

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 17
5622866

BETWEEN KELLY MANN
 Applicant

AND MAXAM CORPORATION
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: John Gwilliam & Trina Williams, Counsel for Applicant
 Graeme Ogilvie, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 15 December 2017 and 19 January 2018 from the
 Applicant
 20 December 2017 from the Respondent

Determination: 22 February 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 11 October 2017¹ I found Ms Mann's employment agreement with Maxam Corporation Limited (Maxam) contained a valid 90 day trial provision. I found her employment was lawfully terminated under that provision and she was accordingly unable to bring a personal grievance for unjustifiable dismissal.

[2] However, I found Ms Mann had a personal grievance relating to an unjustifiable action by her employer that disadvantaged her in her employment. That arose from Maxam's refusal to provide her reasons for her dismissal on the day it gave her notice of the termination of her employment. She had left the workplace in a distressed and agitated state when her employer refused to respond on that matter. I awarded Ms Mann \$1,500 in compensation and reserved the issue of costs.

¹ [2017] NZERA Wellington 104.

[3] She now seeks an award of costs on the basis of the success of one of her two claims. Maxam, in response, seeks costs on the basis of Ms Mann's failure in relation to her claim to have been unjustifiably dismissed.

[4] Ms Mann was legally aided throughout the Authority investigation process. Her counsel, Mr Gwilliam, submitted she had incurred substantial expense as a result of bringing her claims to the Authority. He provided three invoices totalling \$5,188.02, which he referred to as having been "issued to the applicant for the legal services provided via legal aid".

[5] The invoices are addressed to "Legal Aid" and are the Ministry of Justice forms relevant to employment proceedings in the Authority. They are not addressed to Ms Mann and they give no indication of the contribution she is required to make to the aid, other than the standard user charge deduction of \$50.

[6] Mr Gwilliam seeks, on behalf of Ms Mann, costs on the basis of the Authority's nominal daily tariff for one day.

[7] Mr Ogilvie, the advocate for the respondent, submits that the Authority's investigation took little more than half a day. He notes that the invoices submitted by counsel for Ms Mann include fees incurred in the drafting of two statements of problem.

[8] He points out that one of those was lodged before Ms Mann engaged counsel to represent her and submits that only the drafting of the amended statement of problem is relevant to a consideration of costs.

[9] Mr Ogilvie submits that Ms Mann failed in her main claim, which occupied most of the time in the Authority's investigation meeting. On the basis that the respondent had the greater degree of success, Mr Ogilvie submits costs should be awarded to Maxam.

[10] He has provided invoices totalling \$6,440, representing the costs incurred by Maxam in defending Ms Mann's claims. Of this amount the respondent seeks a contribution to its costs of \$1,500.

Discussion

[11] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Underpinning the award of costs are principles which have been developed over many years. They are well known² and it is unnecessary to repeat them all here.

[12] Among the principles are that costs will normally follow the event; they should be modest; and are to be considered in the light of the particular circumstances. They are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. Where a party's conduct has unnecessarily increased costs, that may be taken into account in the award that is made, but costs are not to be used as a punishment.

[13] I reject Maxam's submission that it is entitled to a contribution to its costs because Ms Mann did not succeed in both her claims. Apart from any other consideration, s.45 (2) of the Legal Services Act 2011 precludes costs being awarded against a legally aided person except in exceptional circumstances, none of which apply in this instance.

[14] I find it appropriate that Ms Mann's success in establishing one personal grievance warrants the tangible recognition of a contribution to her costs. However, I accept the failure of one of her two claims is relevant to a consideration of the level of costs to be awarded.³

[15] The investigation meeting occupied more than half a day but less than a full day. Accordingly the appropriate starting point for a consideration of costs is two thirds of the Authority's notional daily tariff. At the time Ms Mann lodged her statement of problem the tariff was \$3,500 per day. The starting point is therefore two thirds of that, or \$2,333.33.

[16] It is reasonable to discount that amount by fifty percent because of the failure of one of Ms Mann's two claims. That reduces the award to \$1,166.67.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC), confirmed in *Fagotti v Acme & Co Ltd* [2015] EmpC 135.

³ *Radius Residential Care Ltd v The New Zealand Nurses Organisation Inc & ors* [2016] NZEmpC 176.

Determination

[17] For the reasons given above I find an appropriate contribution to Ms Mann's legal costs to be \$1,166.67.

[18] I order Maxam Corporation Limited to pay that amount to Ms Mann.

Trish MacKinnon
Member of the Employment Relations Authority