New Zealand Employment Relations Authority Decisions

Ms X v Y Limited (Christchurch) [2016] NZERA 337; [2016] NZERA Christchurch 127 (1 August 2016)

Last Updated: 30 November 2016

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 127
5520965

BETWEEN MS X Applicant

A N D Y LIMITED Respondent

Member of Authority: David Appleton

Representatives: Peter Moore, Advocate for Applicant

Mr Z, Representative for Respondent

Investigation Meeting: Determined on the papers

Submissions Received: 11 July 2016 for Applicant

None received for Respondent

Date of Determination: 1 August 2016

COSTS DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

[1] For the avoidance of doubt, the prohibition from publication order made in respect of the substantive matter continues.

[2] By way of a determination dated 24 June 20161 the Authority found that Ms X had been unjustifiably dismissed and unjustifiably disadvantaged in her employment. Remedies were awarded and a penalty imposed upon the respondent.

[3] In the determination the Authority reserved costs and invited the parties to agree how costs were to be dealt with.

1 [2016] NZERA Christchurch 96

[4] According to Mr Moore, the respondent has failed to engage with him on the issue of costs. Accordingly, Mr Moore has lodged submissions seeking a contribution towards costs in the sum of $11,579.56.

[5] Mr Moore submits that the first day of the Authority's investigation meeting on 16 February 2016 should be treated as having lasted a full day, and that the subsequent investigation meeting on 26 May 2016 should be treated as having lasted two-thirds of a day.

[6] Mr Moore also argues that, because of conduct of the respondent which resulted in unnecessary costs being incurred, the daily tariff for the first day should be increased by 100%, to $7,000, and that the costs incurred since that first day of investigation meeting should be paid by the respondent on an indemnity basis, less certain specified costs. Mr Moore argues that the second day of investigation would not have been necessary if the respondent had lodged a statement in reply and

witness statements setting out its case in full.

[7] The behaviour of the respondent that Mr Moore says was unreasonable, and which led to costs being unnecessarily incurred by the applicant, was alleged to be as follows:

(a) No statement in reply was lodged;

(b) No proper witness statements were lodged;

(c) Mr Z and Ms B were around 1.5 hours late for the first day of the investigation meeting;

(d) Mr Z and Ms B unnecessarily extended the time of the investigation meeting by raising irrelevant issues and interjecting inappropriately;

(e) Directions conferences were unnecessarily extended by either giving late notice of not attending, or by raising irrelevant issues in an antagonistic manner;

(f) The respondent unnecessarily dragged out the entire process by failing to respond to communications from the Authority; and

(g) The respondent unreasonably failed to engage with the applicant on the issue of negotiating a costs agreement.

The principles relating to the award of costs in the Authority

[8] The Authority's power to award costs is set out in clause 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.

[9] The Authority is also bound by the principles set out in the case of *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz2* when setting costs awards. These principles 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.

2 [2005] NZEmpC 144; [2005] 1 ERNZ 808

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.

Discussion

[10] First, I accept that it is appropriate for the respondent to make a contribution towards the costs of the applicant, given that she was almost wholly successful.

[11] I also accept that it is reasonable to treat the first day of investigation meeting as having lasted a full day. Although the Authority's investigation meeting did not start until 10.30am, as the Authority was waiting for Mr Z to arrive, and although Mr Z and his witness Ms B did not arrive until 10.40am, the applicant and her representative were present at 9.30am, the pre-arranged start time of the investigation meeting. The first day of investigation meeting lasted until 4.45pm. In other words, the applicant incurred an hour of costs waiting with Mr Moore for the Authority's investigation meeting to commence, which the Authority delayed as Mr Z said that he was running late.

[12] I do not agree that the second part of the investigation meeting lasted two- thirds of a day. It clearly lasted half a day, even if it ran into the lunchtime period.

[13] I also agree that the failure of the respondent to lodge a statement in reply or witness statements that clearly set out the evidence of the respondent, contributed to costs being incurred by the applicant unnecessarily.

[14] However, I am not satisfied, as submitted by Mr Moore, that the second day of the investigation meeting could have been wholly avoided if a statement in reply and proper witness statements had been provided by the respondent in advance of the first investigation meeting. This is because the applicant was seeking a substantial sum by way of compensation under s.123(1)(c)(i) of the Act, but had not produced sufficient

medical evidence to enable the Authority to assess the effect on her of the respondent's actions that she claimed. Therefore, the period between the first and second investigation meetings was spent, partly, in the applicant attempting to obtain information and evidence from her counsellor.

[15] On the issue of Mr Moore's costs, I note that he substantially discounted his costs for the applicant and the resultant costs incurred, after discounts, of $14,377 do appear reasonable given the work that he undertook. I take this opportunity, in passing, to commend Mr Moore for having provided a very detailed breakdown of the work he carried out on behalf of the applicant. All too often representatives fail to provide anything but the most cursory of summaries of how costs have been incurred, which makes it difficult for the Authority to assess whether those costs are reasonable.

Determination

[16] I do not believe that it is appropriate to award costs on an indemnity basis in respect of the second part of the investigation meeting. This is because, as noted above, the period between the first and second investigation meeting was necessary, in part, for the applicant to seek evidence from her counsellor that she did not provide before the first investigation meeting.

[17] However, I do agree that it is more likely than not that costs were incurred unnecessarily by the applicant because of the way that the respondent engaged in the Authority's process. I will not set out all of those ways in this determination, but a large part of the problem arose because Mr Z's communications were intermittent and often difficult to follow, and his full defence could only be guessed at until the date of the investigation meeting. Whilst I accept that Mr Z was not represented, he did have the opportunity to discuss with the Authority's Officer how he should have proceeded.

[18] I believe that the best approach in handling this matter is to uplift the daily tariffs applying for the first and second investigation meetings. I do not believe that it is appropriate to double the daily tariff for the first day as it is not clear that the respondent's conduct was so bad as to have caused the respondent's costs to have been doubled unnecessarily. The award of costs is not to be used as a punishment. My approach will be to increase the first day's daily tariff of $3,500 to $5,000 and the second day's half daily tariff of $1,750 to $2,500. This results in a just result for both parties in my view.

Order

[19] I order the respondent to make a contribution towards the applicant's costs in

the sum of $7,500.

David Appleton

Member of the Employment Relations Authority