

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 217
5442608

BETWEEN

GAVIN TEMARA
Applicant

A N D

MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: T G Tetitaha

Representatives: AJ McKenzie, Counsel for Applicant
S Cook/S McFetridge, Counsel for Respondent

Submissions received: 13 May 2014 from Applicant
28 April 2014 from Respondent

Date of Determination: 6 June 2014

COSTS DETERMINATION OF THE AUTHORITY

A. Gavin Temara is ordered to pay the Ministry of Social Development \$2,333.33 towards its actual legal costs. Payment shall be by instalments of \$10.00 per week starting 1 July 2014.

[1] The Authority in its substantive determination dated 14 April 2014¹ held that the applicant was not unjustifiably dismissed. His application for personal grievance was dismissed and costs reserved.

[2] The respondent now applies for costs. The respondent's actual costs were \$55,000 (excluding GST and service fees).

¹ [2014] NZERA Auckland 144

Issues

[3] The following issues are to be determined:

- (a) Should the costs application be adjourned pending hearing *de novo* by the Employment Court?
- (b) If no, what is the starting point for assessing costs?
- (c) Are there any factors that warrant adjusting the notional daily tariff?

Should the costs application be adjourned pending hearing *de novo* by the Employment Court?

[4] The applicant submits he has filed an election challenging the Authority's determination and seeking a hearing *de novo* by the Employment Court. A deferral of the costs decision until the challenge has been resolved is sought.

[5] The applicant is in effect seeking a stay of the costs decision pending the outcome of the challenge. The making of an election under s179 does not operate as a stay of proceedings unless the Court or Authority so orders.²

[6] The applicant's costs submission does not address any relevant legal tests for an order to stay the Authority's costs decision. The submissions primarily focus upon the fact of the challenge and his impecuniosity.

[7] No copy of the challenge has been filed or received by the Authority. The support officer made enquiries with the Employment Court Registry and was advised they had no record of a challenge of this file. Financial hardship can be met by conditions such as payment by instalments pending the challenge.

[8] Costs follow the event.³ Given the respondent's success, it is entitled to an award of costs. It is highly desirable for the Authority's process to come to an end, especially in view of the challenge and pending *de novo* hearing in the Employment Court. The applicant can challenge the costs determination and seek stay if required.

² Section 180 Employment Relations Act 2000

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [44]

[9] In the circumstances, the Authority declines to stay or defer its costs determination.

What is the starting point for assessing costs?

[10] Both parties agree the correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs.⁴ The current notional daily tariff is \$3,500. This matter involved a two day investigation meeting. The starting point for assessing costs is therefore \$7,000.

Are there any factors that warrant adjusting the notional daily tariff?

Factors which warrant an increase in the notional daily tariff

[11] The respondent submits the urgency and, therefore, truncated timetable to ensure an early hearing of this matter, numbers of witnesses, preparation of opening and closing submissions, extended sitting time, and degree of success, requires the Authority to apply an increased daily tariff of \$4,000.

[12] Truncation of the timetable and urgency are not matters warranting an increase in costs. The applicant agreed to abandon an interim hearing in favour of having of an early substantive hearing. This avoided the additional costs of arguing an interim reinstatement application. This is not conduct by the applicant which unnecessarily increased costs.

[13] The number of respondent witnesses called was determined by the respondent. The majority of hearing time involved examination and cross examination of the applicant. The primary respondent witness examined was the decision maker, Sharon Tong. The remaining respondent witnesses were called to support the evidence before the decision maker. Applicant counsel was succinct and relevant in his examination and cross-examination. None of this conduct requires an increase in the notional daily tariff.

[14] The filing of opening and closing submissions is part of expected preparation encompassed by the notional daily tariff.

⁴ *Mattingly v Strata Title Management Ltd* [2014] NZEMPC 15 at [16]

[15] While there were a large number of documents filed, a significant proportion of relevant documentation was produced at the hearing in response to requests by me. These included the SWIFT case file notes and the Ministry's child interviewing policies.

[16] The extended sitting time, whilst regrettable, does not necessitate an increase to the daily notional tariff. The fact of sitting late does not evidence conduct of the applicant that increased costs. Both parties estimated the hearing time should be two days. Unfortunately extended sitting hours on the second day were still required.

[17] The degree of success on issues before the Authority is not a matter warranting any increased costs.

[18] There are no matters warranting an increase in the notional daily tariff.

Factors which warrant a reduction in the amount of costs

[19] The applicant seeks a reduction in the amount of costs awarded due to his financial position.

[20] A party's ability to pay costs is a relevant consideration in costs awards.⁵ Reductions in awards of costs due to financial hardship have ranged from no award of costs⁶ to heavily discounted costs awards of \$1,000⁷ to \$3,000⁸. All the cases focused on the ability of the plaintiff to meet any more than a nominal award of costs.

[21] This applicant has \$50,675.56 debt. His income is \$186 benefit per week. He has recently had his car repossessed. It is clear on the evidence before me that the applicant would be unable to meet more than a nominal award of costs (if any).

[22] In all the circumstances, there shall be a reduction of two-thirds in the daily notional tariff. An award of costs of \$2,333.33 is made.

[23] Having regard to the Employment Court challenge and his financial position, this is an appropriate case for payment of the costs by instalments. An order for

⁵ *Shepherd v. Scan Audio New Zealand Ltd* [1999] 2 ERNZ 374 (EmpC)

⁶ *IHC New Zealand Inc v. Fitzgerald* EmpC Wellington WC7/07, 28 February 2007 at [11]; *Binnie v. Pacific House Ltd* [2002] 1 ERNZ 438 at 443

⁷ *Burns v. Media Design School Ltd* EmpC Auckland AC40/09, 17 November 2009

⁸ *Kaipara v. Carter Holt Harvey Ltd* [2012] NZEmpC 92, (2012) 10 NZELC 79-010

payment of the costs by instalments of \$10.00 per week shall be included as a condition on this costs award.

Outcome

[24] Gavin Temara is ordered to pay the Ministry of Social Development \$2,333.33 towards its actual legal costs. Payment shall be by instalments of \$10.00 per week starting 1 July 2014.

TG Tetitaha
Member of the Employment Relations Authority