

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 339
5407497

BETWEEN

JOHN LOWE
Applicant

A N D

GRAEME WRIGHT
TRANSPORT LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Wendy McPhail, Advocate for the Applicant
Susan-Jane Davies, Counsel for the Respondent

Submissions Received: 02 and 27 October 2015 from the Applicant
09 October 2015 from the Respondent

Date of Determination: 30 October 2015

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Graeme Wright Transport Limited is ordered to contribute \$3,500 towards Mr John Lowe's costs which are to be paid within 14 days of the date of this determination.**

The substantive determination

[1] In a determination of the Authority dated 18 September 2015¹ the Authority determined that;

- (a) The applicable employment agreement was the "collective employment agreement" dated in 1997. The employment contract made no provision as to redundancy compensation and did not have a restraint of trade provision.

¹ [2015] NZERA Auckland 286

- (b) Mr Lowe's dismissal was not for genuine reasons of redundancy.
- (c) Graeme Wright Transport Limited did not follow a fair and proper process when dismissing Mr Lowe.
- (d) Mr Lowe was awarded the sum of \$15,000 compensation for hurt and humiliation suffered by him pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).
- (e) Mr Lowe breached his obligations of good faith and fidelity to Graeme Wright Transport Limited and was ordered to pay a penalty of \$1,000.
- (f) Taking into account the penalty to be paid by Mr Lowe to Graeme Wright Transport Limited, Graeme Wright Transport Limited was ordered to pay Mr Lowe the sum of \$14,000 distress compensation within 21 days of the date of the determination.

Costs determination

[2] A memorandum of costs was filed by Ms McPhail on behalf of Mr Lowe seeking a costs award of \$3,500 being the Authority's daily tariff. Mr Lowe's costs were approximately \$6,000.

[3] Ms Davies opposes Mr Lowe's claim for costs. Ms Davies submits that the usual daily tariff should be reduced because Mr Graeme Wright was named as a respondent personally in the first statement of problem and that the claims by Mr Lowe for lost wages and redundancy compensation were lacking in merit. Further, Ms Davies submits that Graeme Wright Transport Limited (Wright Transport) was successful in obtaining a penalty award of \$1,000 against Mr Lowe in respect of his conduct following the termination of his employment.

The Authority's power to award costs

[4] The Authority's power to award costs arises from Schedule 2, clause 15 of the Act. This confers a wide discretion on the Authority to award costs on a principled basis.

[5] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². In particular;

- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- 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; and
- Awards will be modest.

[6] The general principle is that costs follow the event, and I see no reason to depart from that in this case. Mr Lowe was largely successful in his claims and should be awarded costs.

[7] The Employment Court in *Carter Holt Harvey v. Eastern Days Independent Industrial Workers Union & Ors*³ observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. This approach has been affirmed by the Employment Court recently in *Fagotti v. Acme & Co Ltd*⁴. I adopt that approach.

[8] The normal starting point for costs in the Authority is \$3,500 per day. Wright Transport filed a counterclaim in relation to Mr Lowe's statement of problem and initially, the investigation meeting was scheduled for two full days. As it turned out, the matter was able to be disposed of in one full day.

[9] Ms McPhail is seeking costs of \$3500 in respect of the one full day of the investigation meeting.

² [2005] 1 ERNZ 808, para.[44]

³ [2011] NZEmpC 13

⁴ [2015] NZEmpC 135

[10] Consideration has been given to the submissions made by Ms Davies that the naming of Mr Wright as a party added to Wright Transport's costs, that parts of Mr Lowe's claims were flawed and unmeritorious and that Wright Transport itself was successful in obtaining a penalty against Mr Lowe. There is insufficient evidence to persuade me Mr Lowe's claims increased costs unnecessarily.

[11] Both parties had degrees of success. However, it was Mr Lowe who was substantially successful with his claims against Wright Transport. Taking all these factors into account I am not persuaded there should be a reduction in the daily tariff.

[12] Accordingly, I order costs of \$3,500 are to be paid by Wright Transport to Mr Lowe within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority