

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA 331
5620448**

BETWEEN

PHILIP WILSON
Applicant

AND

SAFARI HOSPITALITY LIMITED
Respondent

Member of Authority: Eleanor Robinson

Submissions received: 8 September 2016 from Respondent
27 September 2016 from Applicant

Determination: 28 September 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2016] NZERA Auckland 291 it was determined that the Applicant, Mr Philip Wilson, had not been unjustifiably disadvantaged by the Respondent, Safari Hospitality Limited (SHL) providing him with two weeks' notice of termination.

[2] In that determination I indicated that costs should not be awarded by the Authority but should lie where they fell. However SHL now seeks costs in that matter.

[3] The matter was not a complex matter; it did not involve extensive research and was determined 'on the papers'.

[4] Both parties have filed submissions on costs. Ms Fiona McMillan, on behalf of SHL, is seeking a contributory award of \$4,890.00 towards the actual costs of \$13,500.00 (exclusive of GST). Mr Benedict Molloy, on behalf of Mr Wilson, submits that costs should lie where they fall.

Submissions of the Respondent

[5] In support of the claim for an award of contributory costs Ms McMillan submits that the Authority has discretion in considering whether or not the parties' costs were necessary or unreasonable, and submits that costs should be awarded in respect of mediation.

[6] Ms Fiona McMillan points out that in response to the Respondent's request, the matter was directed by the Authority to mediation. At the Applicant's request, a Statement in Reply was lodged prior to mediation, which the Respondent claims delayed the process and involved the Respondent incurring the costs of preparing the Statement in Reply.

[7] In addition the Respondent was required to incur legal costs for the preparation and attendance at mediation.

[8] Ms McMillan submits in reliance upon comments made by the Employment Court in *RHB Chartered Accountants Limited v Rawcliffe*¹ that a blanket rule cannot be adopted in respect of costs incurred during the mediation process. As the Respondent was the successful party in the proceedings, it is entitled to an award of costs which should include costs associated with attendance at mediation.

[9] Accordingly Ms McMillan is seeking, on behalf of SHL, \$2,250.00 in respect of a half day hearing in the Authority, and a further \$2,640.00 in respect of mediation.

Submissions of the Applicant

[10] Mr Molloy submits that costs should lie where they fall on the basis that the Applicant was required to bring his application due to ambiguity in the Employment Agreement provided by the Respondent.

[11] In addition, the Respondent refused to provide a substantive response to the Applicant's personal grievance prior to the issuance of the proceedings in the Authority. Mr Molloy notes that:

- the Applicant raised his personal grievance with the Respondent by email dated 20 May 2015;
- the personal grievance was rejected by the Respondent on 21 May 2015 without providing any reasons for its response and it refused to attend mediation; and
- the Applicant was required to seek the assistance of the Authority in order to resolve his grievance.

¹ [2012] NZEmpC 31

[12] Mr Molloy submits that the costs associated with preparation and attendance at mediation, whether by agreement of the parties or at the direction of the Authority are not typically included in costs awards of the Authority as set out in ERA Costs Practice Note for 2016.

[13] Further that the Applicant should not be penalised in respect of the Respondent being required to provide a Statement in Reply on the basis that this was required for the Applicant to understand the position taken by the Respondent.

Principles

[14] 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.

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

[16] 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.

[17] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

[18] 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

[19] 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.

[20] Costs normally follow the event and SHL is entitled to a contribution towards its costs.

[21] As regards the question of ambiguity in the Employment Agreement, this issue was addressed in determination [2016] NZERA Auckland 291 and I note the principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[22] In respect of the claim that costs be awarded in respect of the directed mediation, I note that as a general rule costs are not available for mediation.⁶ There is a public interest consideration in the resolution of disputes by means of mediation without parties incurring the costs of an investigation meeting. The fact that mediation is a confidential process can assist the resolution of issues between the parties.

[23] I accept there is some justification for the view that a blanket rule should not be strictly applied, and consider that there are two possible exceptions which may be relevant as being where there has been:

- a default by one party in respect of mediation which falls within a category of “*aggravated*” circumstances;⁷ or
- a serious breach of good faith by a party which was directed to attend mediation pursuant to s 159(2) of the Act.

[24] In this case neither exception is applicable: (i) following the direction of the Authority to attend mediation, the Respondent did so, (ii) once a party has been served with a Statement of Problem, a Statement in Reply becomes due for filing within 14 days pursuant to Regulation 8 of the Regulations to the Employment Relations Act 2000. The Applicant's

⁶ *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 935, 937 and *Naturex Limited v Rogers* [2011] NZEmpC 9 at [16]

⁷ *Real Cool Ltd v Gunfield* AC 37A/09, ARC 58/08

request for the Statement in Rely to be filed as required and prior to the parties attending mediation is not in breach of good faith.

[25] I also note that the Respondent chose to incur legal costs in preparing for, and attendance at, mediation. Parties may choose to 'lawyer up' for mediation, but it is not a statutory requirement that they do so, and I do not take this factor into consideration when exercising my discretion as to costs.

[26] Costs normally follow the event and the Respondent was the successful party in the matter. This matter was decided 'on the papers'. I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the appropriate amount of time required to be spent on this straightforward matter.

[27] Accordingly Mr Wilson is ordered to pay SHL the sum of \$1,750.00 towards its legal costs.

Eleanor Robinson
Member of the Employment Relations Authority