

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 449  
5425453

BETWEEN                      ROGER SIMISTER  
   Applicant  
  
AND                              LUXURY                      AIRPORT  
   SHUTTLES LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Cate Andersen, Counsel for the Applicant  
   Lloyd Brewerton, Advocate for the Respondent  
  
Submissions:                25 September 2014 from the Applicant and 9 October  
   2014 from the Respondent  
  
Determination:              3 November 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A.      Luxury Airport Shuttles Limited (LASL) must pay Roger Simister \$5000 as a contribution to his costs in bringing his successful personal grievance application in the Authority.**

[1]      Roger Simister sought an award of \$7000 costs after the Authority determined he was unjustifiably dismissed and ordered Luxury Airport Shuttles Limited (LASL) to pay him \$3500 as compensation and \$5235 in reimbursement of lost wages.<sup>1</sup>

[2]      The usual tariff for costs for a one day investigation meeting is \$3500 but Mr Simister submitted two factors required more work than normally expected for an Authority investigation and warranted a higher award. Firstly, LASL had not provided requested documents, despite an Authority direction, including some documents that it then produced during the investigation meeting. Secondly, Mr Simister said he had made a reasonable settlement offer some months before the

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<sup>1</sup> [2014] NZERA Auckland 356.

Authority investigation and, if LASL had accepted his proposal, additional legal costs he incurred could have been avoided.

[3] LASL submitted the daily tariff should be applied and then reduced by 15 per cent to match the reduction for contributory conduct that was taken away from the compensation and wages remedies awarded to Mr Simister.

## **Documents**

[4] Mr Simister's submissions referred to two documents that were not produced until during the Authority investigation meeting. One was an email detailing a customer complaint. The complaint was part of the reason LASL took disciplinary action against him. The other document comprised notes taken by Mr Brewerton during a disciplinary meeting.

[5] It was correct that LASL should have provided the email earlier than during the investigation meeting, as part of its evidence required under an Authority timetable, but the effect of that omission was an inconvenience to the Authority rather than something that increased the amount of work required by Mr Simister's legal representative. Costs are not to be used to punish an unsuccessful party for inadequacies or failings. The conduct of the unsuccessful party – including in preparing for and in participating in an Authority investigation – is only relevant for costs purposes where some unsatisfactory aspect of its conduct unnecessarily increased costs. In this case I have not identified any consequential increase of costs from LASL's omission so no increase of the tariff was appropriate on that account.

[6] It was also unhelpful that LASL did not provide, or refer to, Mr Brewerton's disciplinary meeting notes until during the Authority investigation meeting. However he had earlier provided a copy of that document to Ms Andersen. The situation, as it emerged some way into the investigation meeting, was that neither representative had referred to or provided a copy of this document under the Authority's timetable to lodge witness statements and relevant documents. Again, that was not something, in and of itself, that resulted in extra work for Mr Simister's representative. If the absence of that document made some points of evidence more difficult to establish or require longer to address during the investigation meeting, the cost of the further time

taken was a burden for both parties to bear rather than warranting an upward adjustment of the tariff to Mr Simister's benefit.

### **Settlement offer**

[7] Following mediation Mr Simister offered to settle his grievance on a 'without prejudice save as to costs' basis in September 2013 and then again in November 2013. His offer sought a payment from LASL of \$6000 "*plus legal costs*". His costs submission did not disclose what his legal costs were at that time but LASL's submission said it understood Mr Simister's legal costs were around \$5000 at the time of mediation. On that basis LASL understood the settlement sum sought totalled around \$11,000, plus GST on legal costs.

[8] The principles to be applied when the Authority exercises its discretion to award costs allow for without prejudice offers to be taken into account.<sup>2</sup>

[9] The net value of the total remedies awarded to the Mr Simister, allowing for an approximate deduction for tax on the wages portion, was about \$7300 (that is \$1300 more than he sought in settlement some months earlier). In that light his offer to settle was a reasonable compromise of his claim and, had it been accepted, would have spared both parties the cost of further time and legal fees from that point.<sup>3</sup> In those circumstances an upward adjustment of the daily tariff was warranted but Mr Simister's costs submissions were not accompanied by sufficiently detailed information about his costs from the time of his settlement offer. On the limited information available I was not satisfied the uplift to \$7000 costs that he sought was warranted. Instead I concluded that application of the relevant principles (including that an award of costs should be modest) made an upward adjustment of the tariff to \$5000 appropriate.

### **Deduction for contributory conduct?**

[10] Costs generally follow the event of success by one party. The conduct of parties is only relevant, for costs purposes, in respect of whether the conduct of one or

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<sup>2</sup> *PBO v Da Cruz* [2005] ERNZ 808, 819.

<sup>3</sup> *Da Cruz*, above, at 822.

other increased costs unnecessarily. Accordingly, there was no basis to apply LASL's suggestion that the deduction for contributory conduct applied to the remedies awarded to Mr Simister should also be applied to the award of costs made to him in this determination.

Robin Arthur  
Member of the Employment Relations Authority