

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 78
5583769

BETWEEN MICHAEL MOMO
 Applicant

A N D MOUNT RILEY WINES AND
 ESTATES LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Craig Knowles, Counsel for Applicant
 John Buchanan, Advocate for Respondent

Submissions Received: 27 May 2016 from the applicant.
 8 June 2016 from the respondent

Date of Determination: 10 June 2016

COSTS DETERMINATION OF THE AUTHORITY

The respondent is to pay to Mr Momo the sum of \$1,750 as a contribution towards his costs.

[1] By way of a determination dated 2 May 2016¹, the Authority found that Mr Momo had been unjustifiably dismissed, and was awarded remedies. Costs were reserved. The parties have been unable to agree between them how costs should be disposed of, and so they have served and lodged memoranda containing submissions in relation to costs.

¹ [2016] NZERA Christchurch 55

[2] Mr Momo seeks costs against the respondent on an indemnity basis. The costs incurred by Mr Momo, and therefore claimed by him against the respondent, amount to \$17,780.60, including GST.

[3] The basis upon which Mr Momo claims costs on an indemnity basis are as follows:

- a. There was no tenable defence to the personal grievance claim;
- b. No concessions were made by the respondent which could have focussed matters, and allowed Mr Knowles to have been more efficient in his approach; and
- c. The respondent would not attend mediation until proceedings had been filed by Mr Momo;
- d. The respondent did not attend mediation in good faith.

[4] Mr Knowles submits that, if the Authority is not minded to award costs on an indemnity basis, then it should apply an uplift to its daily tariff.

[5] The respondent accepts that costs should follow the event, but opposes an award of costs on either an indemnity or uplift basis. It asks that the Authority awards costs on the basis of the half day that the Authority's investigation meeting took. That would make the award \$1,750. The basis of Mr Buchanan's submission is that the respondent did nothing that increased the time and expense of the proceedings and simply defended the claim against it.

[6] In particular, Mr Buchanan submits that:

- a. The respondent genuinely believed that Mr Momo had acted dishonestly in his employment, and that, even if the dismissal was unjustified, no remedies should have been awarded;
- b. The respondent conceded that the trial period was not applicable, but that no other concessions were warranted;
- c. The respondent did attend mediation in good faith, but wished to fully investigate its legal and factual position, and consider its defences;

- d. The matter was straightforward, and so the costs incurred on behalf of Mr Momo are unreasonable;
- e. Travel costs should not be paid as the parties are based in Marlborough, and Mr Momo could have instructed local counsel. Also, the most cost effective means of travel was not chosen.
- f. The respondent was entitled to argue that the statement in reply be delayed until after the mediation;
- g. GST should not be included;
- h. Indemnity costs are only awarded where a party has behaved badly or unreasonably, and an uplift is only applied when a party contributes unnecessarily to the time and expense of the proceedings. No such factors apply to the way the respondent conducted itself.

Discussion

[7] The Authority's power to award costs is set out in paragraph 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[8] When determining how legal costs and expenses should be dealt with, the Authority must take into account the principles set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. These principles include the following:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.

- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. 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.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

Indemnity costs?

[9] It is well established that indemnity costs will be awarded in only exceptional circumstances. These circumstances were recently summarised by the Employment Court in *Richard & Jennifer Adams T/A Untouchable Hair & Skin v Shannen Brown*², when the Court held that indemnity costs were appropriate where a party has acted *vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding*. The threshold for such an order requires *exceptionally bad behaviour*. Whilst this case involved costs in the Employment Court, I am satisfied that the same principles apply to costs in the Authority.

² [2016] NZEmpC 13, at [44]

[10] Even on Mr Momo's own case, the respondent did not behave exceptionally badly. I do not accept that there was never any tenable defence to the personal grievance claim. Whilst the Authority was always going to find that the dismissal was procedurally unjustified, it was possible that a finding of substantive fairness could have been found, or that a reduction in remedies through Mr Momo's contribution could have been made. It was only when the Authority questioned the various witnesses that the picture became clear.

[11] I therefore reject the submission that Mr Momo is entitled to costs on an indemnity basis.

Should an uplift be applied?

[12] The starting point to the costs award is, as Mr Buchanan has said, \$1,750 on the basis that the investigation meeting took half a day. The question is, therefore, whether an uplift is merited.

[13] I agree with the submission of Mr Buchanan that an uplift should only be applied if the conduct of the respondent contributed unnecessarily to the time or expense in the proceeding.

[14] The respondent did not expressly concede that it did not rely upon the trial period to justify the dismissal of Mr Momo until the investigation meeting. However, it hinted at that position in the statement in reply, and more strongly in the witness statement of at least one witness. I note that the respondent was not represented by a professional representative, although I understand that it may have got advice at one point. I do accept that the respondent should have conceded the trial period point expressly from the start.

[15] However, it is not evident from the breakdown helpfully lodged by Mr Knowles how much time was spent by him in preparation of cross examination as a result of this failure to expressly concede the trial period point from the start. Therefore, I cannot judge whether this caused any extra time to be expended or not.

[16] Whilst I was not involved in the matter until close to the investigation meeting, I note that Member Hickey had to direct the respondent to lodge its statement in reply. It would appear that Mr Knowles may have charged Mr Momo \$319 in respect of work he did arising out of the respondent not wishing to lodge its

statement in reply prior to mediation. However, the respondent was not necessarily unreasonable in wanting to not do so until after mediation, so as to save costs. It would depend upon whether the respondent's position had already been made clear in previous correspondence. I note that it did set out its position in its letter to Mr Knowles dated 24 July 2015.

[17] On this basis, I do not believe that the respondent was unreasonable in wishing to delay the lodging of its statement in reply. Whilst Member Hickey wished it to do so, for sound reasons, that situation in itself does not justify an uplift in costs in my view.

[18] As far the mediation is concerned, because of the confidential nature of the mediation process, it is simply not possible for the Authority to assess whether or not the respondent attended in good faith. Just because the mediation reportedly only lasted 20 minutes does not allow me to infer that this was solely because of the respondent's actions. This is therefore no basis upon which to uplift the daily tariff.

[19] I will address two other points raised by the respondent. First, I agree with the respondent that, whilst Mr Momo was entitled to engage whichever counsel he wished, it is not appropriate for the respondent to have to pay the travel costs which resulted from Mr Knowles being based in Rangiora. This was made clear in *Commissioner of Salford School v Campbell*³.

[20] The second issue relates to whether it is appropriate for GST to be included in a costs award. This question has recently been examined in detail by Her Honour Judge Inglis in *Ritches Transport Holdings Limited v Keerithi Merennage*⁴. Her conclusion was that it was appropriate for costs awarded to an individual who was not registered for GST to include the GST element.

[21] However, that judgement related to costs in the Employment Court, which is based on a different regime. In the Employment Court, the starting point is 66% of actual costs assessed as reasonable. This is quite different from the position in the Authority, where the starting point has no reference to actual costs, but rather how long the investigation meeting took. For that reason, I do not agree that GST is

³ [2015] NZEmpC 186, at [70]

⁴ [2016] NZEmpC 22

relevant in this case, unless I had been persuaded to award costs by reference to actual costs.

Conclusion

[22] It is my conclusion that there are no persuasive factors for uplifting the daily tariff in this case. Whilst this means that Mr Momo will recover only \$1,750 in costs, yet owes (or owed) Mr Knowles \$17,780.60 in terms of Mr Knowles' fees, that is not something, in itself, that justifies the uplift of the daily tariff. The full Court of the Employment Court in *Davide Fagotti v Acme & Co Limited*⁵ has held that the daily tariff approach is appropriate in the Authority. It also cited with approval the following passages from *Stevens v Hapag-Lloyd (NZ) Ltd*⁶

*[94] ...Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate, currently set at \$3,500) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate. As the full Court observed in Da Cruz:
... The unique nature of the Authority and its proceedings mean that parties to investigation meetings should not have the same expectations about procedure and costs as they have of the Court.*

[95] In my view it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority.

[23] What this means in practice for representatives appearing in the Authority on behalf of parties is that they need to think creatively about how to do the best they can for their clients, while at the same time keeping irrecoverable costs to a minimum.

⁵ [2015] NZEmpC 135

⁶ [2015] NZEmpC 28 at [94] – [95] footnotes omitted.

Order

[24] I order the respondent to make a contribution towards Mr Momo's costs in the sum of \$1,750.

David Appleton
Member of the Employment Relations Authority