

[5] Virgin Australia points out that the total hearing time involved in this matter was a half day hearing for the interim reinstatement application together with three full days for the substantive matter.

[6] Virgin Australia alleges that A “*unnecessarily widened the scope of the investigation*” by including matters which were not germane to the claim that he had pleaded. That view is advanced, of course, as a basis for increasing the quantum of the contribution that A should pay to Virgin Australia.

[7] In a similar light, Virgin Australia maintains that the material provided by A was “*unnecessarily voluminous and in consequence, the employer had to respond in kind*”.

[8] Next, Virgin Australia says that as A abandoned his claim for permanent reinstatement on 17 June 2011, some four months after the investigation meeting had been held, Virgin Australia had effectively been put to the trouble and expense of defending a portion of the claim which was withdrawn before the Authority had even determined the matter.

[9] Finally, Virgin Australia says that there were a greater number of “*interlocutory matters*” in relation to this proceeding than was normal and that that further added to the cost.

[10] In the result, Virgin Australia seeks a contribution to its costs in the sum of \$27,000 plus GST and disbursements. The disbursements amount to \$794 for travel costs together with \$702.17 for accommodation costs.

[11] The calculation of the \$27,000 figure is based first on a daily rate calculated at \$6,000 for a total of 4½ days. The additional day (beyond the 3½ hearing days) is to allow for the “*extensive legal submissions filed by both parties post the hearing*”. The daily rate tariff suggested of \$6,000 is arrived at by incremental increases on the usual daily rate based on the various arguments advanced by Virgin Australia to support its submission that A’s behaviour materially added to the costs of the fixture.

The response

[12] A accepts that Virgin Australia is entitled to an award of costs but rejects the basis on which Virgin Australia seeks to elevate those costs beyond the norm. In particular, A contends that the additional material complained about by Virgin Australia was not a function of A’s behaviour at all but a function of Virgin Australia’s in the way in which the hearing was conducted.

[13] Furthermore, A points out that, contrary to the submission made by Virgin Australia, it was necessary to traverse a reasonably long timeframe in addressing the nature of A's two grievances, totalling, in effect, 17 months together with various disciplinary meetings, suspensions and other associated incidents.

[14] In essence, A accepts that a contribution to costs is due and owing, argues for the retention of a less inflated daily rate, and accepts that the disbursements sought by Virgin Australia are themselves reasonable.

The law

[15] The relevant law on costs fixing in the Authority is well settled. The leading case is the decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 which decision provides an admirable summary of the jurisprudence.

[16] As Virgin Australia notes in its submissions to the Authority in the instant matter, those principles include:

- (a) Costs normally follow the event;
- (b) Costs are discretionary;
- (c) Conduct which increases costs may be taken into account;
- (d) Costs are frequently judged on a notional daily rate; and
- (e) The non-adversarial environment in the Authority results in costs awards in that jurisdiction being typically modest.

[17] As to the daily tariff, the Authority has recently considered the quantum of the daily tariff, having regard to the effects of inflation and the consequential increase in charge-out rates for lawyers and lay advocates. In consequence, the Authority has determined that a starting figure of \$3,500 per day will apply from now on.

Determination

[18] Both parties accept that costs are due and owing and there is agreement on the level of disbursements claimed. Further, both parties accept the logic of the number of days claimed to which the daily rate ought to apply.

[19] The only dispute is as to the quantum of the daily rate. The starting point for that discussion must be the Authority's own conclusion that, from now on, the starting position should be a figure of \$3,500 per day. Virgin Australia commends to the Authority the

proposition that that figure should be almost doubled, and it argues for that view by pointing up the various aspects in which it says that A contributed to the increasing of its costs.

[20] Conversely, A says in his defence that any increase in the size of the litigation was a function of Virgin Australia's insistence on including matters which were not strictly relevant to the employment, together with Virgin Australia's insistence on cross-examining in relation to those matters when the applicant thought them irrelevant. The ultimate decision of the Authority is read to indicate that the Authority thought them irrelevant too.

[21] Certainly, the Authority is unattracted by the argument that A materially added to the size of the litigation by the way in which he prosecuted his case. The point made by A's counsel that the factual matrix stretched over a lengthy period of time and involved a large number of different events of significance, all of which were relevant to the disciplinary process, is a good one. The Authority is not persuaded that A produced material that was irrelevant or advanced propositions which were not designed to assist the Authority to reach appropriate conclusions on the issues pleaded. In particular, the Authority is not persuaded by Virgin Australia's argument that A was not entitled to refer extensively to the history of the employment relationship and the initial final written warning as relevant context for the subsequent grievance or grievances. Certainly it is true that the Authority was not persuaded that A had ever raised a grievance in respect of the final written warning, but that does not make it irrelevant to the wider context of the employment relationship.

[22] Conversely, Virgin Australia's complaint about interlocutory matters is hardly fair. It was Virgin Australia that insisted on the introduction of the Police file and the CAA file so it was its initiative that resulted in the additional time being spent. Presumably the implication of that submission is that A should simply have given up that material without an argument; but he is entitled to defend himself and the argument around those documents and their relevance or otherwise was a proper argument in the circumstances of the file which the parties needed to have. It is true that the Authority placed little reliance on either the CAA material or the Police material, preferring to rely on the *viva voce* evidence of the witnesses who actually were heard in person, but the fact that the Authority was not much influenced by the material just described does not mean that the material was, by definition, irrelevant. In the Authority's view, the release of that material was proper and the argument around its release was itself a proper argument and so it cannot be used as a ground to increase the quantum of the daily rate that ought to apply.

[23] Looked at in the round, the Authority is not persuaded that this matter was poorly conducted or handled by either counsel. This was a complex and difficult litigation involving a long period of time in which there were relevant incidents in the factual matrix, together with a number of significant protagonists, including statutory agencies which were involved

on the periphery. Furthermore, the fact of the Christchurch earthquake and the inaccessibility of the Authority's Christchurch offices as a consequence, greatly elongated the Authority's decision-making process. The very length of that process made it almost inevitable that A would give up his claim for permanent reinstatement.

[24] In all the circumstances of the case, the Authority is not persuaded that any multiplier should apply to the usual daily rate and on that footing, directs that A is to pay to Virgin Australia the sum of \$15,750 as a contribution to legal costs together with disbursements of \$1,496.17.

[25] It is to be noted that A's submission on costs records that he " will be seeking " a stay on the enforcement of costs awarded, pending his challenge in the Court. From the use of the future tense, the Authority discerns that no application for a stay is made at this juncture. Should that not be the position, leave is reserved for the parties to revert to the Authority.

James Crichton
Member of the Employment Relations Authority