

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 81
5324994

BETWEEN WILLIAM NICHOLAS
 MACHEN
 Applicant

A N D RD1 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Paul Fisher, Counsel for Applicant
 Andrea Twaddle, Counsel for Respondent

Submissions Received: 9 January 2012 from Respondent
 27 January 2012 from Applicant
 3 February 2012 from Respondent

Date of Determination: 01 March 2012

COSTS DETERMINATION OF THE AUTHORITY

A. Mr William Machen is ordered to contribute \$3,000 towards RD1 Limited's legal costs.

[1] In a substantive determination dated 9 December 2011¹ the Authority dismissed Mr Machen's unjustified dismissal grievance. The parties were encouraged to resolve costs by agreement, but failing that a timetable was set for costs to be dealt with by an exchange of memoranda. The applicant requested and was granted an extension to the original timetable directions.

[2] Agreement was not reached. The applicant's position was that he could not afford to pay any costs because he was unemployed and had no assets.

¹ [2011] NZERA Auckland 523

[3] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000. This confers a wide discretion on the Authority to award costs, on a principled basis.

[4] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*². Those principles are so well recognised I do not need to restate them.

[5] The general principle is that costs follow the event, and I see no reason to depart from that in this case. Accordingly, the respondent as the successful party is entitled to a contribution towards its actual legal costs.

[6] The respondent said it incurred actual costs of \$25,080 plus GST and disbursements. It sought an order that the applicant pay \$14,200 costs plus GST within three months of the date of this costs determination.

[7] The respondent's claim for \$14,200 was based on;

- a. A daily tariff of \$5,000 being applied to two days' investigation time;
plus
- b. \$3,000 for one day of preparation time for submissions; plus
- c. \$1,200 plus GST for its costs application.

[8] The respondent submitted that the Authority should adopt a "*Binnie*"³ approach to awarding costs which it said meant the starting point for an award of costs in its favour should be \$15,798.601 plus GST for the substantive matter plus \$1,200 plus GST for its costs application. I do not accept that submission.

[9] Alternatively, the respondent submitted that if the Authority adopted a tariff based approach then the daily tariff should be set at \$5,000 to reflect the additional costs it said it incurred "*in preparation arising from the manner in which the case was conducted [...]*".

² [2005] 1 ERNZ 808

³ *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438

[10] The Employment Court in *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union & Others*⁴ 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. I therefore adopt that approach.

[11] This matter involved a two day investigation meeting. The investigation meetings were held approximately two weeks apart because the matter went part heard at the end of the first day. The parties also filed written submissions after the second investigation meeting had been completed.

[12] I have adopted a notional daily tariff of \$3,000 as my starting point and now consider whether there are any factors which would warrant adjusting that notional tariff.

[13] I consider that the applicant's financial situation warrants a substantial reduction to the notional daily tariff.

[14] The applicant filed a sworn affidavit dated 27 January 2012 which set out his current personal circumstances, income, and financial situation.

[15] I acknowledge that the applicant is unemployed and receives an unemployment benefit of approximately \$200 per week. He has no savings or assets. He has a student loan of \$3,802.08 and a personal unsecured debt to his father of \$12,500 which was used to pay off his own legal costs. The applicant lives at home with his parents.

[16] The applicant deposed that he was actively seeking work but believed that his dismissal had severely limited his ability to obtain employment in Tokoroa. He had apparently had some occasional seasonal work prior to mid December 2011, but no details about that were provided.

[17] The applicant's own legal costs were \$18,615.40, which he has paid in full by using all of his savings and by borrowing the balance from his father by way of an unsecured loan.

⁴ [2011] NZEmpC 13

[18] I consider that the notional daily tariff should be halved to \$1,500 to reflect the hardship that an award of costs is likely to have on the applicant given his current limited means.

[19] I have carefully considered the factors the respondent submitted should result in an increase to the notional daily tariff but do not agree that should occur. I am not satisfied that any of the matters relied on by the respondent would have in fact increased its actual legal costs to the extent that the tariff should be adjusted to reflect that.

[20] Even if the respondent was able to satisfy me that it had incurred unnecessary additional costs (and it could not) I would have found that would be cancelled out by the respondent's conduct during the disciplinary investigation, relating to documentation and note taking issues, which caused some confusion during the Authority's investigation and which I consider would have increased the applicant's costs.

[21] I have concluded that none of the matters raised by the respondent warrant an increase to the notional daily tariff so it stands at \$1,500.

[22] I find that this is not an appropriate matter in which to award the respondent preparation time. This was a straightforward dismissal grievance which did not involve complex factual or legal issues. The Authority does not normally award extra costs for preparation of submissions and there is no good reason to do so in this case.

[23] It is appropriate for the applicant to contribute towards the respondent's costs. He knew he was at risk of costs if his claim was unsuccessful. I also recognise that some hardship as a result of a costs award is an expected and acceptable consequence of a party's decision to engage in unsuccessful litigation.⁵

[24] I decline the respondent's request to order that the costs awarded must be paid within three months of the date of this determination. That is unrealistic. The applicant is currently unable to pay the respondent \$3,000 from his own means. However, that may change in future. The applicant enjoys the ongoing support of his family. His father has previously lent him money and he may be persuaded to do so again.

⁵ *Gates v Air New Zealand Limited* [2010] NZEmpC 26.

[25] The applicant is a young man who is actively seeking full time paid employment. He has his entire working life ahead of him and I expect he will re-enter the workforce at some point, which will no doubt improve his current financial situation.

[26] The applicant is ordered to pay the respondent \$3,000 towards its legal costs.

[27] The respondent has also asked the Authority to award it an additional \$1,200 costs (in addition to the amount awarded in paragraph [26]) to cover the costs it said it has incurred by having to apply to the Authority for a cost order in respect of the substantive matter. I decline to make a costs order for any of the respondent's costs relating to its filing of this costs application because I consider this is an appropriate situation for those particular costs to lie where they fall. I have already awarded the respondent costs on the substantive matter, and I do not consider it reasonable to make a further costs award given the applicant's current financial situation.

Rachel Larmer
Member of the Employment Relations Authority