

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 22  
5333232

BETWEEN                      MIRIAMA MOKOMOKO and  
   TOM HARPUR  
   Applicants

A N D                              LA FAMILIA FOUNDATION  
   NZ  
   First Respondent

A N D                              LA FAMILIA NUMBER 2  
   LIMITED  
   Second Respondent

Member of Authority:        Helen Doyle

Representatives:              Karina Coulston, Counsel for Applicants  
   Angela Smalley, Advocate for First and Second  
   Respondents

Submissions Received:        22 November 2012 from Applicant  
   No submissions from Respondents

Date of Determination:        30 January 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In my determination dated 6 November 2012 I found that both applicants were unjustifiably dismissed and awarded to each applicant one week's unpaid wages and two weeks lost wages together with holiday pay – see also [2012] NZERA Christchurch 278.

[2]     There were counterclaims by the first and second respondents against each applicant. The Authority found one claim was made out and made an award against both of the applicants with respect to that matter. There was a small adjustment made to holiday pay by virtue of a double processing issue.

[3] I reserved the issue of costs and timetabled for an exchange of submissions from the applicants by 28 November 2012 and the respondents by 19 December 2012. Submissions were received from Ms Coulston on behalf of both applicants by the due date but no submissions have been received from the respondents, notwithstanding that a support officer from the Authority sent a reminder to the respondents' representatives on 22 November 2012 at the same time the applicants' costs submissions were forwarded.

[4] The Authority now intends to proceed to determine costs.

### **The applicants' submissions**

[5] This file and another file, *Glen v. Wilfred Investments Ltd* [2012] NZERA 252, were by agreement dealt with on four consecutive hearing days. The respondents share a common managing trustee/managing director and the applicants' employment relationship problems were linked in some key aspects. Consecutive hearing days meant that the evidence from an applicant or respondent witness when relevant to the other case did not have to be given twice. Ms Coulston proposes in her submission that the Authority divide the hearing and preparation time for assessment of costs between this file and that of Ms Glen, to arrive at two hearing days for each matter.

[6] Ms Coulston also submits that there were numerous frivolous counterclaims that unnecessarily prolonged the length of the hearing and added to the costs of the applicants.

[7] Ms Coulston submits that the applicants incurred \$16,650 in legal costs and that it was a complex matter with a number of witnesses and extensive documentation. She submits that the costs in the Authority can be calculated either by way of a daily tariff or a charge out rate. The appropriate charge out rate she submits is \$250 - \$300.

[8] Ms Coulston submits an appropriate award for both applicants for costs would be \$12,000.

### **Determination**

[9] There is no good reason to depart from the usual principle that costs follow the event. The applicants were successful in obtaining a determination that their

dismissals were unjustified. The respondents did have limited success with one counterclaim against the applicants upheld but most of the claims were not successful. The applicants are entitled to costs.

[10] In the exercise of my discretion as to costs I think it appropriate to divide the total hearing time of four days by three rather than two because that reflects that each personal grievance had to be considered separately. For each applicant therefore that is a hearing time of a little under a day and a half.

[11] There was no complexity about the personal grievances as they were straightforward. There was some complexity around the counterclaims. There was some documentation but I do not consider it to be excessive.

[12] The leading judgment in this area of costs is that of the Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. In that case the Court set out cost principles that it held were appropriate to the Authority and consistent with its functions and powers recognising that each case has to be considered in light of its own circumstances. These principles include a discretion as to whether costs are awarded and in what amount. Costs are not to be used as a punishment or an expression of disapproval and awards will be modest.

[13] It was also recognised in *PBO* that frequently costs are judged against a notional daily rate. The Authority now recognises this as \$3,500.

[14] As a starting point there is no reason to depart from the usual daily tariff in assessing costs. The Authority can then consider any adjustments in a principled way up or down that need to be made to the tariff.

[15] On the basis of a daily tariff of \$3,500 for four days that is a total sum of \$14,000. For each of the three applicants, \$14,000 divided by three would be a sum of \$4,666.66. Whilst there were counterclaims, they were identified and could not be referred to as numerous in relation to each applicant. I do accept though that they did add considerably to the hearing time for what otherwise would have been a very straightforward personal grievance. The Authority needs to consider in a principled way whether there should be any adjustment to the daily tariff to reflect the counterclaims. The respondents did have success in one of the counterclaims. That would in the ordinary course have resulted in an adjustment down of the tariff. Given

however that the balance of the counterclaims were unsuccessful that would normally have resulted in an adjustment up of the tariff. The fairest approach is to make no change to the daily tariff for the success or otherwise of the counterclaims.

[16] In all the circumstances I consider a fair and reasonable award for each of the applicants for costs to be the sum of \$4,666.66 together with disbursements. In this case there was a hearing fee incurred by all three applicants in the sum of \$306.66. A fair approach would be to divide that by three to arrive at the sum of \$102.22. The applicants are entitled to disbursements for hearing fees in the sum of \$204.00 together with a filing fee of \$71.56.

[17] I order La Famia Foundation NZ and La Famia No.2 Ltd to pay to Miriama Mokomoko and Tom Harpur the combined sum of \$9,333.33 being costs and \$275.56 being disbursements.

Helen Doyle  
Member of the Employment Relations Authority