

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 488A/10
5324954

BETWEEN CORRECTIONS
 ASSOCIATION OF NEW
 ZEALAND
 Applicant

AND CHIEF EXECUTIVE
 DEPARTMENT OF
 CORRECTIONS
 Respondent

Member of Authority: Rachel Larmer

Representatives: Jim Roberts, Counsel for Applicant
 Karen Spackman, Counsel for Respondent

Submissions: 15 December 2010 Applicant's submissions
 15 December 2010 Respondent's submissions

Date: 17 December 2010

COSTS DETERMINATION

[1] The applicant's claim arose from the introduction by the respondent of a new roster pattern and changes to other arrangements for staff at Mt Eden Prison and Auckland Central Remand Prison. The respondent implemented the roster change on 15 November 2010, the day of the Authority's urgent substantive investigation meeting. The Authority issued its determination on 18 November 2010.

[2] The applicant sought a compliance order requiring the respondent to reverse the new roster which was implemented on 15 November 2010 and to properly consult with it over the proposed roster changes. It also sought declarations that the respondent had breached;

- a. Clause 9 (consultation) of the Collective Agreement (CA);
- b. Clause 8 (representation) clause of the CA;

c. Good faith obligations.

[3] The parties were invited to resolve costs between them, and failing that each party had 28 days within which to file costs submissions. Costs was not resolved by agreement and the applicant now seeks a costs order.

[4] This matter involved one longer than usual day for the investigation meeting. Written submissions were provided on the day of the investigation meeting and supplementary submissions were filed the following day by the respondent and the day after that by the applicant. I did not consider the applicant's supplementary submissions because they were filed out of time, without prior leave being sought to do so and with no explanation being provided for the failure to meet the Authority's timetable, and because the respondent had objected to their admissibility.

[5] The applicant was predominantly successful. The Authority held that the respondent had breached the consultation provisions in the CA; it had breached its good faith obligations; and compliance orders were issued. The applicant was unsuccessful on its claim that the respondent had breached the representation provisions of the CA.

[6] In its Statement of Problem the applicant sought indemnity costs. In its costs submissions the applicant referred to the well known principles in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 but then urged the Authority to depart from that and award 66% of its actual costs. The applicant attached to its submissions an invoice dated 30 November 2010 (which was not itemised) for \$57,640.56 GST inclusive.

[7] That seems extraordinarily high for a straightforward one day matter.

[8] It is unclear how that amount was made up or whether it involved costs associated with mediation. The invoice did not identify what lawyers had worked on the file, how many hours they had charged, what the various charge out rates were, or what specific activities had been undertaken. This is all information that should have been provided in support of an application for the Authority to award 66% of actual costs because that type of approach to costs would involve the Authority assessing whether the actual costs incurred were reasonable.

[9] The applicant seeks an award of \$33,000 (excl GST) plus disbursements of \$71.56 for the filing fee.

[10] The applicant essentially put forward two reasons in support of a departure from the Authority's usual tariff approach to costs;

- a. Proceedings could have been avoided if the respondent had been prepared to delay its decision on the new roster to enable information to be provided and proper consultation to occur; and
- b. The respondent's defence that it had no obligation to consult at all was without merit.

[11] The respondent submitted that the usual tariff approach was appropriate. It stated that a notional starting point of \$3,000 per day should be adopted as an appropriate starting point for assessing costs. However, it submitted that costs should be adjusted downwards in this case because;

- a. The applicant did not use the CA dispute resolution provisions before filing proceedings;
- b. The applicant contributed to the need to file proceedings by its actions;
- c. The respondent genuinely believed it had met its consultation obligations;
- d. The respondent had tried to settle the matter.

[12] Pursuant to clause 15, Schedule 2 of the Employment Relation Act 2000, the Authority has the power to award costs to the applicant in any amount which it thinks reasonable. The principles relating to costs in the Authority are well settled so there is not need for me to set those out in full; *PBO Ltd*.

[13] A successful party is usually entitled to a contribution towards its actual legal costs, and I find that there are no factors in this case which would justify departing from that usual principle. The applicant was successful and is entitled to a contribution towards its actual costs.

[14] I adopt a notional daily tariff of \$3,750 in this matter, which is consistent with the Employment Court's dismissal of a challenge against the Authority's award of \$3,750 for a one day investigation meeting in *Johnson v Gilligan Business School*, 03/04/09, Travis J, AC14/09.

[15] Because I am adopting a tariff based approach towards an award of costs, I do not need to know the charge out rate or specific details of the legal work undertaken because I do not have to assess whether the applicant's legal costs were reasonable. Suffice to say, I am satisfied that the applicant incurred actual costs which far exceed what it is claiming.

[16] I specifically acknowledge that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct, although I note that conduct which unnecessarily increased costs is relevant to my assessment of whether the notional daily tariff should be adjusted.

[17] I find that there are no factors which would warrant a downward adjustment of the notional daily tariff.

[18] I consider that the notional daily tariff of \$3,750 should be adjusted upwards in this case to reflect that the respondent pursued arguments that were entirely without merit and which clearly had no prospect of succeeding. I refer to the respondent's claims that consultation was not required for the roster change and that the new roster did not amount to an *organisational review* in terms of the consultation provisions in clause 9 of the CA.

[19] This was an untenable position that should not have been adopted in light of the express contractual consultation obligations, the fact the respondent had embarked on what it had itself described as a consultation process, the consultation obligations set out in the Protocol, statutory good faith consultation obligations, and relevant case law including a decision involving the same parties which had considered the same clause in relation to the same type of roster change - see *CANZ v CE Department of Corrections* 20 June 2010, Member Urlich, AA303/10.

[20] Whilst the respondent is entitled to present its case as it sees fit, where it elects to run entirely unmeritorious arguments, which lengthen an investigation meeting, and which unnecessarily increase the successful party's legal costs, that is an appropriate factor for the Authority to consider when it is exercising its costs discretion.

[21] This was not a complex matter. The law in this area was well settled and the fact scenario was also straightforward. There are no other factors which I consider warrant an upward adjustment to the notional daily tariff.

[22] I consider that an award of \$4,750 for costs plus disbursements of \$71. 56 for the filing fee is a reasonable contribution by the respondent towards the applicant's actual costs.

[23] **The respondent is ordered to pay the applicant \$4,821.56 towards its legal costs.**

Rachel Larmer
Member of the Employment Relations Authority