

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 126
5399425

BETWEEN

DIANE LIVINGSTON
Applicant

A N D

G L FREEMAN HOLDINGS
LIMITED trading as THE
REDWOOD HOTEL
Respondent

Member of Authority: Helen Doyle

Representatives: Carren McDonald and Robert Thompson, Advocates for
Applicant
Tim McGinn, Counsel for Respondent

Submissions Received: 11 June 2013 from Applicant
18 June 2013 from Respondent

Date of Determination: 26 June 2013

COSTS DETERMINATION OF THE AUTHORITY

A. G L Freeman Holdings Limited is to pay to Diane Livingston the sum of \$1321.56 being costs and the filing fee.

[1] In my determination dated 16 May 2013, I ordered the respondent to pay to the applicant the sum of \$1,943.50 being accrued annual leave and payment for alternate days. I further ordered that the applicant pay a penalty in the sum of \$500 to the respondent for a breach of her employment agreement. Half of the penalty was to be paid to the Crown and half to the respondent. I reserved the issue of costs. The parties were unable to reach agreement on costs and submissions have now been received from both representatives.

The applicant's submissions

[2] The applicant submits that the Authority's normal daily tariff of \$3,500 should apply to an award of costs although reduced because the investigation meeting was only slightly longer than half a day. The applicant submits that under these circumstances, a payment of \$1,750 should be applied together with the applicant's filing fee of \$71.56. I am satisfied that that costs incurred by the applicant exceed that sum.

[3] The applicant seeks a costs award of \$1,821.56.

The respondent's submission

[4] Mr McGinn accepts that the starting point of costs to a successful party for a half day investigation meeting should be \$1,750.

[5] He submits that both parties have had a measure of success in relation to the determination and that it cannot be said that one party was more successful than the other.

[6] Mr McGinn submits that there are aspects of the conduct of the case which should be taken into account as below:

- The applicant's claim at the investigation meeting bore little resemblance to the claim lodged with the Authority;
- The applicant originally claimed a personal grievance for disadvantage and made "*wild and offensive allegations*" which were withdrawn after a telephone conference with a Member of the Authority;
- Although the allegations were withdrawn, the applicant persisted with them to justify her breach of contract; and
- The applicant initially brought a lost wages claim when no wages were deducted.

[7] Mr McGinn submits that, given the relative success of both parties, the conduct of the case and the actual costs incurred by the respondent in the sum of \$4,200 plus GST, the fairest outcome would be to let costs lie where they fall.

Determination

[8] The leading judgment about costs in the Authority is that of the Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. The Authority has discretion as to whether costs should be awarded and if so in what amount. That discretion is to be exercised in accordance with principle and not arbitrarily. Costs generally follow the event and are often assessed against a notional daily tariff now recognised as \$3,500 per day. It was stated in *PBO* that the danger of the tariff being too rigid can be avoided by adjustments either up or down in a principled way without compromising the approach to costs.

[9] In its statement in reply the respondent claimed successfully against the applicant for a penalty for a breach of her employment agreement. Both parties had a measure of success however I find that the applicant was overall the successful party and it is fair costs should be awarded in her favour rather than lie where they fall.

[10] There is agreement from the submissions that costs should be based on the daily tariff adjusted to reflect that the meeting took less than a full day in the sum of \$1750.

[11] A further adjustment should be made to \$1750 to reflect the respondent's success in its claim for a penalty in the sum of \$400 and in a more limited way for costs associated with replying to, and dealing in a telephone conference with the personal grievance, before it was withdrawn in the sum of \$100 well before the investigation meeting.

[12] I do not find that the very limited reference by the applicant to some of the same matters alleged by way of personal grievance at the Authority investigation meeting increased costs for the respondent and make no adjustment on that basis. The applicant was unaware until the day of the investigation meeting exactly what money had been withheld by the respondent in reliance on the forfeiture provision and indeed how much had been withheld. I make no adjustment for the reference by the applicant in those circumstances to wages.

[13] The applicant is entitled to costs in the sum of \$1250 together with a filing fee in the sum of \$71.56.

[14] I order G L Freeman Holdings Limited to pay to Diane Livingston the sum of \$1321.56 being costs and the filing fee.

Helen Doyle
Member of the Employment Relations Authority