

employment. Hawkeye was ordered to pay outstanding holiday pay together with interest and a penalty was imposed in respect of the breach by Hawkeye of the Holidays Act 2003.

[2] Costs were reserved. The parties were invited to exchange memoranda as to costs.

Submissions as to costs

[3] On behalf of Hawkeye, a memorandum was filed by its advocate, Mr Trivedi. The fees incurred by Mr Singh, according to the invoices submitted, amount to \$7,919.76. Mr Singh's advocate also states that a further amount of \$350 was incurred in order to prepare the costs submissions.

[4] Mr Trivedi submits in paragraph 1 of his submissions that he is seeking full costs in accordance with the Authority's notional daily tariff, being \$4,500 for the first day of the investigation meeting and \$3,500 for the second day. That total would amount to \$8,000. In his final paragraph, Mr Trivedi seeks actual costs of \$7,919.76 together with exemplary/special costs "as deemed fit".

[5] In her memorandum in reply, Ms Moncur submits that costs "should lie where they fall" because Mr Singh's claim for holiday pay and a penalty were upheld by the Authority.

Costs determination

[6] The Authority's power to award costs against a party is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (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.

[7] 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:

- (a) There is discretion as to whether costs should be awarded and in what amount;

² [2005] 1 ERNZ 808

- (b) The discretion is to be exercised in accordance with principle and not arbitrarily;
- (c) The statutory jurisdiction to award costs is consistent with the equity in good conscience jurisdiction of the Authority;
- (d) Equity and good conscience are to be considered on a case by case basis;
- (e) 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;
- (f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- (g) That costs generally follow the event;
- (h) That without prejudice offers can be taken into account;
- (i) That awards will be modest;
- (j) That frequently costs are judged against a notional daily tariff; and
- (k) 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.

[8] First, I accept that it is appropriate for Mr Singh to make a contribution towards Hawkeye's costs on the basis that costs follow the event. Except for the requirement to pay holiday pay which was an obligation accepted by Hawkeye, Hawkeye successfully resisted Mr Singh's claim that he was unjustifiably dismissed.

[9] 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 investigation meeting took two full days in the Authority.

[10] During the course of the investigation meeting, Ms Moncur presented a number of new documents which despite the Authority's directions had not been provided to it previously. This caused delay. Further, Mr Singh called a new witness to the investigation meeting. The Authority did not have a witness statement from the witness and this too caused delays. I consider these factors meant that the Authority had to spend two full days investigating Mr Singh's claims when in all likelihood, the investigation meeting could have been completed in one to one-and-a-half days.

[11] I agree with Ms Moncur's submission that Mr Singh was successful in his claim for holiday pay from Hawkeye.

[12] Hawkeye was aware of its obligation to pay holiday pay to Mr Singh. It did not do so in the mistaken belief it was not required to pay it in circumstances where Mr Singh had failed to return its property.

[13] Hawkeye was ordered by the Authority to make the appropriate holiday pay payment to Mr Singh together with interest. Further, a penalty of \$1,000 was imposed on Hawkeye in respect of its breach of the Holidays Act 2003. I consider those factors should also be taken into account when considering the amount that should be awarded in costs.

[14] Costs should be reasonable and awards modest. Costs are not to be used as a punishment. Taking into account the above factors and the principles that guide the Authority when assessing costs. I consider a contribution by Mr Singh to Hawkeye of \$6,000 towards its costs to be appropriate.

[15] I order Mr Singh to pay Hawkeye the sum of \$6,000 towards Hawkeye's costs. These costs are to be paid by Mr Singh within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority