

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 180
5301308

BETWEEN PAUL KENNEDY
 Applicant

AND BRAMBLES NEW ZEALAND
 LIMITED t/a RECALL NEW
 ZEALAND
 Respondent

Member of Authority: K J Anderson

Representatives: M Whitehead, Advocate for Applicant
 J Douglas, Counsel for Respondent

Submissions received: 5 April 2011 from Respondent
 15 April 2011 from Applicant

Determination: 5 May 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 8th March 2011¹ the Authority found that the issuing of a final warning to Mr Kennedy was not, in itself, an unjustified action by his employer leading to a disadvantage in his employment. But it was found that, initially imposing the warning for the duration of his employment with the company, was an unjustified action by his employer leading to a disadvantage to Mr Kennedy in his employment. As there was no evidence to support an order for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, the outcome for Mr Kennedy was more or less nugatory for him.

[2] The parties were invited to resolve the issues of costs but have not been able to obtain resolution. Submissions on costs have been received from both parties.

¹ [2011] NZERA Auckland 87

[3] The respondent (Recall) has incurred total costs of \$6,216.85 (including GST and disbursements) and seeks a contribution from Mr Kennedy in the sum \$2,000. Mr Kennedy has incurred costs of \$7,400 and it is submitted for him that costs “should remain where they lie.” Neither party has provided details of how the respective costs were incurred.

[4] The investigation meeting was comfortably completed within half of a day and there was nothing particularly exceptional about the case, apart from the costs incurred by Mr Kennedy, as even if he had been totally successful with his claims, any anticipated remedy was never going to give him any monetary outcome at all; after the costs he incurred are taken into account.

[5] The accepted practice of the Authority is to apply the principles set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*². In particular, a tariff based approach is applied with the current rate of \$3,000 for each day of an investigation meeting being commonly awarded, with this sum being increased or reduced depending on the circumstances.

[6] Taking all the circumstances of this particular case into account and that the investigation meeting was approximately half of a day, a normal award of costs to the successful party would be approximately \$1,500-\$2,000. Recall has been largely successful in defending the claims of Mr Kennedy but it seems to me that had the company taken a more realistic position in regard to the initial duration of the warning, this litigation may not have occurred at all. However, Mr Kennedy was also substantially at fault in that his actions warranted a warning being issued and then further, when Recall modified the duration of the warning following mediation, he still pursued the matter to a hearing with the Authority. Regrettably, this whole matter has largely been an exercise in futility for both parties.

² [2005] ERNZ 808

Determination

[7] Given the overall circumstances I conclude that it is appropriate that costs should lie where they fall. It is so ordered.

K J Anderson
Member of the Employment Relations Authority