

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 35/10  
5136023

BETWEEN CHRISTINE FLORENCE  
BENNET  
Applicant

AND RONALD EDWARD BISHOP  
and MARGARET ELLEN  
BISHOP trading as DEBTOR  
COMMUNICATIONS  
Respondents

Member of Authority: Helen Doyle

Representatives: Marieke van den Bergh, Counsel for Applicant  
Respondents in person

Submissions Received: 1 February 2010 for Applicant  
9 February 2010 for Respondents

Determination: 18 February 2010

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1] In my determination dated 21 December 2009 I found that the applicant had a personal grievance that she was unjustifiably dismissed from her employment and I awarded her remedies and dismissed the respondents' counterclaim in its entirety.

[2] I timetabled for the lodging and serving of submissions as to costs and have now received submissions on behalf of the applicant and from the respondents.

**The applicant's submissions**

[3] The submissions lodged on behalf of the applicant set out that her actual costs in the matter were \$10,167.75 made up as follows:

Attendances in relation to mediation	\$ 1,913.75
Preparation for and attendance at investigation meeting	\$ 7,654.00
Preparation of memorandum as to costs	<u>\$ 600.00</u>
<b>Total</b>	<u><b>\$10,167.75</b></u>

[4] The applicant asks that an award be made against the respondent for that sum in all the circumstances of the case set out below:

- That the respondents hindered resolution of the matter, had an unrealistic view of the matter and lack of understanding of employment law in general and therefore mediation was not successful in terms of resolving the matter ;
- That the statement in reply lacked merit, was based on unfounded allegations and a lack of understanding of employment law;
- That the counterclaim lacked merit and was unsuccessful and should not have been lodged but it was necessary for the applicant to prepare a detailed response;
- That there was protracted correspondence with the respondent, requests for irrelevant information and for information that was already in the respondents' possession and a failure to provide wage and time records between the date they were requested 18 November 2008 and 24 April 2009;
- That briefs of evidence were not filed as the Authority directed;
- Witness statements were prepared on behalf of the respondents for witnesses who did not then appear at the investigation meeting;
- That there were unfounded allegations of dishonesty and conduct before and following the issue of the determination. Copies of articles posted on websites were attached to the submissions and these criticise the applicant's character and conduct and the employment law system generally.

### **The respondents' submissions**

[5] The respondents make the following submissions in resisting an award of costs and seeking costs:

- The costs submissions are not in the name of the counsel who appeared at the investigation meeting;
- It is not accepted there should be a claim for costs of mediation;
- The additional costs over and above those for mediation are not itemised and there are no invoices attached and therefore costs should not be considered by the Employment Relations Authority;
- That any documents produced after the determination was issued were for the interests of the public at large and that the determination is public and it is unprofessional for reference to be made to those matters;
- The Authority should dismiss the claim for costs on behalf of the applicant because the costs submissions are incomplete and full of irrelevant information; and
- That the respondents seek costs in relation to attending solicitors to prepare a challenge to the Authority's determination and for Mr Bishop's attendances and expenses as the General Manager and Managing Director of Timaru Tourist Promotions Limited, a company that provides an advisory service to business owners.

## **Determination**

[6] The Authority is given the power to award costs under clause 15 of the Second Schedule to the Employment Relations Act 2000.

[7] The principles to be applied in exercising the discretion as to costs in the Authority are found in the Full Court judgment of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. De Cruz* [2005] ERNZ 808. The Full Court said at para.[44]:

*The costs principles which the Authority now applies are not necessarily as comprehensive or as prescriptive as those set out in Okeby and similar earlier judgments. The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:*

- *There is a discretion as to whether costs would be awarded and what amount.*

- *The discretion is to be exercised in accordance with principle and not arbitrarily.*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
- *Equity and good conscience is to be considered on a case by case basis.*
- *Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.*
- *It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.*
- *That costs generally follow the event.*
- *That without prejudice offers can be taken into account.*
- *That awards will be modest.*
- *That frequently costs are judged against a notional daily rate.*
- *The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances*

[8] I do not find in this case there is any good reason to depart from the usual principle that costs should follow the event and the successful party, the applicant, is therefore entitled to costs. The application of that principle therefore means that although requested, the respondents are not entitled to costs for the proceedings in the Authority. In relation to costs incurred for preparing the challenge, then that is a matter for the Employment Court.

[9] I am satisfied that the respondents were provided with a copy of the applicant's costs submission. The name of the counsel in those submissions has changed from counsel who was involved initially and appeared at the Authority investigation meeting Anne-Marie McRae. That, however, is not material to the exercise of my discretion as to costs.

[10] I turn to the claim for costs in relation to mediation. Consideration of the files does not show that this was a case where a formal direction from the Authority was required for the parties to attend mediation. Many parties before the Authority are

unrepresented and therefore not knowledgeable about employment law. I am not persuaded in this case that any costs should be awarded in relation to attendances at the mediation.

[11] I now consider whether costs in this case should be judged against a notional daily rate and increased or decreased where required in the exercise of my discretion or, whether, this is the type of case where, as submitted by the applicant, there should be an award of indemnity costs.

[12] The Court of Appeal in *Bradbury v. Westpac Banking Corp* [2009] NZCA 234, concluded that *indemnity costs are exceptional and require exceptionally bad behaviour* and referred at para.[29] of the judgment to the following non-exhaustive categories of circumstances in which indemnity costs have been ordered:

- (a) *the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;*
- (b) *particular misconduct that causes loss of time to the court and to other parties;*
- (c) *commencing or continuing proceedings with some ulterior motive;*
- (d) *doing so in wilful disregard of known facts or clearly established law;*
- (e) *making allegations which ought never to have been made or unduly prolonging a case by groundless contentions ...*

[13] There has also been consideration by the Employment Court of the types of proceedings that may attract an award of solicitor/client costs. In *Counties Manakau Health Ltd t/a South Auckland Health Limited v Pack* 25/10/00 Goddard CJ AC 72A/00 the Court expressed the view that, ordinarily, solicitor – client costs should be reserved for cases where the case or defence was without merit and was pursued in a way that could be described as reprehensible. In *The Order of St John Midland Regional Trust Board v Greig* [2004] 2 ERNZ 137, at para 98 it was noted that the Court of Appeal’s judgement in *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 opens the way for indemnity costs to be made available on a more liberal basis than previously noted.

[14] A claim for indemnity costs needs to be considered both in terms of the role of the Authority and those who appear before it. The Authority’s role is to establish the facts in the employment relationship problem before it and make a determination

according to the substantial merits of the case without regard to technicalities. The Authority often has before it unrepresented parties. Unrepresented parties are not usually familiar with the law in terms of assessing the merits of their own claim or defence and are sometimes unaware of what would be regarded as acceptable or unacceptable conduct and behaviour.

[15] Some of the categories in *Bradbury* could be said to apply in this matter. There was a pattern of making of allegations by the respondents about the applicant's dishonesty that went beyond that relied on simply to justify the dismissal. These were not found by the Authority to have an evidential foundation. The criticisms and allegations have continued on the part of the respondents following determination but there has been a challenge to the Authority determination and it is not appropriate for the Authority to take this conduct into account in determining costs for proceedings before it in those circumstances. If it is to be taken into account at all it is a matter for the Employment Court.

[16] In all the circumstances I do not consider it would not be appropriate to make an award of indemnity costs. I will therefore deal with the matter of costs by assessing them against a daily rate and making any adjustments necessary.

[17] The respondents' submit that I should disregard the costs because they are not supported by invoice. The Court of Appeal in *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 said in para.27:

*...Pacific Health's stance in the Employment Court included a complaint about the failure of counsel to particularise their charge out rates and the hours they had spent. While details of time involved and charge-out rates are often available and supplied, we do not consider such information is a mandatory requirement in a matter such as this, as some of the material emanating from Pacific Health's side seems to imply. We have not reached the point where counsel are obliged to approach charging for their services on that basis. Obviously this kind of information may help, and its absence may invite a degree of caution, but in the end the Court, when considering whether actual costs are reasonable, has to make a judgement, bearing in mind the proper interest of the losing party in the question.*

[18] I do not disregard the applicant's costs because there were no invoices for work performed following meditation. The costs incurred have been set out and I

have no good reason to conclude that they were not the actual costs incurred by the applicant. The applicant's costs were reasonable for a matter of this nature and they reflect the sensible and restrained approach taken by Ms McRae during the initial stages of this matter and at the investigation meeting. Further I am not considering as already set out costs on an indemnity basis but on the basis of a daily rate. I record that there is no mention in the respondents submissions about any financial difficulty in terms of meeting a costs award.

[19] This was an important case to both parties. It occupied almost a full day. There were a large number of documents and some factual complexities. These arose, not so much from the relevant factual background to the dismissal, which only covered a few days from start to finish but in relation to the matters alleged in the counterclaim which spanned the entire working period of the applicant's employment. In terms of a daily rate I am of the view that a starting rate of \$3000 is appropriate. I make no adjustment to that in terms of the contents of the statement in reply, bearing in mind that the respondents were unrepresented and that the Authority's role is not to have regard to technicalities.

[20] I do have regard to the wide ranging and significant counterclaim against the applicant. The applicant had to prepare a statement in reply to that claim and address that matter in her evidence. It also required addressing on behalf of the applicant in final submissions. I make an adjustment therefore to the daily tariff of \$1,300 in terms of that counterclaim.

[21] I do not make an adjustment in terms of the correspondence that took place between the parties except in relation to the requests made by the applicant and the delay by the respondents in the provision of wage and time records, for which I make a further adjustment of \$200.

[22] I make no adjustment in terms of the briefs of evidence as I am not satisfied that there was any deliberate failure in that regard on the part of the respondents but there could have been some confusion. Although the briefs of evidence included respondent witnesses who were not available at the investigation meeting, I am not satisfied that this led to an increase in costs as these witnesses were not central to the matters the Authority was required to investigate and no time was required for questioning.

[23] I make an adjustment in relation to the preparation of the cost submission which I accept for good reason was somewhat more involved than may otherwise have been the case, of a further \$300 on the basis of about one and a half hours work.

[24] I order Ronald Edward Bishop and Margaret Ellen Bishop trading as Debtor Communications to pay to Christine Florence Bennet the sum of \$4 800 being costs.

Helen Doyle  
Member of the Employment Relations Authority