

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 63
5314176

BETWEEN

REX FIELD
Applicant

AND

CHIEF EXECUTIVE OF
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: P R Stapp

Representatives: P Drummond, Counsel for the Applicant
M Richards, Counsel for the Respondent

Submissions Received By: 24 March 2011

Determination: 26 April 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicant has applied for costs, which were reserved by me in a determination issued on 21 February 2011. The applicant has requested me to consider costs beyond the notional tariff. He has applied for a contribution of his legal costs in the sum of \$10,000, and the \$70 filing fee.

[2] The respondent (Corrections) acknowledged that costs follow the event but has requested the Authority not to increase the daily tariff beyond the usual range of \$2,500–3,000.

[3] Mr Field's reasons for more than the notional tariff are based on:

- (a) The complexity of the case;
- (b) The preparation that was involved;
- (c) That Mr Field was virtually wholly successful in his claim;

- (d) That Mr Field has limited means to cover the costs associated with this matter;
- (e) Corrections resisted attending mediation when new counsel had become involved;
- (f) Corrections attempted to justify the unjustifiable; and
- (g) Corrections put Mr Field to unnecessary costs in not reasonably making any concessions on any individual point relating to the substance.

[4] Corrections has opposed Mr Field's application for costs because it says the case not complex, but rather a straightforward unjustified dismissal with nothing unusual in the documentation, preparation and attendances. It submitted that this was supported by a one day investigation with a total of three witnesses giving evidence (the applicant and 2 witnesses from Corrections). There was considerable detail provided in the statement of problem, applicant's witness statement and submissions and the matters raised were entirely at the discretion of the applicant and his representative. It was submitted this would not merit a departure from the usual daily tariff approach. Also, it was submitted that it is not unusual for submissions to be provided after an investigation meeting. There were no authorities cited to support the submission that the applicant's limited means should be a factor supporting an increase in the amount of costs awarded.

[5] My determination of this matter is that:

- (a) Despite there being a one day hearing and three witnesses, this was a relatively complex matter in regard to the scrutiny required of the information provided and relied upon by Corrections and its witnesses involved.
- (b) Mr Field was virtually wholly successful in regard to his claims and it would appear he needed to have an investigation in the Authority because the respondent's approach to the matter meant he would not get the remedies he sought without a determination from the Authority. This is supported by Corrections decision to resist further mediation and its opposition to reinstatement.

- (c) On the substantive points Mr Field was successful and the employment relationship problem was resolved by an order for reinstatement, a payment of lost wages less than the amount actually claimed, and a payment for compensation for hurt, humiliation and injury to feelings, which also was for less than the amount that was claimed. Also, Mr Field received an award for superannuation contribution.
- (d) I am satisfied that the case involved extended preparation particularly in regard to witness briefs although there were only three witnesses. Also the approach taken by Corrections to produce and rely on a lengthy investigator's report of an internal investigation, notes of interviews and detailed correspondence was significant because Corrections did not call anyone else directly involved. It is a credit to both parties that this did save time and restricted the investigation to one day and submissions made afterwards.
- (e) Mr Field's approach to his employment relationship problem by providing the detailed statement of problem was entirely reasonable, given the nature of the problem and remedies sought. This was entirely reasonable given that Mr Field would be required to respond to all relevant matters that Corrections raised to justify its actions and that consideration of the issues had to be based on all the circumstances (as required using s 103 (A) of the Act).
- (f) I am also satisfied that Mr Field should not be deprived of his full entitlement of remedies because of costs, but in coming to the Authority there is always the underlying presumption that a party will incur a portion of the costs.

[6] Mr Field had costs in the internal investigation and in the lead up to his dismissal. These are costs that he will have to incur because they did not involve proceedings in the Authority and it was his choice to engage a representative for that.

[7] Mr Field's actual costs for the Authority's investigation have been calculated in the region of \$18,500 plus GST and disbursements. I recognise that some consideration should be given to the complexity of the matter before the Authority and where the investigation involved a one day investigation meeting and submissions

which followed in writing. The investigation could have easily taken more time having regard to the material and the issues.

[8] The parties did attend mediation at first. Any subsequent issues around attending further mediation would have polarised because of the genuine stance being taken by both parties on an outcome. Because Mr Field was successful in his employment relationship problem I have factored in that Corrections took a risk about the outcome and applied more than just the usual tariff for a one day because of the full range of issues involved that had to be tested and examined. It is arguable that it would have been reasonable for Corrections to have acknowledged the substantive and procedural risk and to have narrowed the issues to just mitigation on remedies. Given the issues surrounding reinstatement I am not convinced such an approach would have saved more time and costs for either party.

[9] Although I am aware that the applicant says he has limited means he would have gone into the proceedings with his eyes open to the risk of having to bear a lot of the costs because the notional tariff applied by the Authority. The notional tariff has been applied for some considerable time, albeit there have been some rare exceptions to exceed it. It was a huge risk for Mr Field to fight to keep a job and claim reinstatement and I accept this was a major point for him in his claim and that Corrections opposed it as it was entitled to do. No more time was taken up unnecessarily because of this approach. There is nothing more significant in the proceedings for me to depart from the principle of applying the notional tariff, but not to the extent the applicant has requested to get 30 % of his costs back in the absence of any invoices and receipts.

[10] The notional tariff takes into account most of the variables associated with claims and this matter does not involve anything different to depart from the usual principles applied.

[11] I assess costs at \$5,000 plus the filing fee.

[12] I therefore award Mr Field the sum of \$5,000 costs. I order Corrections to pay \$5,000 reasonable contribution to costs and the \$70 filing fee to Mr Rex Field.

P R Stapp
Member of the Employment Relations Authority