

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 89  
5321473

BETWEEN                      PAUL NEWTON  
   Applicant  
  
AND                                SANDBLASTING  
   SPECIALIST OTAGO  
   LIMITED  
   Respondent

Member of Authority:        M B Loftus  
  
Representatives:              Jenny Guthrie, Counsel for the Applicant  
   Rachel Brazil, Counsel for the Respondent  
  
Submissions received:        27 May 2011 from the Applicant  
   13 June 2011 from the Respondent  
  
Determination:                22 June 2011

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1]     Mr Newton claimed that Sandblasting Specialists Otago Limited (Sandblasting Specialists) dismissed him on two occasions - 11 June 2010 and then 2 August 2010.

[2]     Sandblasting Specialists accepted that it dismissed Mr Newton on 11 June but claimed that it was justified in doing so by reason of redundancy. It denied dismissing Mr Newton on 2 August.

[3]     In a determination dated 27 April 2011 I upheld Mr Newton's claim that he had been unjustifiably dismissed on 11 June 2010, with the finding being attributable to a failure to consult adequately. The claim that Mr Newton was dismissed on 2 August failed.

[4]     Costs were reserved with Mr Newton being advised that if he wished to seek a contribution toward his costs, he should do so via a written submission. He does.

[5] Mr Newton incurred legally assisted costs of \$3,280 (including GST, the filing fee and disbursements). It is submitted that:

*Notwithstanding that the Investigation was concluded in a half day, it is submitted that an award of \$3,000.00 towards legal costs would reflect both the principles of equity and good conscience and that the Applicant was unjustifiably dismissed on 11 June 2010.*

[6] Mr Newton has, since his dismissal, moved to Nelson and in addition to legal costs he seeks \$565.75 as a contribution toward the cost of travelling to the investigation meeting. He also seeks \$240, being two days earnings foregone in order to attend the investigation meeting.

[7] Relying on *Northern King Country Old People's Home Trust Board Inc v Smyth* [1994] 1 ERNZ 221 Sandblasting Specialists argues that costs do not necessarily follow the event. It says this is a case where costs should not be awarded to the 'successful' party as Mr Newton claimed to have been dismissed twice and one of those claims failed. They say the claim that succeeded only did so because of a *procedural reason* and that I *inferred* that the technicality would not have altered the outcome.

[8] It is therefore submitted that:

*... in relying on the principles of equity and good conscience, the respondent's wrong doing was minimal and therefore costs should lie where they fall. Where both parties have achieved a measure of success, it may be appropriate for no order for costs to be made: Health Waikato Ltd v Elmsly [2004] 1 ERNZ 172 (CA) at [39].*

[9] Sandblasting Specialists' answers the claim for travel costs and wages by submitting there is insufficient evidence upon which to base an award; stating that I concluded that the relocation would have occurred irrespective of the procedural breach (para 35) and noting there was no request the investigation be moved to another venue.

[10] Normally the Authority will assess costs on a daily tariff basis: refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. In assessing that tariff a common starting point is \$3,000 per day: refer *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73. From that point adjustment may be made depending on the circumstances.

[11] I am not convinced by the arguments of either party that I should depart from this approach. At the end of the day Mr Newton claimed that he was unjustifiably dismissed. Procedural rational aside, he succeeded.

[12] The hearing took a half day. Applying *Da Cruz* and *Tawhiwhirangi (No 2)* the award would be \$1,500. As was said by Ms Brazil, Mr Newton raised two claims – only one succeeded. Half of \$1,500 is \$750 and that, I consider, is an appropriate recompense of Mr Newton's legal costs.

[13] Mr Newton had to travel from Nelson. The argument that he would have relocated in any event is, in my view, disingenuous in the context of costs. My comment at para 35 was made in respect to arguments proffered in support of Mr Newton's hurt and humiliation claim. That is quite different from the present issue and it would be inappropriate to disadvantage him for attempting to mitigate his loss. The argument proffered in support of the claim is that Mr Newton used his car to travel to the hearing and, applying the IRD mileage rate, he could have claimed \$565.75 each way. Had he flown he would have paid no less than \$532 but that may have been unreasonable as the fares would have been non-refundable had the matter settled. I consider the argument to have merit and will make an order accordingly.

[14] I will not consider the claim for lost wages. Mr Newton suffered two days loss due to his choice of transport – he could have made the trip in a day and would have suffered the loss of a day's wages irrespective of where he was domiciled. In addition, and as pointed out by Ms Brazil, I have no evidence supporting the claim.

### **Conclusion**

[15] Sandblasting Specialists Otago Limited is to pay Mr Newton the sum of \$750 (seven hundred and fifty dollars) as a contribution toward costs, along with a further \$565.75 (five hundred and sixty five dollars and seventy five cents) as a contribution toward the cost of travelling to the investigation meeting.

Mike Loftus  
Member of the Employment Relations Authority