IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 110
3035411

	BETWEEN	WMS Applicant
	AND	HGC Respondent

Member of Authority:	Michele Ryan
Representatives:	Kevin O'Sullivan, advocate for Applicant Daniel Vincent, counsel for the Respondent
Investigation Meeting:	11 February 2019
Date of Determination:	28 February 2019

COSTS DETERMINATION OF THE AUTHORITY

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[1] The Authority investigated the applicant's employment relationship problem on 11 February 2019. At the conclusion of providing evidence the applicant withdrew her claims. The parties subsequently agreed to terms of settlement including that the nature of the claims remain confidential between them. To this end I have referred to these only where necessary, and in very general way, so as to reduce the possibility that the parties might be identified.

[2] Unfortunately the parties were not able to reach agreement on the issue of costs and have requested the Authority determine the matter.

The law

[3] Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act) provides the Authority with a discretionary power to awards cost. The discretion

must, however, be exercised on a principled basis. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out a range of principles to guide the Authority when assessing a costs application.[1] I have not restated these in full but I have referred to the relevant principles where applicable to the particular circumstances of this matter.

The parties' positions[2]

[4] The respondent says it should be awarded an increase to the Authority's daily tariff where the applicant's claims were without merit, and where the remedies sought were unrealistic and exacerbated the dispute.

[5] In contrast, the applicant asks to have costs lie where they fall. Alternatively, the Authority was reminded that costs should be modest.

Should costs be awarded?

[6] This is not a case where costs should lie where they fall. The applicant was represented by an experienced advocate. In pursuing her claims she must be taken to have been aware that if unsuccessful, a contribution to costs would likely follow. In this instance the respondent successfully defended the claims against it and was put to some expense in doing so. Costs generally follow the event, and there is no good reason that they should not do so in the matter.

What is an appropriate award?

[7] Having determined that an award of costs should be made in favour of the respondent, the quantum of such an order is decided by first applying the Authority's notional daily tariff, currently set at $4,500 for a one day investigation meeting.

[8] The investigation into the applicant's claims occupied half a day. A pro-rated application of the daily tariff using the length of the investigation as the only relevant measurement equates to $2,250. The Authority must then take into account whether there are any particular aspects of a case that would warrant modification to the rate.

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1 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, reaffirmed in *Davide Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

2 Oral submissions on costs were provided by each party at the end of the investigation meeting.

[9] Turning to factors which may uplift an award of costs, I find the characterisation of the applicant's claim as "without merit" goes too far, albeit there were some considerable factual and legal obstacles that the applicant needed to overcome to establish her claim. Costs are not be used as a punishment or an expression of disapproval of an unsuccessful party's conduct. It was apparent that the applicant held a genuine belief that she had suffered a personal grievance which she was entitled to have the Authority investigate.

[10] There were, however, several aspects to the applicant's claims that were misconceived,[3] and/or outside the Authority's jurisdiction,[4] or significantly lacking in precision.[5] The respondent's pragmatic approach to those matters during the investigation meeting assisted its speedy progress. Nevertheless, the applicant's claims were sufficiently muddled that I am satisfied the respondent's costs in preparing for the investigation meeting were unnecessarily increased. A modest uplift of $500 to the pro-rated tariff is appropriate.

[11] There are no factors provided to Authority which would lead to a conclusion that the rate of an award should be reduced.

Orders

[12] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order WMS to pay HGC the sum of $2,750 as a contribution to its costs.

Michele Ryan
Member of the Employment Relations Authority

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3 For example, many of the remedies requested either did not correspond to, or were not statutorily available under, the head of claim on which the remedy was sought.

4 For example, the Authority does not have jurisdiction to make finding or orders pursuant to the Health and Safety at Work Act 2015.

5 For example, $60,000 in penalties for various statutory and contractual breaches were claimed but little by way of specificity was identified in the statement of problem or in written evidence as to the nature of the alleged breaches.