



[3] In referring to those principles Mr Pine submits that the conduct of the respondent in this case and the facts of the case mean that the daily tariff approach sometimes adopted by the Authority is not appropriate.

[4] Mr Pine makes that submission for the following reasons:

- The respondent was not prepared to attend mediation requiring a statement of problem to be lodged with the Authority after which time the parties were directed to mediation.
- Prior to the investigation meeting the respondent made allegations that the applicant was potentially guilty of some criminal behaviour requiring Mr Pine to investigate and liaise with the Police.
- At the investigation meeting on 18 September 2009, a key witness for the respondent did not attend and new allegations were raised at the meeting. This resulted in an adjournment to allow further evidence to be presented.
- Further briefs of evidence were required and a subsequent investigation meeting was held on 20 October 2009.
- The matters raised post employment were not proven at the investigation meeting although the Authority did acknowledge they raised some questions but not such to make any adjustment to the award.

[5] Mr Pine submits that the sum of \$12,000 plus GST is a reasonable contribution to the actual costs incurred and also seeks reimbursement of the \$70 disbursement for filing of the statement of problem, which was not included in the invoice attached to the costs submission.

### **The respondent's submissions**

[6] The respondent also refers to *PBO Ltd* and sets out the principles that govern awards of costs in the Authority.

[7] Ms Ashcroft submits that the respondent's conduct in defending the grievance was not unreasonable and that the matter was a straightforward claim with a relatively low degree of complexity.

[8] Whilst noting that costs will generally be awarded to the successful party Ms Ashcroft set out that the Authority has discretion to award costs to any party. Ms Ashcroft submits that the applicant was only partially successful because it was found she contributed to the personal grievance that gave rise to her dismissal and that her remedies were reduced by 20%. Ms Ashcroft submits that costs should lie where they fall in this case because both parties had a degree of success and that if the Authority concludes otherwise then it is submitted that a modest award is appropriate.

### **Determination**

[9] I have considered the Authority's file with respect to how the parties came to attend mediation. I agree with Mr Pine that the parties did not attend mediation until after the statement of problem and reply had been lodged with the Authority. There was an email exchange between a Support Officer of the Authority and the person then representing the respondent company who agreed to participate in mediation in a email dated 27 February 2009. The Support Officer then wrote to both parties by letter dated 2 March 2009 confirming that as both parties were willing to participate in mediation they were now referred to mediation on the matters currently before the Authority. A formal direction was therefore not required.

[10] The matter did not resolve at mediation but in those circumstances I do not consider further costs were incurred by the lodging of the statement of problem before mediation because it would have been required in any event. I do not therefore consider that costs in relation to mediation should be taken into account at this stage.

[11] Matters however from that point to investigation were somewhat out of the ordinary. Ms Ashcroft was only instructed shortly before the investigation meeting in Queenstown was due to commence. Prior to that there had been a telephone conference on 1 July 2009 with Mr Pine and two other representatives of the company. During that telephone conference it was agreed that the Authority would conduct an investigation meeting on 18 September 2009.

[12] Ms Ashcroft then sent a letter in which she advised that the main witness for the respondent, Mr Kennedy was currently overseas at the time of the investigation meeting but would be lodging a written statement of evidence.

[13] The Authority duly held a further telephone conference on 7 September 2009 with Mr Pine and Ms Ashcroft and advised Ms Ashcroft that the Authority did not recall any discussion regarding the fact that Mr Kennedy may be overseas at the time of the investigation when the matter was set down. Ms Ashcroft confirmed that the Authority would not be hearing from any respondent witnesses at the investigation meeting set down for 18 September 2009 but it may be possible to contact Mr Kennedy by telephone.

[14] At the investigation meeting the Authority conducted its investigation including putting the matters in Mr Kennedy's statement of evidence to Ms Ellis for comment. The respondent provided two briefs of evidence, one from Mr Kennedy and another very short statement from another witness. This witness was able to be contacted by telephone.

[15] The investigation meeting on 18 September commenced at 9.30am and concluded at 12.50pm on the basis that there would have to be some thought given on how to deal with Mr Kennedy's evidence and also any evidence in relation to the allegations of subsequently discovered misconduct.

[16] After the meeting adjourned there was then a further telephone conference and the investigation meeting which had been adjourned part heard was scheduled to resume in Queenstown on 28 October 2009. At the time of the telephone conference a further statement of evidence had been lodged in relation to the subsequently discovered misconduct and the Authority wanted to give Ms Ellis an opportunity to lodge and serve a statement of evidence in reply to that evidence. There was then a further investigation meeting on 28 October 2009 at 2pm. That investigation meeting concluded at 4.40pm.

[17] Although Mr Pine submitted that the Authority sometimes uses a daily tariff I think it is more accurate that the Authority usually adopts the daily tariff approach in exercising its discretion as to costs. I am not persuaded this is the sort of case where another approach would be justified. I do not consider that this is a case for indemnity costs. In relation to contribution and costs the Court of Appeal in *White v. Auckland*

*District Health Board* [2008] ERNZ 635 (CA) held that the Employment Court had erred in failing to deal separately with the discrete issues of remedies and costs. It held that where contributory conduct is taken into account to reduce or decline remedies, the same behaviour cannot also be taken into account in determining the issue of costs.

[18] The starting rate that I consider appropriate per day of investigation is \$3,000. The daily rate has now been approved by the Employment Court in a range up to \$3,000 – see *Sefo v. Sealord Shellfish Ltd* (unreported) CC4B/08 Chief Judge Colgan.

[19] I accept that the requirement to attend two investigation meetings did cause additional expense for the applicant and that that should be taken into account

[20] When the timeframes are considered it could be seen that this matter was dealt with in one full day but I consider that I should increase the daily tariff to take into account the need for the matter to be adjourned part heard and then reconvened and for the additional statement of evidence required.

[21] I start with a daily tariff of \$3,000 and make an increase of \$2,000. The applicant is also entitled to her disbursements as set out in the sum of \$147.15 together with \$70 filing fee that I consider reasonable.

[22] I order Oaks Hotel & Resorts NZ Limited to pay to Patricia Claire Ellis the sum of \$5,000.00 being costs and disbursements in the sum of \$217.15.

Helen Doyle  
Member of the Employment Relations Authority