IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 20
5429828

	BETWEEN	STEPHEN THOMPSON Applicant
	A N D	ANGLICAN FAMILY CARE Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Diana Hudson, Counsel for Respondent
Submissions Received:	23 January 2014 from Respondent 31 January 2014 from Applicant
Date of Determination:	5 February 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination dated 20 December 2013 the Authority found that the respondent had not breached the terms of a settlement agreement between the parties, save in one respect. It declined to order compliance and to impose a penalty upon the respondent. Costs were reserved and the parties have been unable to agree how costs are to be dealt with between them.

[2] The respondent has lodged and served a memorandum of counsel seeking a contribution towards its legal costs of $3,275 plus GST, being around half its total costs in defending the matter, but more than Mr Thompson would otherwise be expected to pay if the Authority were to apply the daily tariff approach, given that the investigation meeting lasted half a day. This is resisted by Mr Thompson, who asks for an order that costs lie where they fall.

[3] The respondent's arguments are as follows:

a. The respondent was successful in defending Mr Thompson's claims, save for a technical breach of the settlement agreement that was found to have occurred;

b. Mr Thompson did not provide sufficient evidence to substantiate his allegations;

c. The law applied by the Authority was non contentious;

d. Mr Thompson did not follow due process, including not indicating till late in the day that he wished to question Ms Brazil, the respondent's representative; and

e. Mr Thompson's failure to obtain legal advice led to the respondent incurring unnecessary legal expense.

[4] Mr Thompson responds as follows:

a. The respondent's costs submissions were lodged out of time;

b. The tariff approach does not override the other principles of *PBO Ltd (formerly Rush Security Limited) v Da Cruz*, [2005] 1 ERNZ 808;

c. The respondent was not wholly successful as is asserted by the respondent;

d. The breach of the settlement agreement that the Authority found had occurred was more than a *technical breach*, as is asserted by the respondent;

e. His decision to proceed was not ill-founded;

f. He did not fail to follow due process;

g. It was the Authority who decided that Ms Brazil should be questioned, not he; and

h. Mr Thompson is not in a position to pay any costs.

[5] I address the parties' submissions below, but first set out the *da Cruz principles* governing the setting of costs awards in the Authority*:*

a. There is a discretion in the Authority as to whether costs would be awarded and what amount.

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 and good conscience jurisdiction of the Authority.

d. Equity and good conscience is 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 rate.

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.

Respondent's submissions out of time

[6] I deal first with the assertion that the respondent served and lodged its costs submissions out of time. Strictly speaking, this is correct and the respondent did not seek leave to serve and lodge them out of time. However, in setting the 28 day time limit, I took no account of the intervening Christmas/New Year holiday period, and believe that it would be unjust to deprive the respondent of the opportunity to make its submissions given that the festive season would have impinged upon the respondent's time frame significantly.

[7] The respondent's submissions were received four working days after the 28 deadline expired and, as there were four public holidays during the period of 28 days set, it is appropriate to extend time pursuant to s. 219 of the Employment Relations Act 2000 to allow the respondent's submissions to be treated as having been received in time. I am satisfied that Mr Thompson has not been prejudiced by this extension as he has put in comprehensive submissions in reply in any event.

Was the respondent wholly successful?

[8] Turning to whether the respondent was wholly successful, and whether the breach of the settlement agreement that the Authority found was just technical, what is important is the overall effect of the Authority's findings. Mr Thompson failed in obtaining the compliance orders and penalties that he sought, and he also failed to persuade the Authority that the respondent was under a duty to release an agreed statement. Therefore, whether he was wholly unsuccessful or not, he failed in his main applications. Therefore, it is appropriate that costs follow the event, subject to other factors set out in this determination.

Mr Thompson did not provide sufficient evidence to substantiate his allegations

[9] Mr Thompson decided not to name (or call to give evidence) certain individuals who may have proved part of his claim, because he did not wish to involve them in his dispute. That was his choice, but it made it almost inevitable in the face of denials given in evidence by the person accused of having breached the settlement agreement that Mr Thompson would fail in that part of his application, as he was warned in the directions conference. However, this aspect of the application (whether the respondent had spoken ill of him in breach of the agreement) was dealt with reasonably simply and quickly in evidence (by way of a straight forward denial) and in submissions by the respondent and I do not believe that Mr Thompson should be made to contribute more in costs than he otherwise would as a result of his decision.

The law applied by the Authority was non contentious

[10] Mr Thompson sought to argue that the settlement agreement contained terms agreed orally between the parties, despite the terms not being reflected in the written agreement. I am not of the view that this approach was plainly ill founded or doomed to fail from the start, as the respondent appears to be contending. Whilst I rejected it

in my determination, it required an analysis of the relevant legislation and of the evidence. I therefore do not agree that Mr Thompson should be made to contribute in costs more than he otherwise would as a result of his approach.

Mr Thompson did not follow due process

[11] It came as a surprise to me, and I believe to the respondent, when Mr Thompson explained at the start of the Authority's investigation meeting that he was relying upon an oral agreement between the parties, purportedly reached during negotiations prior to the signing of the settlement agreement. He should have made this clear prior to the investigation meeting. However, the Authority was able very easily to accommodate this revelation into its enquiry, and neither the respondent nor its representative was unduly handicapped by it.

[12] I accept Mr Thompson's submission that it was the Authority which first mooted that Ms Brazil was to be questioned during the investigation meeting, not him.

[13] All in all, whilst Mr Thompson may not have conducted his case in an ideal manner, I believe that he did his best, and certainly did not appear to be acting in bad faith in any respect. I do not accept that he should be made to contribute in costs more than he otherwise would as a result.

Mr Thompson's failure to obtain legal advice

[14] This is linked to the previous two points I believe. Many applicants are not able or choose not to obtain legal advice for financial or other reasons, and they cannot be penalised for not doing so. In any event, Mr Thompson did obtain legal advice he says.

Inability to pay

[15] Finally, Mr Thompson asserts that he cannot pay anything in costs. However, he does not set out any details whatsoever about his monthly income, expenditure or savings, and so I cannot assess the extent to which this assertion is true. I must therefore set it to one side.

Conclusion

[16] I believe that Mr Thompson should make a contribution to the respondent's costs but do not accept that this should be more than that indicated by adopting a daily tariff approach. As the investigation meeting lasted half a day, and the usual daily tariff is $3,500, I believe that an appropriate contribution is $1,750.

Order

[17] I order Mr Thompson to pay to the respondent the sum of $1,750 as a contribution towards its costs.

David Appleton
Member of the Employment Relations Authority