IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 96
5563822

	BETWEEN	ELISA WALTERS Applicant
	AND	AVIATION SECURITY SERVICES LIMITED Respondent

Member of Authority:	Eleanor Robinson
Submissions received:	None from Applicant 17 March 2017 from Respondent
Determination:	03 April 2017

COSTS DETERMINATION OF THE AUTHORITY

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[1] By determination [2016] NZERA Auckland 50 it was determined that the Applicant, Ms Elisa Walters, was not unjustifiably disadvantaged by the Respondent, Aviation Security Service Limited (AvSec). Further that AvSec did not breach the duty of good faith towards Ms Walters, or breach her employment agreement.

[2] In that determination costs had been reserved in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so, and The Respondent has filed submissions in respect of costs.

[3] The matter involved 4.5 days of investigation meeting time.

Submissions for the Respondent

[4] Ms Hornsby-Geluk, on behalf of the Respondent, is seeking a contribution towards the costs of the Respondent in the sum of $31,000.00 together with disbursements of $2,426.47 plus GST.

[5] Applying the Authority's usual daily tariff rate of $4,500.00 for the first day of any investigation meeting and $3,500.00 for each subsequent day, AvSec submits it could reasonably expect an order for costs in the sum of no less than $18,500.00 in respect of the substantive investigation meeting.

[6] In addition to that amount, AvSec is seeking an uplift of $12,500.00 ($2,500.00 per hearing day) on the basis that the Applicant's conduct resulted in costs unnecessarily increasing.

[7] In support of that application, AvSec submits that it is well established that conduct that unnecessarily increases costs may be taken into account[1]. Examples of the Applicant's conduct which the Respondent submits unnecessarily increased costs included:

(a) The considerable delay between the filing of the Applicant's Statement of Problem in June 2015, and the commencement of the investigation meeting in August 2016. This was as a consequence of counsel for the Applicant's availability, and the original date for the investigation meeting, which was set down to occur in March 2016, being postponed following the Applicant's last minute request that 10 new witnesses be summonsed to give evidence.

The Respondent filed its evidence in accordance with the original timeframe. On 23 March, counsel for the Respondent and the Authority Member were advised that the Applicant wished to summons the 10 witnesses. No prior notification of this request, or briefs of evidence had been supplied in respect of these 10 witnesses despite the fact that the hearing was scheduled to commence in one week's time;

(b) As a result, the Authority Member was forced to adjourn the March hearing. This resulted in further unnecessary cost to the Respondent as it needed to respond to the applications for summonses and attend several additional directions conferences to deal with the matter. Once the hearing was adjourned, counsel for the Respondent had to prepare (including re-briefing witnesses) for a second time for the hearing some months later;

(c) In respect of the Applicant's request that six witnesses be summonsed, the Respondent submits:

(i) The evidence was largely irrelevant to the Authority's consideration of the Applicant's substantive claims;

(ii) The request significantly and unnecessarily extended the length of the investigation meeting to the point that it needed to be adjourned and reconvened months later (see below);

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1 *Da Cruz* at [44]

(iii) No briefs of evidence were provided for the summonsed witnesses (with the exception of Brett Clark whose brief was provided by the Respondent) which increased preparation costs as a result of the Respondent having to (largely) guess as to the possible evidence these witnesses may give and the Applicant's purpose in calling them;

(d) Last minute requests by the Applicant for irrelevant information and documentation in the days leading up to the investigation meeting which required counsel for the Respondent to prepare for and attend a further teleconference with the Authority Member at which counsel for the Applicant was ill prepared and did not appear to understand the nature or date of the document being requested;

(e) Failures by the Applicant to comply with the Authority's timetabling orders, resulting in added confusion and delay. This included the Applicant's failure to comply with the direction of the Authority that it provide a list of questions for two of its witnesses (Harvey Jefferies and Alexander Coulthard) by no later than 31 May 2016. After failing to meet the required deadline, counsel for the Applicant sought to challenge and reverse the Authority's earlier direction. The Authority was then required to intervene and direct the Applicant to file the questions by a new deadline;

(f) The attempt by the Applicant to introduce new documentary evidence on 20 October 2016 after all but two of the witnesses had completed giving their evidence and over a year after the original case management conference;

(g) Questioning from counsel for the Applicant which was unduly protracted and often focused on irrelevant and extraneous matters;

(h) It is submitted that the above matters caused the hearing to extend beyond the original allocated timeframe which necessitated the adjournment and resumption of the investigation meeting several months later resulting in additional unnecessary costs being incurred by the Respondent including:

(i) The cost of counsel having to re-prepare for the resumed hearing (noting that this was not the first time that counsel had been required to do so);

(ii) Additional costs and disbursements associated with arranging for witnesses and counsel to travel back to Auckland;

(i) The withdrawal of the Applicant's counsel days before the resumption of the investigation meeting in December 2016 which resulted in the Respondent agreeing to provide submissions first to assist the Applicant and the Authority but as a consequence having to also provide submissions in reply.

[8] The Respondent submits that many of the issues caused by the Applicant and which resulted in the Respondent's costs being unnecessarily increased were also present in *Lawson v New Zealand Transport Agency* [2015] NZERA Auckland 173. In that case, the Authority ordered an uplift in the daily tariff rate of $2,500.00 for each hearing day.

[9] In conclusion, the Respondent submits that the matter should not have occupied more than a two day investigation meeting and would in all likelihood have been resolved in less time. The five day investigation meeting which transpired and the costs associated with that was well and truly disproportionate to the nature of the Applicant's unfounded claims and was a direct consequence of the Applicant's conduct set out above.

Principles

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

> ***15 Power to award costs***
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> *(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
>
> *(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[11] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*[2].

[12] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[3] as confirmed in *Fagotti v Acme & Co Ltd.*[4] .

[2] [1996] 2 ERNZ 622
[3] [2005] 1 ERNZ 808

[13] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[5] that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*[6] at para [48] "*As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred."*

[14] It is also a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

Determination

[15] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day investigation meeting this would normally equate to $4,500.00, $3,500.00 for each subsequent full day, and therefore for 4.5 days of investigation meeting, this would normally equate to an award of $16,750.00.

[16] However as observed by the Employment Court in *PBO Ltd* : "*The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs"*[7]

[17] The Respondent submits that costs should be increased above the notional daily tariff rate for the reasons set out in the preceding paragraphs.

[18] I accept that there was considerable delay in this matter proceeding to an Investigation meeting, and the delay was largely attributable to the conduct of the Applicant's then counsel, Ms Barbara Buckett, both prior to and during the first 4 days of the investigation meeting.

[19] I also accept that the examples as submitted by the Respondent of the Applicant counsel's conduct are largely substantiated in my own experience. This was a case marked by what appeared to be an inadequate amount of case management on the part of counsel for the Applicant which lead to delay together with an increase in investigation meeting time and I accept this has had the effect of increasing the Respondent's costs. This is a factor which I take into consideration when determining the appropriate level of costs in this matter.

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[4] [2015] NZEmpC 135 at [114]
[5] [2005] 1 ERNZ 808
[6] [2001] ERNZ 305
[7] [2005] 1 ERNZ 808 at para [45]

[20] Having considered all of the circumstances, I can see no justification for not making an appropriate uplift in the costs award to the Respondent.

[21] Accordingly, Ms Walters is ordered to pay a contribution to AvSec's costs in the sum of $28,000.00 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[22] Ms Walters is also order to pay disbursements in the sum of $2,426.77 plus GST to AvSec, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority