IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 152
5384303

	BETWEEN	NICOLA SHANNON WATSON
	AND	HELEN CLARE HOBBS Applicants
	AND	PRIDEX KITCHENS (PN) LIMITED
	AND	BRIDGET ROSEMARIE DAVEY-HICKS Respondents

Member of Authority: P R Stapp

Submissions Received: By 21 November 2012

Date of Determination: 3 December 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] This is an application for costs from the applicants. In a determination [2012] NZERA Wellington 136 dated 2 November 2012 I reserved the matter of costs. The parties have been unable to resolve the matter, and thus it falls to the Authority to make a determination on the costs.

The issue

[2] How much are the applicants entitled to receive for costs?

The facts

[3] Ms Watson and Ms Hobbs were successful in their claims for personal grievances against Pridex Kitchens (PN) Limited. They were awarded $3,000 each

under s.123(1)(c)(i) of the Employment Relations Act for hurt, humiliation and loss of dignity, in the earlier determination.

[4] Their representative has submitted that costs should follow the event, and I agree. The matter involved a full day's investigation and both parties were informed by me that the starting point for costs would involve the notional daily tariff of $3,500. This is one application and costs apply on that basis, although there were two applicants and both of them gave evidence in person.

[5] The applicants' representative sent a *Calderbank* offer dated 23 December 2011 to the respondents in an attempt to resolve the matter, but the respondents did not accept the offer and made no counter-offer. The *Calderbank* offer was for $2,500 per applicant. This amount was less than the amount awarded by the Authority. Costs of $700 per applicant were also claimed. It was submitted that this would have covered the applicants' costs to the date of the *Calderbank* offer being made, and allowances for costs associated with the drafting of a record of settlement agreement and having the agreement signed off by a mediator from the Ministry of Business Innovation and Employment (MBIE) under s149 of the Act. This supports an attempt by the applicants to settle early and try and save costs.

[6] In the same letter (23 December 2011) the respondents were put on notice that the applicants would be claiming four weeks wages in lieu of notice (plus interest) and compensation for hurt and humiliation that had not been included in the first statement of problem filed in the Authority on 5 June 2012. The statement of problem was subsequently amended (16 July 2012) to reflect these remedies. The applicants have incurred additional costs since the *Calderbank* offer. The further costs have been itemised as $4,262.07 each (up to 10 October 2012). There have been costs incurred for mediation, preparation and attendance at mediation for two hours.

[7] It has been submitted that although the facts of each applicant's case were different and that there were separate and joint meetings, separate phone calls and communications, the applicants agreed to share costs of representation equally. Therefore in total the costs are $8,524.14.

[8] Less than a week after the applicants were made redundant from their employment, the managing director of the Pridex group (Steve Chaning-Pearce) suggested that there would be a counterclaim made against each of the applicants (in a

letter dated 24 November 2011). The counterclaim was filed in the Employment Relations Authority as part of the statement in reply (filed on 25 June 2012). The Authority agreed to hear the counterclaim at the same time as the applicants' employment relationship problem. An investigation meeting was required to cover those issues.

[9] It is submitted that the applicants' costs were significantly increased by having to prepare a defence to the counterclaim and attendance at a day long investigation meeting. It was anticipated that if the Authority did not have to deal with a counterclaim, the hearing would have been much shorter and/or at least may have been able to be dealt with on the papers. The latter was never a possibility because the Authority needed to hear from both applicants personally in regard to their claims.

[10] Mr Steve Chaning-Pearce attended the Authority's investigation meeting. He was allowed to give evidence. There had been no prior notice of his attendance or that he would be present as a witness. He had no written brief of evidence. He introduced new documents as evidence that the applicants did not have the opportunity to view until the investigation meeting. The respondents avoided the costs of a filing fee by using the applicants' statement of problem to mount their own legal action.

[11] The cost of the application was met by the applicants ($71.56).

[12] The respondents deny the claim for costs. Costs in the sum of $1,000 plus GST have been incurred by Ms Davey-Hicks for legal advice personally. She provided a copy of an invoice dated December 2011, but did not provide any other details of what the costs entailed.

[13] The respondents rely on the company no longer trading, having no assets, no income and substantial debts that mean it will be difficult to recover any costs awarded.

Determination of the Authority

[14] As I have said costs follow the event in this matter on the basis that this is one application. Ms Watson and Ms Hobbs are entitled to a contribution towards their costs. The starting point is the notional daily tariff of $3,500. I have had regard to the principles outlined in *PBO Limited v Da Cruz* [2005] 1 ERNZ. I do not accept that

the applicants should receive full indemnity costs from the date of the applicants' *Calderbank* offer, 23 December 2011. This is because costs follow the event in any case as the applicants were successful.

[15] The factors that I am bound to take into account as to whether or not to move the notional daily tariff up or down are:

a. That the parties must meet their own costs for attending mediation. This is not a cost item included in the Authority's awards on costs. Indeed there is nothing in this matter for me to depart from the usual principle.

b. That I am satisfied the applicants tried to resolve the employment relationship problem early and made an attempt to try and save additional costs.

c. That the respondents proceeded with counterclaims using the applicants' employment relationship problem, albeit had given earlier notice of the possibility of the claims.

d. That the respondents were wholly unsuccessful in the counter claims. The counter claims added to the time and preparation unnecessarily, I hold.

e. That Mr Chaning-Pearce attended the investigation meeting without giving notice, there was no written brief of evidence and additional documents were introduced.

f. That the applicants were successful in part of their claims. Their success on one claim related only to their employer, Pridex Kitchens (PN) Limited. The claims against Ms Davey-Hicks personally for penalties were unsuccessful and dismissed.

[16] It is my decision that the applicants are not entitled to their full indemnity costs. There is nothing exceptional about the matter and the conduct of the parties to order full costs. However a reasonable contribution of costs in this matter must take account of a much longer than necessary hearing because of the respondent's counter claim, the respondents' counter claim was unsuccessful, and Mr Chaning-Pearce's

attendance without any notice and without a statement of evidence and he produced more documents.

[17] The applicants' costs incurred are being shared in the preparation of each of their claims. However the amount has to reflect abatement for the portion of the claim that involves any advice during their employment and the matter being filed in the Authority and has to take account of the applicants being unsuccessful on some claims and including the claims for penalties and claims against Ms Davey-Hicks personally. I accept that there is no double counting involved in the applicants' claim where they have agreed to pay half their costs each.

[18] The applicants can not be reimbursed for mediation where they have to incur their own costs for that.

[19] At the moment as the company is no longer trading, has no assets, no income and has substantial debts, I am not satisfied that in the future the situation will be the same to not make an award as the respondents have asked. Therefore it is still appropriate that the applicants know what they are entitled to in costs.

[20] Ms Davey Hicks is the sole director of Pridex Kitchens (PN) Limited. She would have been involved in the proceedings irrespective of the personal claims against her and she decided to attend without representation. The costs she says she has incurred occurred before the Authority's investigation were for advice. Both parties have to meet those costs. I have decided that the applicants do not have to pay Ms Davey-Hicks any costs. A reasonable contribution of costs for the applicants would be $5,000 based on the daily tariff for two applicants in a one day hearing with counter claims.

Order of the Authority

[21] The claims for costs against Ms Davey-Hicks personally are dismissed. Ms Watson and Ms Hobbs are not required to pay costs to Ms Davey-Hicks personally.

[22] Pridex Kitchens (PN) Limited is required to pay Nicola Watson and Helen Hobbs a total of $5,000 contribution to their costs and the filing fee of $71.56 (to be apportioned as Ms Watson and Ms Hobbs wish).

P R Stapp
Member of the Employment Relations Authority