

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Karen Dillon (Applicant)
AND Tip Top Ice Cream Company Limited (Respondent)
REPRESENTATIVES Kay Stringleman, Advocate for Applicant
Jennifer Mills, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
SUBMISSIONS RECEIVED 21 July 2006
28 July 2006
18 September 2006
DATE OF DETERMINATION 10 October 2006

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 7 July 2006, I upheld Ms Dillon's claim for a severance payment under a collective employment agreement following a finding that she had become permanently unfit for work as a result of a work related accident. The applicant's representative made submissions about costs with her submissions about the substantive matter but I reserved costs for the respondent to make any submissions and for the applicant to reply. I now have those further submissions. This determination resolves the disputed question of costs.

[2] The main point made by the applicant is that she should have her entire legal costs and disbursements paid by the respondent because of the way in which the respondent conducted itself during the investigation process. By that, the applicant means that the respondent did not meet deadlines, required adjournments, introduced substantial amounts of irrelevant documentation, made unnecessary demands of the applicant for documents and was poorly organised for the presentation of witnesses. These matters are canvassed in some detail in the applicant's submissions. The respondent challenges nearly all the points made by the applicant and says this was a complex case entitling the applicant to no more than a reasonable contribution to her costs.

[3] The starting point is the Employment Relations Act 2000. That says at Schedule 2 that the Authority may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable. Reasonableness requires the Authority to adopt a measure of consistency between cases as well as to properly reflect the relevant circumstances of the instant case. As to consistency, the Authority is often enough faced with a claim for indemnity costs but an award is hardly ever made on that basis. In *Lavery v Trust Bank Wellington Ltd*, 12/4/95, Castle J, WEC 22/95, the Employment Court noted only two indemnity awards, both cases which are not directly applicable to the present circumstances. I was not referred to any comparable cases to support the claim for an indemnity award and I find that the present matter does not justify an award of costs at an indemnity level.

[4] The respondent accepts that an award should be made on the basis of a reasonable contribution to the applicant's costs and proposes the sum of no more than \$5,300.00 in costs and \$2,050.00 in disbursements subject to the applicant providing copies of invoices to prove what has been said about the actual level of her costs and disbursements. In a schedule, annexed to her original submissions, the applicant's representative reports her professional costs are \$11,224.68. Disbursements are shown as \$450 for phone, fax, emails, photocopying and printing, \$2500.00 for Dr Williams (an expert witness), \$1,113.75 for Dr Day's attendance to preparation of documents and \$600.00 for meeting fees charged by the Department of Labour.

[5] To return to the point about consistency, a Full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, 9/12/2005, Colgan CJ, Travis & Shaw JJ, AC2A/05 noted the value for parties arising from the use of an average daily tariff when assessing costs. There the Court referred to Department of Labour figures showing that the majority of costs awards for one day are between \$2,000.00 and \$2,499.00. However, the Court cautioned against the rigid application of a tariff approach without regard to the particular characteristics of the case. The Authority itself in *Graham v Airways Corporation New Zealand Ltd*, 28/1/2004, A Dumbleton, AA39/04 noted a trend at that time to awards between \$2,000.00 and \$3,000.00 per day. The different ranges reflect cost differences in cases which take the same or a similar amount of time for an investigation meeting. Generally, the differences between those cases are not sufficiently compelling for justice to require a significant departure from the application of a tariff approach. However, the present case is unlike most cases dealt with by the Authority. It involved reviewing an enormous amount of documentation from several sources mostly created after Ms Dillon was no longer in the workplace. Applying a daily tariff based on meeting time would significantly understate the time required for the advocate to properly review that material and help the Authority with assessing the significant amount of specialist medical evidence. That leads me to conclude that justice requires a different approach to assessing what would be a reasonable contribution for the respondent to pay towards the applicant's costs.

[6] Ms Dillon's representative reports spending 153.5 hours. That was questioned by the respondent and I was provided with an invoice dated 28 April 2006 covering 58.5 hours worked between 6 January 2006 and 22 April 2006. I was also provided with a copy of the representative's record of time worked between 27 April 2005 and 13 December 2005 which records 109 hours worked. Based on that information I accept that Ms Dillon incurred costs of representation totalling \$9,977.50 plus GST of \$1247.18, a total of \$11,224.68. I include the GST in the costs faced by Ms Dillon because she must pay that to her representative. The total is relatively modest in the circumstances of this case because the hourly rate is low in comparison with fees charged by others who provide professional representation. I accept that Ms Dillon incurred reasonable fees of professional representation amounting to \$11,224.68. The next question is what amount should the respondent contribute to those fees.

[7] There is substantial merit in the point made for the applicant that the respondent caused additional costs by reason of the factors mentioned in paragraph [2] above. In particular there was a significant degree of non compliance with timetables set by the Authority. It is not a matter of punishing the respondent but rather ensuring that the applicant is not unreasonably put to extra cost as a result of the various problems. I conclude that the respondent should meet about 75% of the applicant's legal fees in order to meet this objective. That sum amounts to \$8500.00.

[8] It is also necessary to deal with some points about disbursements. There is a claim for \$1,113.75 being costs incurred by Ms Dillon in having her GP provide a copy of medical notes with unrelated information removed. The material was provided in response to an application by the respondent and discussion with the Authority during which the respondent undertook to pay the

costs involved. The respondent is surprised by the cost and queries the appropriateness of the GP charging for her time at an ACC rate for preparing documents. There is an offer to pay reasonable photocopy costs instead. However, what was required was not just the administrative action of copying or printing some material but a medical judgement to exclude material unrelated to the issues before the Authority. The respondent is to meet the GP's costs in total, a cost of \$1,113.75.

[9] Ms Dillon called her psychiatrist to give expert evidence and she has been charged \$2,387.00 for the work involved. An understanding of the link between the physical injuries suffered by Ms Dillon and the ensuing mental injuries was an important part of resolving the problem. I see no reason why Ms Dillon should meet the costs involved in the presentation of this evidence and I order the respondent to pay these costs in full, a sum of \$2,387.00.

[10] Finally, Ms Dillon's representative claims \$450.00 for *Telephone, fax, emails, photopying and printing* and reimbursement of meeting fees. There are receipts provided for \$50.00 of the \$450.00 and it is included in the 28 April 2006 invoice. I am satisfied that this cost was incurred and I order the respondent to meet it in full by paying \$50.00. I do not have sufficient information in respect of the balance of the \$450.00 that is claimed so no award will be made. I am aware that the applicant has been charged \$600.00 in meeting fees by the Department of Labour. The respondent should meet that cost in full.

Summary

[11] The respondent is to pay Ms Dillon costs of \$8,500.00 and disbursements totalling \$4,150.75.

Philip Cheyne
Member of Employment Relations Authority