

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 148
5446364

BETWEEN

NATHAN MORUNGA
Applicant

A N D

WATERFORD HOLDINGS
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Gerhard Engelbrecht, Counsel for Applicant
Hamish Burdon, Advocate for Respondent

Submissions Received: 25 July and 11 August 2014 from Applicant
5 August 2014 from Respondent

Date of Determination: 19 September 2014

COSTS DETERMINATION OF THE AUTHORITY

Costs of \$2,821.56 are awarded to the Applicant.

[1] By way of a determination dated 22 August 2014¹, the Authority found that Mr Morunga had been unjustifiably dismissed, and was awarded remedies, with a 50% reduction for contribution. The Authority reserved costs to enable the parties a chance to agree how costs were to be dealt with, but they have been unable to do so.

[2] Mr Morunga seeks a contribution towards his legal costs in the sum of \$3,500, together with reimbursement of his lodgement fee of \$71.56. Mr Morunga's counsel states that Mr Morunga's legal costs exceed \$3,500, but that he limits the contribution to costs sought to \$3,500 as this is the Authority's standard daily tariff.

¹ [2014] NZERA Christchurch 128

[3] Mr Burdon, for the respondent, refers me to the seminal case dealing with the recovery of legal costs in the Authority, namely *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808, and seeks an order that costs lie where they fall. He states that the Authority's finding was that Mr Morunga was only unjustifiably dismissed because of procedural defects, and that the dismissal was substantially justified. In addition, there was a reduction in remedies which should sound in costs. Also, the investigation meeting lasted only half a day.

[4] Mr Burdon also refers to Mr Morunga seeking payment of the remedies awarded within hours of the determination being issued and a statutory demand subsequently being issued four days later. He also says that Mr Morunga's counsel sought costs of \$3,571.56 immediately, and then lodged his memorandum for costs before the period of 28 days that the Authority had given the parties to agree costs had expired, so that no further discussions could take place.

[5] Mr Morunga's counsel lodged submissions in reply and, although I had not directed that they be lodged, I accept them on this occasion given that his initial submissions were very brief. They asserted that, although the investigation meeting took half a day, he also had to prepare for the investigation. In addition, he asks the Authority to take into account the respondent's pre-hearing conduct, which should justify an uplift in the costs awarded. He says that this was:

- a. A deficiency in evidence (as there was no brief of evidence for the employer);
- b. Presenting irrelevant legal submissions as part of the evidence exchange process;
- c. Dealing with matters of conflict of interest; and
- d. Lodging a counterclaim for which the Authority found it had no jurisdiction.

[6] Mr Engelbrecht points out that a finding of contribution cannot justify a reduction in costs. He also says that post judgement conduct is irrelevant in assessing costs.

Determination

[7] The Authority's power to award costs is set out in clause 15 of Schedule 2 of 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] The Authority must follow the principles set out in *PBO Ltd v Da Cruz*, when setting costs awards. These include:

- 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.

[9] I agree with Mr Engelbrecht that costs should follow the event in this case. Mr Morunga succeeded in his claim and recovered reasonably substantial remedies, even after reduction. I also agree that it would not be just to reduce the award of costs on the basis of contribution, nor on the basis of post determination conduct.

[10] The question to determine is how much to award. I do not agree that the respondent's pre-investigation meeting conduct justifies an uplift. Whilst Mr Burdon did not follow the procedure usually adopted in the Christchurch office of the Authority, his approach did not cause any material inconvenience in my view. Whilst elements of the counterclaim were not particularly convincing, the jurisdiction point was not obvious, and the respondent can be forgiven for seeking a judgement on the counterclaim in the Authority instead of the Tenancy Tribunal.

[11] I see no reason to depart from the daily tariff approach, and the meeting ended at 13.10, which suggests that \$1,750 is an appropriate sum to award. However, submissions were lodged after the investigation meeting, and if they had been heard on the day, a lunch break would have occurred and at least another hour of meeting needed to hear the submissions. I believe that it is just to take into account the time that the submissions would reasonably have taken to deliver.

[12] All in all, I believe that it is appropriate to consider that the investigation meeting would have lasted another 90 minutes if submissions been heard on the day, and adopting a broad, and unscientific extrapolation approach, I increase the half day tariff to \$2,750.

[13] Mr Morunga is also entitled to recovery of the lodgement fee.

Orders

[14] I order that the respondent pay to Mr Morunga the sum of \$2,750 as a contribution towards his costs, together with the sum of \$71.56 in respect of the lodgement fee.

David Appleton
Member of the Employment Relations Authority

