

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 52/10
5158527

BETWEEN

John Nepe-Apatu
Applicant

AND

Te Kohanga Reo National Trust
Board
Respondent

Member of Authority: Denis Asher

Representatives: Andrew Gallie for Mr Nepe-Apatu
Barbara Buckett for the TKR

Submissions received: By 16 March 2010

Determination: 22 March 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 11 December 2009 (WA 193/09) I found in favour of Mr Nepe-Apatu's claim that he had been unjustifiably dismissed. Remedies were reduced by way of a finding of 50% contributory fault.

[2] Costs were reserved.

[3] I made some observations in my substantive determination as to costs. They included: as indicated to the parties during the investigation, costs typically follow the event. The substantive investigation ran to two-days, albeit with some of that time being taken up by the parties unsuccessfully attempting to settle the matter on their own terms. I concluded that, subject to the parties' submissions, but taking into account the costs Mr Nepe-Apatu was unnecessarily put to in defending serious unsubstantiated allegations advanced by the respondent but which were either withdrawn late in proceedings or not at all, I could see no reason not to set costs at \$4,000 per day.

Applicant's Costs Submissions Summarised

[4] In costs submissions received on 4 March 2010 Mr Gallie advised that the applicant's costs were \$33,214.05 inclusive of GST and disbursements. Copies of itemised invoices were attached. Of that amount, \$3,210 related to counsel's attendance at mediation and should be excluded.

[5] A reasonable award of costs would be a sum representing two thirds of costs incurred by Mr Nepe-Apatu; High Court Rule 47 (d) and *Smith v Air New Zealand*, unreported, Colgan J, 19 March 2001, AC 17/01. It is accepted that ultimately costs awarded should be a reasonable contribution to costs actually and reasonably incurred.

[6] A 2/3rds award would be reasonable because:

- a. TKR insisted on maintaining a defence that was patently unsustainable;
and
- b. That defence was ever changing; and
- c. The 11th hour admission by TKR's chief executive that she dismissed Mr Nepe-Apatu negated all of the arguments previously advanced by the respondent in an effort to show justification; and

- d. TKR's failure to acknowledge the fact of dismissal and the absence of procedural justification, and its persistence in maintaining unsustainable defences (even after the chief executive's admission) added considerably to the applicant's costs; and
- e. The respondent's statement in reply raised a counter-claim, later withdrawn, that resulted in unnecessary costs to Mr Nepe-Apatu; and
- f. The persistent lateness in the respondent meeting agreed timelines for witness statements and submissions also caused the applicant unnecessary follow-up costs; and
- g. The calderbank offers came nowhere near the quantum ultimately achieved by Mr Nepe-Apatu, and therefore cannot be taken into account; and
- h. It is correct that the applicant's initial expectation in respect of compensation were unrealistic but this was addressed very early on in the Authority's telephone conference call, where Mr Nepe-Apatu agreed to leave the quantum to the Authority's discretion; and
- i. There is no evidence to support the claim TKR cannot afford a costs award.

[7] A punitive costs award is not sought but a reasonable contribution to the same is being claimed.

The Respondent's Position Summarised

[8] In submissions received on 10 February and 16 March for the respondent (TKR), Ms Buckett relied on without prejudice offers to the applicant to settle, including one in respect of costs. No response has been received from Mr Nepe-Apatu so the respondent now submits costs should lie where they fall because:

- a. Several offers of resolution including the last one have been made to the applicant which he has failed to respond to; and
- b. Mr Nepe-Apatu's expectations were always unrealistic and this contributed to the matter having to be defended; and
- c. TKR has been put to substantial cost in defending the matter.

[9] The level of costs indicated by the Authority is unjust and unwarranted in the circumstances where such is reserved for extraordinary solutions, is punitive and punishes the respondent for some alleged misconduct when there was not any and is thereby offensive to natural justice. Mr Nepe-Apatu was not successful on all his claims; in particular he was not reinstated. Costs must be relevant to actual and reasonable. Given the Authority's indication of costs, what information does it have about the (I presume) applicant's costs that the respondent does not have?

[10] Offers attached to TKR's costs submissions include a without prejudice save as to costs offer made to Mr Nepe-Apatu in a letter dated 2 June 2009 which included, amongst other things, a proposed payment of \$7,500 in full and final settlement of his grievance, and another calderbank offer dated 3 November of \$15,000 on the same terms, as well as confirmation TKR would treat the applicant as having resigned his position.

Discussion and Findings

[11] The Authority's discretion with which to award costs is now well settled and typically follows the event: *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

[12] After having regard to the parties' arguments (including the calderbank offers) and the above, I am satisfied that there is no reason to change the approach indicated in my substantive decisions, that costs of \$8,000 against TKR is entirely appropriate.

Determination

[13] TKR is to pay to Mr Nepe-Apatu as a contribution to his fair and reasonable costs \$8,000 (eight thousand dollars).

Denis Asher

Member of the Employment Relations Authority