

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 254
3027977

BETWEEN SAMUEL NEWMAN
 Applicant

A N D SOLID ROOFING LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Peter Vandenberg, Director of Respondent

Submissions Received: 26 July 2018 from Applicant
 No submissions from Respondent

Date of Determination: 15 August 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. The respondent is to pay a contribution towards the applicant's costs in the sum of \$5,000 within 14 days of the date of this determination.

The substantive determination

[1] By way of determination dated 12 July 2018¹, the Authority found that the respondent had unjustifiably issued the applicant with a written warning and suspended him from his employment. Compensation in the sum of \$3,500 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) was awarded in respect of the unjustifiable disadvantages. The Authority further found that the

¹ [2018] NZERA Auckland 214

respondent had unjustifiably dismissed the applicant from his employment and an award of \$15,000 compensation under s 123(1)(c)(i) of the Act was awarded in respect of the applicant's humiliation, loss of dignity and injury to feelings together with loss of remuneration of \$4,375 under s 128 of the Act. A penalty in the sum of \$5,000 was awarded in respect of failures by the respondent to provide information to the applicant as requested by him. Costs were reserved.

[2] The applicant was given 14 days in which to file a memorandum as to costs and the respondent was given 14 days in which to reply.

Submissions as to costs

[3] Mr Newman has filed a letter seeking costs in excess of the Authority's daily tariff to cover the full amount of his legal fees and costs. Mr Newman is also seeking costs in respect of preparing and filing his memorandum as to costs. The applicant seeks legal costs of \$7,690.17 plus GST together with \$760 plus GST in respect of legal costs incurred to prepare and file his application for costs.

[4] No memorandum as to costs has been filed by the respondent.

[5] The applicant has attached to his letter in respect of costs, a letter which was sent by his lawyer to the respondent on 18 January 2018. In that letter a settlement offer of \$16,500 was proposed. The respondent did not respond to the offer of settlement. The settlement offer was less than the amount awarded by the Authority in its determination of 12 July 2018.

[6] The applicant has also attached email correspondence between the applicant's lawyer and the respondent regarding costs following the Authority's determination. In an email dated 24 July 2018, following a request to make a contribution to legal costs, Mr Vandenberg, the Director of the respondent, stated that no contribution to the applicant's legal costs would be made by the respondent because the applicant "could not claim legal costs if successful ... if his lawyer was not present on the day ...".

Costs determination

[7] The Authority's power to award costs against a party 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 is bound by the principles set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*² when setting costs awards. These include:

- There is discretion as to whether costs would be awarded and in what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity in good conscience jurisdiction of the Authority;
- Equity and good conscience are to be considered on a case by case basis;
- 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;
- It is open to the Authority to consider whether all or any of the party's costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily tariff; and

² [2005] 1 ERNZ 808

- 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] First, I accept that it is appropriate for the respondent to make a contribution towards the applicant's costs on the basis that costs follow the event. The applicant was entirely successful in his claims against the respondent that he had been unjustifiably disadvantaged and unjustifiably dismissed.

[10] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day. The starting point is \$4,500.

[11] The applicant has included copies of invoices from his lawyer for legal attendances from 31 January 2018 up to 28 June 2018, a few days before the investigation meeting took place. An invoice dated 26 July 2018 has also been included for legal costs incurred in preparing the submission as to costs.

Offer of settlement

[12] Some five months before the Authority's investigation meeting, the applicant's lawyer made an offer of settlement to the respondent. This was not responded to. The settlement offer was an amount approximately \$6,000 less than the total award made by the Authority in favour of the applicant. This is a factor that I can take into account when considering the level of costs to be awarded.

[13] I have considered each of the invoices filed by the applicant which set out the time and attendances and the expenses incurred. They seem reasonable.

[14] Taking into account the above factors, I consider that an uplift in costs is appropriate in the circumstances.

[15] I consider an uplift by \$500.00 to be appropriate.

[16] I order the respondent to pay the applicant the sum of \$5,000 towards his legal costs. These costs are to be paid by the respondent within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority