

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 94

File Number: 5299286

BETWEEN

NICK TEMARAMA

Applicant

AND

MANA COACH SERVICES
LIMITED

Respondent

Member of Authority: Denis Asher

Representatives: Kevin O'Sullivan for Mr Temarama
Blair Scotland for the Respondent

Submissions received: 27 May 2011

Determination: 31 May 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] Mr Temarama was successful in his claim that he had been unjustifiably dismissed by the respondent (the Company) but received no compensation because of a finding of 100% contributory fault (WA 179/10, 4 November 2010).

[2] Costs were reserved. The applicant now seeks costs.

The Applicant's Costs Submissions Summarised

[3] As his submissions of 24 May 2011 make clear, Mr Temarama was represented by his union official, Mr Kevin O'Sullivan.

[4] The costs application is made in reliance on *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

[5] Mr Temarama was successful in his claim of unjustified dismissal even though no remedies were awarded. Costs should follow the event notwithstanding no remedies were awarded. Having taken into account the applicant's contributory behaviour in denying him a remedy the Authority is not entitled to take into account the same behaviour in declining to award him costs: *White v Auckland District Health Board* [2008] ERNZ 635, par 51.

[6] On a tariff approach of \$3,000 per day that amount is sought.

The Respondent's Costs Submissions Summarised

[7] There is no evidence before the Authority of costs having been incurred other than the filing fee of \$75.

[8] Per *Da Cruz* (above), the Authority's discretion is to be applied in accordance with principle and "... *not arbitrarily*" (p 819).

[9] On *Da Cruz* (above), the Court also noted that 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*" (p 820).

[10] The present case is one to which this latter principle applies. Where the parties have had 'mixed success the Court of Appeal has held that, "... *it is not necessarily easy to determine who "won" the case so as to be entitled presumptively to costs*": *Health Waikato Ltd v Elmsley* [2004] 1 ERNZ 172, par 35.

[11] It would be at odds with equity and good conscience to award costs in this case where, but for one technical defect and as the Authority clearly signalled, the dismissal would have been found to have been justified. Costs should therefore lie where they fall.

Discussion and Findings

[12] The Authority's discretion with which to award costs is now well settled and typically follows the event: *Da Cruz* (above).

[13] The investigation took less than a day.

[14] I do not accept the submission that a breach of a collective employment agreement, particularly in the context of a dismissal of an employee, is somehow technical and can be ignored.

[15] Because Mr Temarama succeeded with his claim of unjustified dismissal it is therefore appropriate that costs follow the event: *White* (above).

[16] While no evidence has been provided by the applicant in support of his claim for costs, I accept that Mr O'Sullivan is a paid official of the applicant's union, that he would have been engaged elsewhere but for his representation of Mr Temarama, and it is therefore a principled approach that his union receive a contribution to his fair and reasonable costs: *O'Malley v Vision Aluminium Ltd (No 3)* [1992] 2 ERNZ 1043.

Determination

[17] The Company is to pay to Mr Temarama, as a contribution to the costs reasonably incurred on his behalf of the applicant, the sum of \$500 (five hundred dollars), so as to reimburse his union.

Denis Asher

Member of the Employment Relations Authority