

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 121
5525372

BETWEEN MIKE MUIR
 Applicant

A N D INVERCARGILL TAXIS
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
 Mary-Jane Thomas, Counsel for Respondent

Investigation Meeting: Determined on the papers

Submissions Received: None received for Applicant
 7 July 2016 for Respondent

Date of Determination: 25 July 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 20 June 2016¹ the Authority dismissed Mr Muir's claims against the respondent in their entirety as Mr Muir had not appeared at the Authority's pre-arranged investigation meeting.

[2] I reserved costs, giving Ms Thomas seven days within which to serve and lodge a memorandum setting out what contribution to the respondent's costs she seeks from Mr Muir. Mr Muir was then given a further seven days within which to serve and lodge a response.

[3] Although Ms Thomas' costs memorandum was received by the Authority later than seven days, I am prepared to accept this as Mr Muir has had a full two weeks

¹ [2016] NZERA Christchurch 89

from receipt of that memorandum within which to respond. The Authority has received no response to Ms Thomas' memorandum on costs from Mr Muir.

[4] Ms Thomas submits that, in the circumstances, even though there was no actual hearing, it is appropriate that the Authority awards costs as if the investigation had taken place with a one day hearing. Ms Thomas draws my attention to the Employment Relations Authority case *Rika v. Beulah Services Ltd*² in which a similar approach was adopted.

[5] The costs sought by the respondent are, therefore, \$3,500, being the daily tariff currently used as a starting point by the Authority in assessing costs. The total costs incurred by the respondent in relation to preparing for the investigation meeting is \$4,204.25 (including GST and disbursements). Excluding those elements, the respondent has incurred counsel's fees in the sum of \$3,585.00.

[6] Although Mr Muir has not responded to Ms Thomas' submissions, prior to their receipt, Mr Muir did get in touch with the Authority after he had received a copy of the determination dismissing his claims. He had a conversation with an Authority Officer and said that he had been unable to attend on the day of the investigation meeting as he had been attending hospital, as an outpatient it is understood. He also said that his advocate, who had been representing him up to that point, had not passed on to him the details of the investigation meeting.

[7] However, this latter statement is untrue as Mr Muir had been copied into an email from Mr Muir's representative to the Authority which stated:

The applicant will proceed with the matter, representing himself when the matter is heard on 16 June 2016.

[8] Therefore, Mr Muir was well aware of the date of the investigation meeting at the very least. That email had been sent to the Authority on 20 May and so, as the investigation meeting took place on 16 June, Mr Muir had had plenty of opportunity to find out where the meeting was taking place, and its start time.

[9] I therefore conclude that Mr Muir had no reasonable reason for not either turning up to the investigation meeting or, if he had had to attend the hospital

² [2014] NZERA Auckland 376

urgently, advising the Authority that that was the case, either personally, or via someone else.

[10] For this reason, I accept that it is appropriate for a contribution to be made by Mr Muir to the costs incurred by the respondent in defending the claims against them.

Legal principles

[11] 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.

[12] It is well established that the Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ 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.

³ [2005] ERNZ 808

- 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.

Determination

[13] Taking into account the work that was carried out by Ms Thomas, which included preparing the statement in reply, entering into correspondence and preparing briefs of evidence, I am satisfied that the costs incurred are reasonable.

[14] The only question remaining, therefore, is how much should be awarded to the respondent. Ms Thomas submits a full-day's tariff should be awarded. This is, presumably, based on the supposition that the investigation meeting would have lasted a full day.

[15] However, I doubt that that would have been the case and estimate that the investigation meeting could have been properly disposed of within 3 hours. This is partly because Mr Muir was not represented by the time of the investigation meeting, and self-represented parties generally ask fewer questions and make fewer submissions than a represented party. In addition, the issues to be investigated were fairly narrow and self-contained.

[16] Adopting half a day's tariff (\$1,750) as the starting point, I believe it is reasonable to uplift that sum in order to reflect the wasted costs element caused by Mr Muir's non-attendance. Whilst the Authority cannot use costs as a punishment, or an expression of disapproval of Mr Muir's conduct, conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award. Mr Muir in failing to advise the Authority and Ms Thomas that he was not intending to take part

in the investigation meeting, did, no doubt, cause additional costs to be incurred by the respondent.

[17] Whilst I believe that the sum of \$3,500 is too high, I uplift the half day's tariff sum to \$2,500.

Order

[18] I order that Mr Muir pays to the respondent the sum of \$2,500 as a contribution to the costs incurred by the respondent.

David Appleton
Member of the Employment Relations Authority