

Submissions by the Respondent

[4] Ms English, on behalf of the Respondent is seeking a contribution to the actual costs incurred in this matter in the amount of \$15,250.00. In support of the level of costs claimed, the Respondent submits that:

- The Applicant's initial Statement of Problem was deficient in that it claimed injunctive relief against the Respondent for breach of the Record of Settlement. As this was a remedy the Authority had no jurisdiction to grant, this necessitated the filing of an Amended Statement of Problem, and the consequent filing of an Amended Statement in Reply by the Respondent, which resulted in the Respondent incurring unnecessary costs.
- The Respondent had placed Ms Webber on notice in its initial Statement in Reply on 18 July 2014 that statements made by Mr Macaskill-Smith were not made in his personal capacity and no grounds existed for joinder. The Amended Statement of Problem dated 19 September 2014 provided no basis for joinder.
- MHN incurred additional cost in the preliminary matter to have Mr Macaskill-Smith removed as a party to the proceeding. MHN was successful in its request.
- The Applicant's witness statement contained historical matters, not relevant to the determination of the investigation. These matters were not pleaded, and had been resolved pursuant to the Record of Settlement and by an investigation by Worksafe New Zealand, which was closed prior to the filing of the Applicant's first Statement of Problem. This put the Respondent to additional time and expense in successfully having the evidence ruled inadmissible.
- The application by the Applicant for a witness summons in respect of Mr Macaskill-Smith 3 working days in advance of the investigation meeting was not successful in the scope requested by the Applicant. The Respondent incurred additional time and expense in responding the Applicant's application, and had to prepare Mr Macaskill-Smith at short notice to attend the investigation meeting.

Submissions of the Applicant

[5] Ms Twaddle on behalf of the Applicant submits that costs should be awarded at the notional daily tariff rate in the Authority of \$3,500.00 on the basis that there is nothing in the case and the way in which it was conducted to depart from the usual principles that while costs should follow the event, they are modest and a daily tariff approach should be used.

[6] Ms Twaddle submits:

- The contribution to costs claimed by the Respondent is punitive contrary to the principles upon which costs in the Authority are awarded.
- Costs up to and including mediation are expected to be absorbed by the parties, and following no resolution at mediation, the Applicant amended the Statement of Problem to refine the claim. Thus the claim in respect of Mr Macaskill-Smith of alleged malicious and injurious falsehood was amended and not required to be tested. This reduced unnecessary inflation of costs to both parties.
- Amended Statements of Problem and Amended Statements in Reply are not unusual in the Authority. Further there was no deviation from claims and remedies set out in the First Statement of Problem
- The Applicant was successful in having Mr Macaskill-Smith summonsed as a witness. There is no basis for increasing costs in respect of the preparation of Mr Macaskill-Smith for his appearance as a witness.
- The costs sought in respect of the preliminary matter, being the determination of whether or not Mr Macaskill-Smith should be joined as Second Respondent, are not reasonable having regard to the number of appearances sought.
- The attachment of the Applicant's complaint to Worksafe New Zealand to her witness statement was not raised with the Applicant prior to the filing of an application by the Respondent for removal to the Authority. There was no necessity for the Respondent to incur additional costs in respect of this matter. The Applicant did not re-litigate matters previously raised.

Principles

[7] 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

(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.

[8] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[9] 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*².

[10] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

Determination

[11] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. For a 1 day investigation meeting this would normally equate to \$3,500.00.

[12] The preliminary matter was determined ‘on the papers’. With respect to the time taken for consideration of submissions from the parties, I consider a contribution towards costs in the sum of \$1,500.00 to be appropriate in respect of the preliminary matter.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

[13] I accept that Amended Statements of Problem and Statements in Reply are not unusual in the Authority, although claims made should be within the jurisdiction of the Authority. I also accept that preparation of witnesses is part of the normal preparation for an Authority investigation meeting.

[14] However I consider that there are factors in this case that argue in favour of an uplift in the daily tariff in this matter, notably attempting to re-litigate resolved matters such as the Workplace New Zealand investigation and the associated interlocutory matter which involved the Respondent in increased costs.

[15] Having considered all of the circumstances, I believe it is appropriate to increase the tariff.

[16] I order Ms Webber to contribute \$6,500.00 towards MHN's actual costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority