

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 197
3000014

BETWEEN TRACEY OLSEN
Applicant

AND PENINSULA HEALTH (2010)
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, Advocate for Applicant
Andrew Riches, Counsel for Respondent

Submissions received: 18 October 2017 from Applicant
07 November 2017 from Respondent

Determination: 13 November 2017

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A Peninsula Health (2010) Limited t/a The Akaroa Pharmacy is ordered to pay to Tracey Olsen the sum of \$4,500 costs and \$71.56 being reimbursement of the filing fee.

Substantive determination

[1] The Authority in its determination dated 6 October 2017 found that the applicant was unjustifiably disadvantaged and unjustifiably constructively dismissed. The applicant was awarded remedies for reimbursement of lost wages and compensation. There was no penalty awarded.

[2] The Authority reserved the issue of costs and failing agreement set a timetable for an exchange of submissions. The Authority has now received cost submissions from Ms Oberndorfer and Mr Riches.

The applicant's submissions

[3] Ms Oberndorfer refers in her submissions to the judgment of the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹ and the principles for determining costs in the Authority.

[4] Ms Oberndorfer submits costs should follow the event and that while the Authority does award costs frequently on the basis of daily tariff that this is a case where an award moderately in excess of the daily tariff should be made.

[5] Ms Oberndorfer submits that the respondent engaged in correspondence alleging that the grievance letter had not been received. The Authority found on the balance of probabilities that it had been sent. Although the respondent did not subsequently pursue an argument that the grievance was not raised in time it did cause additional correspondence and discussion.

[6] Further Ms Oberndorfer submits that the respondent has not conceded on any issues that would have allowed the parties to mitigate costs.

[7] Ms Oberndorfer submits that the actual costs incurred by the applicant following mediation are \$12,667.25 (incl GST). She attaches a summary of invoices sent to the applicant between May 2017 and September 2017.

[8] Further Ms Oberndorfer in her submissions says that the respondent did not engage constructively in reaching an agreement on costs requiring the submissions applying for costs to be lodged.

[9] Ms Oberndorfer therefore seeks uplift from the daily tariff applicable in this matter of \$4,500 in the amount of \$2,000 for a cost award of \$6,500 together with the reimbursement of the filing fee of \$71.56.

¹ [2005] 1ERNZ 808

The respondent's submissions

[10] Mr Riches on behalf of the respondent submits an appropriate award is that of the daily tariff and that there are no grounds for uplift.

[11] He submits that the respondent has not acted unreasonably in defending the proceedings particularly in a case of constructive dismissal. Further he submits that the respondent co-operated at all times to ensure the fast and expedient determination of the matter.

[12] Mr Riches submits that there are no without prejudice offers to justify an increase in costs and that there is no conduct on the part of the respondent that would otherwise justify an increase.

[13] He rejects the submission that advice the respondent did not receive the initial grievance letter contributed to an increase in costs. He does accept that it could have led to a slightly extended timeframe within which the matter had been resolved.

[14] He submits that any correspondence before the initiation of the Authority proceedings resulted because as counsel he had to come up to speed with the matter but this was limited and caused little or no extra correspondence for the applicant to engage in. Further he submits that the timing of the grievance was not raised as an issue in the Authority. The grievance was accepted as having been raised and action taken to engage with the applicant about it.

[15] He submits that the failure to concede any issues does not give grounds for an increase in costs unless that was unreasonable or unreasonably contributed to the proceedings. He submits that the applicant has not indicated any issues which could have been reasonably conceded in order to have the matter move more expeditiously.

[16] Mr Riches also submits that costs are not to punish a respondent's behaviour and costs are not to be a punitive measure. He rejects the submission that the respondent was not constructive in trying to resolve costs.

Determination

[17] The Authority has a discretion as to whether costs are awarded and if so in what amount. The discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval.

[18] Frequently costs in the Authority are judged against a notional daily rate which is \$4,500 for applications lodged after 1 August 2016. That is, I find, an appropriate starting point.

[19] Ms Oberndorfer in submissions advances three reasons why the daily tariff should be increased. The first is an allegation by the respondent that the letter raising the grievance was not received. I accept there would have been a small amount of additional cost involved in that matter. In the exercise of my discretion I weigh that no issue was taken about whether the grievance was raised within 90 days and I am not minded to adjust the tariff upwards for that reason.

[20] The second is that there was no concession on any issues to mitigate costs. Whilst I accept that is true, that is the same with many matters before the Authority. The matter was still able to be investigated within a day. I am not minded to adjust the tariff for that reason. Costs are not to be used as a punishment or an expression of disapproval unless there is conduct that can clearly be attributed to an increase in costs.

[21] Finally there is the cost submission itself. Mr Riches does not accept in his submission the respondent was not constructive but rather time was required to discuss costs with his client. The applicant's cost submission was commendably brief and I am not minded to adjust the tariff upwards on the basis.

[22] I find a fair and reasonable award for costs is the sum of \$4,500 together with the filing fee of \$71.56.

[23] I order Peninsula Health 2010 Limited t/a The Akaroa Pharmacy to pay to Tracey Olsen the sum of \$4,500 for costs and \$71.56 for reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority