

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 435  
5366986

BETWEEN

MONIQUE BODE-  
PATTERSON  
Applicant

AND

MARGARETA HAMMOND –  
SMITH and KEVIN SMITH t/a  
I LOVE MERINO LIMITED  
Respondents

Member of Authority: K J Anderson

Representatives: W Reid and R Rolston, Advocates for Applicant  
M Beech and E Smith, Counsel for Respondents

Submissions received: 24 July 2013 from Applicant  
7 August 2013 from Respondents

Determination: 24 September 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 10 July 2013<sup>1</sup> the Authority found that the applicant had a personal grievance as she had been unjustifiably dismissed; and that she was entitled to the remedies of reimbursement of wages and compensation for hurt and humiliation. The parties were invited to resolve the issue of costs but have not been able to do so. Submissions on costs have been provided by the parties in anticipation of the Authority determining this matter.

[2] The applicant submits that she has incurred total costs of \$10,000 and her advocate posits that this represents a discount, compared to the fees that would normally be charged. Given that the investigation meeting occupied two days, and in recognition of the daily tariff applied by the Authority,<sup>2</sup> the applicant seeks an order that the respondents should make a contribution of \$7,000 to the costs she has

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<sup>1</sup> [2013] NZERA Auckland 294

<sup>2</sup> Currently \$3,500 per day.

incurred. The applicant also seeks disbursements; being \$600 for her psychologist to attend the investigation meeting as an expert witness, and the application fee paid to the Authority: \$71.56.

[3] The submissions for the respondent acknowledge the principles established by *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.<sup>3</sup> One of these principles is the now well established daily tariff based approach used by the Authority. But the respondent points to the fact that the applicant has not provided any evidence of the costs that she has incurred (apart from the invoice from her psychologist). Attention is also drawn to there being two advocates acting for Ms Bode-Patterson and it is not established whether the costs incurred (\$10,000) are for the two advocates. It is also submitted that as Mr Reid (the primary representative for the applicant) is an advocate rather than a practicing lawyer, then the daily tariff of \$3,500 may exceed the actual costs charged by Mr Reid.

[4] In regard to the failure on the part of the applicant to provide evidence of the costs she has incurred, this evidence should have been presented to the Authority as proof that costs have indeed been accumulated. However the tariff based approach of the Authority is different to the usual method adopted by the Employment Court, whereby an assessment of reasonable costs applying to a particular case is made and then the Court calculates and awards a percentage (usually adopting a 66% base) of those costs. It can reasonably be assumed that Mr Reid is in business and charges appropriate fees accordingly. And given the time involved in preparing for and presenting the applicant's case over two days,<sup>4</sup> and adopting an advocate's average fee of \$250 per hour and dividing this rate into \$10,000, we arrive at a total of 40 hours being expended. Given the Authority's knowledge of the background to this matter, I accept that the costs incurred can be seen as appropriate in the circumstances and do not need to be verified by evidential documents. Nonetheless, I must stress that in future, the Authority will expect to see the evidence of the costs incurred being produced in a costs setting. It is not the role of the Authority to engage in an exercise such as the above and in future, a failure to provide appropriate evidence of the costs incurred may result in an application being declined.

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<sup>3</sup> [2005] ERNZ 808

<sup>4</sup> It is generally accepted (as a rule of thumb) that for each hour of hearing time, two hours of preparation is involved.

[5] It is established that the investigation meeting occupied the better part of two days. Therefore, applying the daily tariff, then a costs award would be normally be \$7,000: the sum sought by the applicant. That takes us to the consideration of whether there are any factors that the Authority should take into account that may require a reduction in the above amount.

### **The evidence for the applicant**

[6] The submissions for the respondents refer to: “spending a lot of time during the hearing addressing irrelevant evidence and extreme allegations”. Specific reference is made to the evidence of Mr Gibson-Patmore whom the Authority found to be, in substance, an unreliable witness. And then there is the involvement by the psychologist who attended the investigation meeting without the prior knowledge of the respondent (or the Authority) that she would be present. However, the presence of Ms Long did not, in my view; result in any prejudice to the respondents and the Authority found the evidence of Ms Long, including her written reports, to be of some assistance in determining certain matters. Furthermore, rather than the respondents being prejudiced by the psychologist’s evidence, it was of some assistance in regard to clarifying that the respondents could not reasonably have had knowledge of Ms Bode-Patterson’s mental health history; despite the advocates for her attempting to escalate this factor in regard to the remedy of compensation for hurt and humiliation.

[7] However, I accept that there was an unreasonable amount of time expended dealing with the evidence of Mr Gibson-Patmore; particularly relating to its admissibility. This required adjournments of the proceedings for appropriate discussions between the Authority, counsel and the advocates. The respondents also provided some useful authority and submissions pertaining to the admissibility of some of Mr Gibson-Patmore’s evidence. The outcome being that Mr Reid conceded that some of the evidence of it should be excluded. Some of the other evidence of Mr Gibson-Patmore was found to be unreliable by the Authority. From the respondent’s perspective, some time was spent in cross examination, exposing what was, I believe, a rather misguided attempt by the applicant to persuade the Authority that certain (alleged) actions of the respondents, resulted in circumstances that should increase the remedy of hurt and humiliation to the applicant. Taking into account the combination of the time expended relating to the inadmissibility and unreliability of some of the

evidence of Mr Gibson-Patmore, I conclude that there should be a 20% reduction in regard to the costs that would otherwise have been awarded: reducing the sum of \$7,000 by \$1,400 to \$5,600.

### **The psychologist's fees**

[8] I note from the invoice that Ms Bode-Patterson's psychologist charged \$600 for the time that she spent attending the investigation meeting (\$200 x 3 hours). However, I conclude that it was not necessary for Ms Long to have attended the investigation meeting for more one hour, at best. If the applicant had notified that Ms Long was attending and would be charging for her attendance, the Authority would have accommodated her evidence at or within an agreed time frame, thereby reducing the time of her attendance accordingly. The respondent should not have to bear the total cost incurred due to the failure of the applicant to make prudent arrangements. Therefore, I conclude that only \$200 of the fees charged by the psychologist can reasonably be taken into account.

### **Determination**

[9] Pursuant to clause 15 of the Second Schedule of the Employment Relations Act 2000, the respondents shall pay to the applicant:

- (a) \$5,600.00 as a contribution to the costs incurred by the applicant; and
- (b) Disbursements of \$200 for the psychologist's fees; and \$71.56 being the application fee paid to the Authority.

**K J Anderson**  
**Member of the Employment Relations Authority**