

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 153
5295330

BETWEEN MATTHEW IAIN SMAILL
Applicant

A N D SIMS BROTHERS (1992)
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Janet Marquet, Counsel for Applicant
Diana Hudson, Counsel for Respondent

Submissions: 21 September 2011 from the Applicant
6 October 2011 from the Respondent

Date of Determination: 7 October 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 19 August 2011 I upheld Mr Smaill's personal grievance claim and awarded various remedies. Costs were reserved. I now have submissions from the parties setting out their respective views about costs. This determination resolves the question of costs.

[2] I am given several different figures for the applicant's costs which I find it difficult to reconcile. Putting that to one side it seems that his legal bill is around \$18,000.00 which includes time for mediation. I have not been given any breakdown of the time spent on this matter or copies of invoices. This is unsatisfactory but I will do the best I can with the material available.

[3] Having said that I should note my agreement with the submission by counsel for the respondent that the information in the applicant's memorandum about mediation should be treated as irrelevant for present purposes. I am asked to ignore that material which I will attempt to do.

[4] The starting point is counsel's submission that there should be an order for full costs because of the respondent's conduct. I disagree. The points made for the applicant about conduct relate to the substance of the grievance claim. Those matters are irrelevant for present purposes. To give them any weight would be to punish the respondent for the very matters that resulted in the finding of a personal grievance. That is not a function of the Authority's costs jurisdiction.

[5] For the two reasons mentioned it is therefore unnecessary to address in detail the submissions made for the applicant or to discuss the cases mentioned.

[6] What is relevant is how the parties conducted themselves in the Authority's investigation process. The matter was handled in a professional and appropriate manner by counsel for the respondent.

[7] The Authority determines costs in accordance with the principles expressed in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[8] There is no reason to depart from the usual approach that the successful party is entitled to costs, nor did the respondent suggest that.

[9] The matter took a little more than one and a half days to deal with the evidence and another couple of hours to deal with submissions in person, so a total of about two days. There was some factual complexity because of the need to canvass events over a long period of time and there were some sharp evidential disputes and a number of witnesses on both sides. Otherwise it was a standard personal grievance claim.

[10] The only feature of note for present purposes is the time wasted because of counsel for the applicant's failure to ensure the disclosure of some relevant notes prior to the investigation meeting. That will result in a modest reduction in the application of a daily tariff approach to the assessment of costs.

[11] At least implicitly counsel for the respondent acknowledges \$3,000.00 as a standard daily rate in an ordinary case. I think that is appropriate here. Taking account of the matter just mentioned I assess a proper award of costs as \$5,000.00. Mr Smail should also be reimbursed the lodgement fee.

Orders

[12] Sims Brothers (1992) Limited is to pay Mr Smaill costs and expenses of \$5,070.00.

Philip Cheyne
Member of the Employment Relations Authority