

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 29
5605508

BETWEEN BRIAN SHELLEY
Applicant

A N D WAITAKERE UNITED
INCORPORATED
Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person
Penny Swarbrick, Counsel for Respondent

Submissions Received: 23 November 2016 from Applicant
14 December 2016 from Respondent

Date of Determination: 3 February 2017

COSTS DETERMINATION OF THE AUTHORITY

- A. **Waitakere United Incorporated is ordered to pay Brian Shelley \$1,500.00 as a contribution towards his costs, in three monthly instalments of \$500.00 each, the first to start within 28 days of the date of this determination**

The substantive determination

[1] In a determination of the Authority dated 27 October 2016¹, the Authority determined that Brian Shelley (Mr Shelley) was unjustifiably dismissed by Waitakere United Incorporated (Waitakere United or the Club) and was awarded \$10,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

¹ [2016] NZERA Auckland 358

Costs application and submissions

[2] The parties were invited by the Authority to resolve the costs issue between them. They were unable to do so.

[3] Mr Shelley has applied for costs. Although Mr Shelley was not represented at the investigation meeting he has incurred legal costs. An invoice was provided from a barrister indicating that advice had been provided in preparation for the investigation meeting, including meeting with Mr Shelley, reviewing the statement of problem and statement in reply, reviewing witness statements and advice regarding the Authority's process, witness statements and closing submissions. The bill was for \$2,185 (including GST).

[4] Mr Shelley seeks to have the entire amount of the barrister's invoice awarded to him as costs. He submits that he deliberately tried to keep his legal costs low and that the amount incurred was much less than the Authority's daily tariff.

[5] Waitakere United's position was to accept that, as the unsuccessful party, a costs award may be imposed against it. However, it did not accept that the daily tariff mentioned by Mr Shelley in his submissions was the applicable one in this case. Further, it opposed Mr Shelley's seeking of what were effectively indemnity costs on the ground that there was no basis for such an award in this case. It also sought to have costs paid by instalment, in the same way as was ordered for the compensation award in the substantive determination.

Determination on costs

[6] The Authority has the power under clause 15 of Schedule 2 of the Act to award costs. This provision confers a wide discretion on the Authority to award costs on a principled basis.

[7] The principles guiding the Authority's approach to costs are set out by the full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². The principles include:

² [2005] 1 ERNZ 808

- The discretion regarding costs is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good faith jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case-by-case basis;
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- Costs generally follow the event;
- Awards will be modest;
- Frequently costs are judged against a notional daily tariff.

[8] In the present case, I am satisfied that costs should follow the event. Mr Shelley was successful in his unjustified dismissal claim and was awarded compensation for that personal grievance.

[9] Mr Shelley's submissions made reference to the notional daily tariff of \$4,500. That tariff is applicable for cases which were lodged in the Authority from 1 August 2016 onwards. This case was lodged prior to that date and so the previous notional daily tariff of \$3,500 per day applies to this case.

[10] The investigation meeting in this case took the most part of a day, with submissions being heard subsequently during a conference call lasting approximately one hour. I accept the Club's submission that the starting point for this case is a one day investigation meeting, with a daily tariff of \$3,500.

[11] In terms of the barrister's invoice, the Club accepts that costs were incurred in relation to the present claim, although noting the difficulty of assessing the exact work undertaken. It does not consider that the costs are necessarily unreasonable.

[12] The Club relied on the Court of Appeal decision in *Bradbury v Westpac Banking Corporation*³ where the Court stated that:

... indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[13] I accept the Club's submission that the present case does not fall within the types of circumstances outlined by the Court of Appeal as those where indemnity costs had previously been ordered.

[14] The daily tariff is not designed to reimburse a successful party for their entire actual costs. Rather it reflects a contribution to actual and reasonable costs incurred by the party claiming costs.

[15] Considering all of the circumstances, I order Waitakere United Incorporated to pay Mr Shelley the sum of \$1,500.00 as a contribution towards his costs.

[16] The Club has sought an order requiring the payment to be by way of instalment, relying on *Tourism Holdings Ltd (t/a CI Munro) v Charlesworth*⁴.

[17] In the substantive determination, I accepted that the Club relies heavily on grants made to it, particularly to pay wages and salaries. It is a relatively small employer, reliant on a lot of volunteer time in order to operate.

[18] I therefore order that the costs of \$1,500 be paid by the Club to Mr Shelley in three monthly instalments of \$500 each, the first to start within 28 days of the date of this determination.

Nicola Craig
Member of the Employment Relations Authority

³ [2009] NZCA 234 at [27]

⁴ [2012] NZEmpC 29 at [13]