successful personal grievance matter.¹ She seeks full payment of her costs or a significant contribution because of delays, her settlement offer and the ability of the respondent to pay costs. The Auckland District Health Board submits a lower award of costs should be made because of Ms Lee's partial success, contribution to the situation giving rise to the personal grievance and the additional costs incurred by the conduct of her advocate due to his lack of understanding of the Authority's processes and procedures.

¹ *Lee v. Auckland District Health Board* [2013] NZERA Auckland 583

Issues

[2] The following issues arise:

- (a) Should indemnity costs be awarded?
- (b) What is the starting point for assessing costs?
- (c) Are there any factors which warrant an increase in costs?
- (d) Are there any factors warranting a reduction in costs?

Should indemnity costs be awarded?

[3] Ms Lee seeks recovery of all of her costs incurred or indemnity costs. Indemnity costs are exceptional. They require evidence of “*exceptionally bad behaviour*” or may be awarded where a party has behaved either badly or very unreasonably.²

[4] This matter does not meet the very high threshold required before indemnity costs may be imposed.

What is the starting point for assessing costs?

[5] The starting point for costs in the Authority is its notional daily tariff of \$3,500. The investigation meeting took approximately two days hearing time. Accordingly, the starting point for assessing costs is \$7,000.

[6] Ms Lee seeks a higher starting point. Her billable costs were \$55,000 which she accepts was unreasonable. These were reduced to \$27,500 due to her impecuniosity. In determining costs, the Authority may have regard to the reasonableness of applicant’s actual legal costs.

[7] Ms Lee did not file her actual legal fee invoices. She relies upon her submissions to detail of what the legal costs involved. The submissions give a monthly breakdown of the hours and general descriptions of activities done. No allocation of hours to the activities is provided. How much time was spent on each activity is unknown. Some items do not appear to be legal costs at all, for example

² *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234

“dealing with MP and others.” Some of the items billed appear questionable such as *“travel and accommodation”*. This matter was dealt with in Auckland. The address for service is in New Lynn, Auckland. There is no basis for accommodation expenses. Travel expenses would be minimal. None of these disbursements have been separately itemised.

[8] Ms Lee’s bills include an unspecified amount for mediation costs. She submits these ought to be covered because she was directed to attend by the Authority. The Authority is required to direct parties to mediation unless one or more of the grounds in s.159(1)(b)(i) to (iv) apply. From the Authority’s file, Ms Lee did not raise any of the above grounds for dispensing with mediation before the (then) member involved.

[9] Mediation is a confidential process. It is a matter of public policy that the parties meet their own mediation costs.³ There are no circumstances in this case justifying a departure from that principle.

[10] This matter was not overly complex. Ms Lee’s evidence and submissions filed were sparse and her cross-examination limited. This matter did not require Counsel with specific skills or expertise.

[11] Given the lack of actual invoices, limited information about the work done, possible duplication and billing of items which are not legal costs, and lack of complexity, the Authority declines to increase the starting point for costs.

Are there any factors which warrant an increase in costs?

[12] Ms Lee alleges factors warranting an increase in costs include her settlement offer, delays by the respondent and its ability to pay costs.

[13] There is no detail of what the alleged settlement offer was, when it was made and whether it exceeded what was achieved by Ms Lee. The Authority is unable to assess its reasonableness in the circumstances. Accordingly it gives no weight to it.

[14] The amount of delay in the decision making appears primarily occasioned by Ms Lee being on sick leave as noted in the determination at paragraphs [9] and [14]. She alleges delay in holding the mediation due to the unavailability of the

³ *Black v Whimp as Trustee for the Dome Trust t/a My Flatpack* [2014] NZERA 3 at [13].

respondent's decision maker and legal representative. This does not automatically mean Ms Lee occasioned more legal costs as a result. Even if she did it would have been minimal. The Authority has no details about what those extra costs may have been. Given the lack of information the Authority declines to grant any increase.

[15] The ability of the respondent to pay costs is not a matter to increase costs awarded to Ms Lee.

[16] Accordingly the Authority determines there are no factors warranting an increase in a costs award to Ms Lee.

Are there any factors warranting a reduction in costs?

[17] The respondent alleges Ms Lee's contributory conduct should reduce costs payable. Where contributory conduct is taken into account to reduce or deny remedies, it cannot also be taken into account in determining the issue of costs.⁴ Ms Lee's conduct has already been taken into account in reducing remedies. She cannot be penalised twice.

[18] The respondent alleges Ms Lee's advocate's approach to hearing demonstrated at times a lack of understanding of the Authority's processes and procedures, and resulted in a longer investigation meeting than necessary. Conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.⁵

[19] The matter was set down for two hearing days, including an earlier half day hearing to accommodate the availability of one of the respondent's key witnesses. Although four witnesses briefs were filed, she produced only two witnesses at hearing. The advocate's approach to hearing could be described as 'sparse', but the hearing was completed within the time allocated. No other detail as to how this approach increased costs is given. In the circumstances the Authority declines to make any further reduction in costs.

[20] Ms Lee's partial success is a matter the Authority may wish to reflect in a reduction in costs. Half of the hearing time was devoted to allegations of harassment

⁴ *White v. Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635 at [40] and [51]

⁵ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808 (Emp C) at [35]

and bullying and the application for reinstatement, both of which ultimately failed. Accordingly, a reduction of 50% is warranted to reflect Ms Lee's partial success.

[21] Accordingly, the Auckland District Health Board is ordered to pay to Judith Lee the sum of \$3,500 as a contribution toward her legal costs.

A handwritten signature in black ink, appearing to read 'T G Tetitaha', written in a cursive style.

T G Tetitaha
Member of the Employment Relations Authority