

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 255A/09
5138988

BETWEEN DAVID MERCER
 Applicant

AND MAORI TELEVISION
 SERVICE
 Respondent

Member of Authority: Robin Arthur

Representatives: Marcus Mitchell Paewai for Applicant
 Blair Edwards for Respondent

Submissions: 24 August 2009 from Respondent. No reply from
 Applicant

Determination: 5 October 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] Maori Television Service (MTS) seeks orders requiring David Mercer to pay a reasonable contribution to its costs incurred because of his unsuccessful applications for interim reinstatement (AA 423/08, 12 December 2008) and a personal grievance for unjustified disadvantage and dismissal (AA 255/09, 30 July 2009).

[2] Mr Mercer has not lodged a reply to the MTS memorandum on costs. He has filed a challenge to Authority determination AA 255/09 in the Employment Court (ARC 62/09). As usual in such circumstances the Authority proceeds to determine costs for the matters that were before it although any award of costs might later be changed by the Court if Mr Mercer's challenge was successful.

[3] MTS says its actual costs were \$25,375 for attendances between 8 October 2008 and 16 March 2009 directly related to Mr Mercer's claims in the Authority.

[4] It says time taken in the Authority equated to two full days – a half day for the interim reinstatement hearing and one-and-a-half days of investigation meeting on the personal grievance application.

[5] MTS seeks costs of \$5000 for responding to the interim reinstatement application and \$12,975 for responding to the personal grievance application.

Determination

[6] Applicable principles on costs in the Authority are that:¹

- (i) costs generally follow the event; and
- (ii) costs may be awarded on the basis of a notional daily rate adjusted up or down to take account of relevant principles and the particular characteristics of the case; and
- (iii) conduct of either party which unnecessarily increased costs can be taken into account in raising or reducing the level of costs awarded; and
- (iv) offers to settle on a without prejudice except as to costs may be taken into account; and
- (v) awards of costs in the Authority are modest.

[7] MTS was the successful party and is entitled to an award of costs.

[8] A starting point is to consider whether costs actually incurred were reasonably incurred. Mr Edwards has provided copies of invoices to MTS in the relevant period. The invoices itemise the nature of attendances which all appear to be directly related to Mr Mercer's case. However the invoices neither identify the time taken in attendances nor the hourly rate used in calculating counsel's total fee. Consequently, for the purposes of assessing costs in the Authority, I am unable to assess whether the total level of actual costs incurred by MTS was reasonable.

[9] In these circumstances I can best determine a reasonable contribution to costs on the basis of a notional daily rate, adjusted up or down for relevant factors.

[10] I accept the MTS submission that the notional daily rate should be applied to a

¹ *PBO Ltd v da Cruz* [2005] ERNZ 808, 819 (EC).

total of two days allowing for the time taken for both the interim reinstatement and personal grievance applications, which actually required attendance at Authority meeting on three separate days – one full day and two half days.

[11] The notional daily rate for a case of this type, which was neither simple nor particularly complex, is \$3000. The interim reinstatement application was efficiently conducted on the basis of affidavit evidence and oral submissions. The personal grievance application dealt with all witnesses bar one during the course of a day. A further half day was required to hear from the MTS chief executive who had been abroad earlier and to hear oral closing submissions from the representatives.

[12] Two factors identified in MTS' costs memorandum suggest an upward adjustment of the notional daily rate should be considered in this case:

- (i) Unnecessary time was wasted on allegations that MTS had relevant security camera footage from 16 June 2008 which should be produced for the investigation; and
- (ii) Mr Mercer rejected an offer to settle the matter on a without prejudice save as to costs basis made shortly after the Authority declined his interim reinstatement application (December 2008).

[13] I accept Mr Mercer's pursuit of the security camera issue did unnecessarily waste time in the Authority's investigation. He knew from 16 June 2008 that there was no relevant footage because he had taken steps himself to check its availability at the time. An extra \$500 is to be added to costs for the time wasted by his representative in pursuing questions on that point.

[14] I do not accept that, in the particular circumstances of this case, any adjustment upward should be made because of Mr Mercer's refusal to settle after the failure of his interim reinstatement application. MTS offered to waive costs if he withdrew his personal grievance application at that stage. In making that offer it had noted the Authority's assessment in the determination on interim reinstatement (based on affidavit evidence only at that stage) that Mr Mercer's grievance claim was "*not strong*". While that proved correct in the Authority's determination after hearing fully-tested evidence, I consider Mr Mercer was entitled to have his claim fully considered without facing more than the anticipated usual tariff for costs.

[15] One other factor may have been important in setting costs in this case – Mr Mercer’s ability to pay. However, as he has not responded to the MTS costs application, I cannot assess that for the purposes of any adjustment, up or down. At the time of the investigation meeting he was generating income by working as a freelance camera operator and I have no further information on his ability to pay.

Orders

[16] In accordance with the principle of modest costs awards, and after considering the factors for adjustment of costs assessed on a notional daily rate, I order Mr Mercer to pay MTS costs of \$6500 as a reasonable contribution to its costs in this matter.

[17] It may be that he will need to pay this amount on an instalment basis over a period of time. If that is so, and the parties are not able to agree a suitable payment plan, leave is reserved for either party to seek further directions or orders.

Robin Arthur
Member of the Employment Relations Authority