

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 132
5455884

BETWEEN ERROL WALKER
Applicant

A N D VULCAN STEEL LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Lou Yukich, Advocate for Applicant
Chris Patterson, Counsel for Respondent

Submissions Received: 13 August 2015 from the Applicant
19 August 2015 from the Respondent

Date of Determination: 11 September 2015

COSTS DETERMINATION OF THE AUTHORITY NO. 2

[1] By way of a determination of the Authority dated 6 August 2015¹ the Authority found that Mr Walker had suffered unjustified disadvantage in his employment for having been refused payment of a profit share bonus for the 2013/14 bonus year. He was awarded remedies of \$3,000 together a further \$3,000 compensation for humiliation, loss of dignity and injury to his feelings.

[2] Costs were reserved by the Authority, and the parties were invited to seek to agree how they were to be dealt with. The parties have been unable to agree, and so this determination addresses Mr Walker's claim for costs.

[3] Mr Walker was represented by Mr Yukich of the Manufacturing and Construction Workers' Union, whose time was charged at \$150 an hour (inclusive of

¹ [2015] NZERA Christchurch 113

GST), and whose costs totalled \$4500, including GST. Mr Walker seeks that this entire sum be ordered to be paid by the respondent.

[4] Mr Walker also seeks a further \$345.80 in respect of travel costs incurred by Mr Yukich, plus reimbursement of the Authority's lodgement fee of \$71.56. However, no Authority lodgement fee is due, as that had already been claimed, and had been awarded in the Authority's first costs determination dated 26 November 2014.² No further lodgement fee was charged by the Authority as the Authority's determination dated 6 August 2015 followed what was effectively an investigation into remedies following the findings of the Authority as set out in its determination dated 15 October 2014.³

[5] The respondent accepts that there is no reason for costs not to follow the event. However, Mr Patterson submits that the applicant made additional claims (discrimination and contempt) which were, respectively, abandoned by the applicant and dismissed by the Authority, thereby putting the respondent to extra costs. Accordingly, Mr Patterson submits that costs should either lie where they fall or, if the respondent is ordered to pay a contribution towards Mr Walker's costs, they should be limited to \$1,000.

Determination

[6] Both parties accept that the general principles governing the award of costs in the Authority set out in the seminal case of *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808 apply. These principles are well known to both parties, and it is not necessary to repeat them here.

[7] First, I accept that costs should follow the event, and that the respondent should make a contribution towards Mr Walker's costs. However, I do not accept that there is any reason in this case to depart from the usual practice of awarding costs in line with the Authority's current daily tariff of \$3,500, as a starting point. The investigation meeting lasted a full day. There is no cogent reason to order the respondent to pay costs to Mr Walker on an indemnity basis. Indemnity costs are still rarely awarded and generally reserved for cases where a party's conduct has been

² [2014] NZERA Christchurch 194.

³ [2014] NZERA Christchurch 160.

especially egregious.⁴ The respondent's conduct of the defence to the matter was perfectly acceptable.

[8] I do, however, have some sympathy with Mr Patterson's remarks about the extra costs incurred by the respondent by Mr Walker pursuing a discrimination claim which was abandoned after the respondent had put together comparator evidence (although the scope of the evidence would not have been sufficient had the discrimination claim been pursued). The respondent also had to address an allegation by Mr Yukich that it had committed contempt by including a copy of a warning letter in evidence that the Authority had earlier ordered be removed from the respondent's files.

[9] I believe that both issues of discrimination and contempt had been raised by Mr Walker (or his representatives) in good faith, but costs should follow the event in these cases. Unfortunately, Mr Patterson has provided no breakdown of the costs that these two allegations caused to be incurred by his client. I can only speculate, and will do so conservatively. I estimate that a reasonable cost of the respondent addressing the two allegations would have been in the region of \$500 including GST, and so I reduce the daily tariff to \$3,000. This shall be the contribution that the respondent must make to Mr Walker's costs.

[10] The next question is what disbursements should be awarded. I accept that Mr Yukich flew to Christchurch for the investigation meeting, and so I award the claimed cost of the flights. I also accept that Mr Yukich drove from Tokoroa to Rotorua Airport and back and so I am prepared to order the reimbursement of that travel too. Mr Yukich does not state how far he travelled, but given that he used a rate of 77 cents per kilometre, that equates to a return trip of 140 kilometres, which does not appear to be inaccurate.

[11] However, the IRD rate for the 2015 income year has been reduced to 74 cents an hour, announced in an IRD Operational statement⁵. This means that the correct sum to be awarded in respect of the car travel is \$103.60. This makes a total disbursement of 341.60.

⁴ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94].

⁵ 2015 review of the Commissioner's mileage rate for expenditure incurred for the business use of a motor vehicle.

Orders

[12] I order the respondent to make the following payments to Mr Walker in respect of costs and disbursements incurred by him:

- a. \$3,000; and
- b. \$341.60.

David Appleton
Member of the Employment Relations Authority