

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 76A/10
5144036

BETWEEN ROBERT MARK INSTONE
 Applicant

A N D QUEENSTOWN GOLF CLUB
 INCORPORATED
 Respondent

Member of Authority: Helen Doyle

Representatives: Sheena Naughton, Counsel for Applicant
 Bruce Boivin, Counsel for Respondent

Submissions Received: 19 April 2010 from Applicant
 3 May 2010 from Respondent

Determination: 31 May 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 26 March 2010, I found in favour of the applicant with respect to part of his claim and dismissed other claims including a claim that he had been unjustifiably constructively dismissed.

[2] I reserved the issue of costs in my determination and timetabled for submissions to be lodged and served on behalf of both parties. Both sets of submissions have now been received.

The applicant's submissions

[3] Ms Naughton, on behalf of the applicant, seeks costs against the respondent and refers to the legal principles relevant to costs determinations in the Authority set out by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

[4] Ms Naughton submits that the actual costs incurred by the applicant with respect to this matter were substantial and has attached invoices totalling \$16,736.67.

[5] She submits that the Authority should exercise its discretion and award costs in excess of the daily tariff based maximum approach. In making her submissions, she relies on a delay on the part of the respondent in providing final submissions because of a mislaid file.

[6] The applicant seeks an award of \$5,000 costs together with the filing fee of \$70.

The respondent's submission

[7] Mr Boivin, in his submission, sets out each claim by the applicant and records beside it whether the claim was successful or not. He also sets out the amounts initially claimed by the applicant and on the basis of what was received submits the applicant was only 21% successful.

[8] Mr Boivin submits that the Authority should exercise its discretion and conclude that costs should lie where they fall. In making his submission, he relies on a statement in the Authority's determination *rather this was an unfortunate set of circumstances that required some careful analysis in order to resolve issues*. Mr Boivin further submits that the delay in lodging and filing submissions is irrelevant because the Authority awarded interest, that the respondent has made payments to the applicant in accordance with the determination and that the respondent is a duly incorporated society operating as a sports club and does not operate for profit.

Determination

[9] The applicant was not successful in terms of several of his claims. I have considered Mr Boivin's submission that costs should lie where they fall. I am not satisfied in exercising my discretion the circumstances of this case were such to change the general principle that costs follow the event and the party which fails should meet a proportion of the costs of the party which succeeds.

[10] The applicant in this case did have a measure of success and the Authority did not accept the respondent's view that there was a termination of the applicant's employment before he went on annual leave. The lack of complete success which Mr Boivin has carefully set out can be considered or taken into account in the exercise of the Authority's discretion.

[11] This case did have some complexity and it was important to both parties. As was stated in the Authority's determination, there was a need for some careful assessment. I accept Ms Naughton's observation in her submission that the Authority had to make findings whether the golf club's actions were deliberate or not in terms of its obligations to the applicant and this required some careful testing of the evidence. Findings from that flowed in terms of the various claims and remedies sought.

[12] The nature of this case is such that had the applicant achieved greater success the exercise of the Authority's discretion in determining costs would have resulted in an award outside the usual daily tariff. In the circumstances however, I am of the view that it is fair and reasonable to start on the basis of a daily tariff recognised by the Employment Court in recent judgments to be up to a range of \$3,000 for a full day matter. Given that I have already taken into account Mr Instone's lack of complete success, I intend to only make a limited further deduction of \$500. In making such a deduction, I have considered that the Authority would probably have had to hear much of the evidence anyway in order to get to determine matters relating to the earlier part of Mr Instone's employment.

[13] In all the circumstances, I consider a fair and reasonable award in this case to be the sum of \$2,500 together with the \$70 filing fee. If the respondent does have difficulty in meeting that amount, then there is an opportunity to return to the Authority in terms of any payment arrangement although I am sure the applicant would be reasonable in terms of the same.

Helen Doyle
Member of the Employment Relations Authority