

[4] Ms Williams' argument proceeds first on the footing that ... *unless the Authority awards the applicant a significant contribution to her costs, her victory will be something of a pyrrhic one* This is because, although Ms Williams was, to an extent, successful in her claim, the awards made in her favour in the substantive determination are not of such magnitude as to enable her to meet her obligations to counsel and, as it were, enjoy the fruits of her victory herself.

[5] Ms Williams then draws my attention to the fact that she offered to settle matters prior to the hearing for a figure of \$20,000 inclusive of costs, but that offer was rejected by Dunedin City Ford without any counter-offer being made, and that such an offer is broadly similar to the sum of what Ms Williams was actually awarded by the Authority and some contribution to her costs to that point.

[6] Ms Williams concludes her submission by arguing that the extra time beyond the time originally allocated to the fixture was a function of Dunedin City Ford adding witnesses to the witness list that had already been indicated.

[7] For its part, Dunedin City Ford denies that it behaved improperly in rejecting the settlement offer proposed by Ms Williams, drawing attention to an indication in the correspondence that Ms Williams' proposal was in the *take it or leave it* category. Dunedin City Ford also argues that the Authority ought not to be swayed by Ms Williams' claim that she has had a pyrrhic victory unless a substantial costs award is made.

[8] The respondent employer emphasises the usual principles which apply to the award of costs in an Authority setting and refers particularly to the decision of the Full Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[9] Dunedin City Ford also refers to the significant number of claims made by Ms Williams, only two of which were found proved, and makes the point that, had the investigation meeting only concerned itself with those two matters, then the hearing time would have been less than a day. Further, Dunedin City Ford alleges that it was put to the defence of a raft of claims which were unsustainable and that the plethora of witnesses which Ms Williams complains about was simply its response to the variety and extent of her allegations against it.

[10] Dunedin City Ford says that the Authority ought to treat the matter on the basis of the daily tariff approach commonly used by the Authority when determining

costs matters and on the footing that the tariff applied is for one day only that being the extent of the evidence relating to Ms Williams' successful claims.

Discussion

[11] This is a matter where the successful applicant, Ms Williams, effectively made 10 allegations against Dunedin City Ford of which the Authority found two proved. The consequences of those facts resonate in two ways. First, Ms Williams' award from the Authority was commensurate with the level of her success; had she been successful in more of her allegations, the award made by the Authority would have been less modest. An obvious consequence of that modest award is the argument advanced by Ms Williams in her submissions on costs that her victory may be a pyrrhic one because of the significant legal costs that she has had to bear in order to be successful at least to that extent.

[12] A further consequence of the factual matrix just stated is that the respondent, Dunedin City Ford, has been put to the expense of responding to a large number of allegations, only two of which were found to have any merit. Dunedin City Ford understandably argues that it should not have to bear the cost of Ms Williams' unsuccessful claims because in fact, Dunedin City Ford can with some justice claim to have disproved the bulk of Ms Williams' allegations. It follows that, had Ms Williams run a more focused argument in the Authority, she would of necessity have incurred less legal cost, would have caused Dunedin City Ford to incur less legal cost and would have taken less time in the Authority as an additional by-product. None of this ought to be seen as in any way a criticism of Ms Williams' very able counsel. Ms Williams' counsel took the matter over from another advocate when the matter was at an advanced stage and it might well have been difficult to completely reformat the matter at that juncture.

[13] It is also the position that Dunedin City Ford is far from blameless in terms of the way in which it chose to defend the allegations made against it. Like Ms Williams, Dunedin City Ford also changed adviser at a late stage and Dunedin City Ford's very able counsel who appeared in the matter before the Authority was, like Ms Williams' counsel, effectively presented with the matter at a very late stage when it may well have been difficult to change the format of the defence of the claim.

[14] However, despite those obvious points, Dunedin City Ford clearly chose to attack Ms Williams' credibility by making a number of specious allegations against her which did nothing to edify the proceedings or assist in the resolution of the employment relationship problem between them.

[15] On balance then, I incline to the view that neither party was blameless in their management of the case in the Authority, although I certainly would not wish to be seen as critical of either counsel.

[16] In the end, the initiative for the extent of the claim must rest with Ms Williams who, by choosing to raise a raft of allegations, the bulk of which were not found proved, effectively created a forum where the likely response from Dunedin City Ford was effectively in kind.

[17] I do not consider it is the Authority's role in a cost setting to award a successful party a greater contribution to costs than they would ordinarily be entitled to simply because that party has done rather less well in the substantive matter than they had anticipated. Applicants in the Authority need to understand that in progressing matters in this jurisdiction, they take the risk that the shape of their pleadings will influence the response of the Authority in a costs setting.

[18] Having said that, I am not persuaded that Dunedin City Ford is right to suggest a limitation on their contribution to just a day's hearing, assuming the daily tariff approach were to be taken. Dunedin City Ford alleges that if the applicant's claim was pared down to the witnesses who gave evidence in respect of the two claims on which she was successful, that would have been dealt with in a day and it would expect to contribute to that.

[19] That argument first supposes that Ms Williams' successful claim could have been dealt with in a day if that was the only matter in dispute and second, it presupposes that nothing about the behaviour of Dunedin City Ford, of its own motion, extended the length of the hearing. In my opinion, neither argument is sustainable.

[20] I think that the claims on which the applicant Ms Williams was successful, although only two out of 10, were nonetheless the central claims of her argument and indeed underpinned the whole framework of her claim. In my opinion, there would have been no claim at all by Ms Williams if the employer, Dunedin City Ford, had not

failed to discharge its obligations properly in relation to the two claims on which Ms Williams was successful. In my view, dealing with those two matters alone, would have taken two days, not one day.

[21] Second, I am persuaded that not all of Dunedin City Ford's behaviour in the way in which it ran its defence of Ms Williams' claim can be sheeted home to the nature and extent of her pleadings. I think there is force in Ms Williams' argument that Dunedin City Ford produced a plethora of witnesses and that the extent to which those witnesses artificially extended the hearing process is not something that can rest solely on the way in which Ms Williams chose to plead her case. Accordingly, I intend to take that factor into account in making a costs award in this matter.

Determination

[22] This was a matter which was dealt with in an investigation meeting which proceeded over three days. It was originally planned to take two days, but by reason of the increase in witnesses (a matter to which I have just referred), a further day was required.

[23] If I were to adopt a tariff-based approach to this matter, I would have been disposed to determine that Dunedin City Ford should contribute a sum of \$5,000 to Ms Williams' costs on the basis of my conviction that the essence of Ms Williams' claim would have taken two days or thereabouts to hear.

[24] In the circumstances, I am not persuaded that all of the evidence advanced by Dunedin City Ford was either necessary or helpful to the Authority in resolving the employment relationship problem between these parties, and accordingly I am disposed to determine that, in the particular facts of this case, a contribution to Ms Williams' costs of \$5,500 be made by Dunedin City Ford.

James Crichton
Member of the Employment Relations Authority