

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 165  
5380705

|         |                                                                                                             |
|---------|-------------------------------------------------------------------------------------------------------------|
| BETWEEN | NEW ZEALAND<br>TRAMWAYS AND PUBLIC<br>PASSENGER TRANSPORT<br>EMPLOYEES UNION –<br>DUNEDIN INC.<br>Applicant |
| A N D   | INVERCARGILL<br>PASSENGER TRANSPORT<br>LIMITED<br>Respondent                                                |

Member of Authority: David Appleton

Representatives: Kevin O’Sullivan, Advocate for Applicant  
Janet Copeland, Counsel for Respondent

Submissions Received: 4 July 2013 from Applicant  
8 July 2013 from Respondent

Date of Determination: 14 August 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Costs in the sum of \$2,500 are awarded to the respondent.**

[1] By way of its determination dated 10 June 2013, [2013] NZERA Christchurch 106, the Authority declined facilitation on the basis that the statutory grounds had not been made out. The Authority invited the parties to seek to agree how costs were to be dealt with but they have been unable to do so. Accordingly, counsel have each served and lodged a memorandum setting out their respective client’s position.

[2] In short, the union seeks that each party should bear its own costs, whereas the respondent seeks that a contribution of \$3,500, together with disbursements of \$337.50 be made to its costs by the union.

[3] Costs are awarded in the Authority in accordance with the provisions of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ENZ 808. The principles governing the setting of costs awards in the Authority as promulgated in *Da Cruz* include:

- (a) There is discretion as to whether costs would be awarded, and what amount.
- (b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- (c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- (d) Equity and good conscience is to be considered on a case by case basis.
- (e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- (f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- (g) That costs generally follow the event.
- (h) That without prejudice offers can be taken into account.
- (i) That awards will be modest.
- (j) That frequently costs are judged against a notional daily rate.
- (k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[4] The union argues that it was successful in two out of five of the grounds required, and that, even though they did not succeed in their application for facilitation, there was clearly value for both parties for the Authority to have considered their application. This latter assertion is made on the basis that the Authority concluded that, at the end of the investigation meeting, the parties were much closer to settling their differences and concluding bargaining than each had believed they had been immediately before the investigation meeting.

[5] The union also states that it is small and of limited means with no employed officials, whereas the respondent was represented by counsel who had been intimately involved in the bargaining, so that she should not have had to prepare as much as would a representative who had not been previously involved. Finally, the union states that there do not appear to be any reported cases of costs being awarded in a facilitation case.

[6] Ms Copeland, for the respondent, submits that the Authority found overwhelmingly in its favour and that costs should follow the event, in accordance with the general principle. She also argues that the usual notional daily tariff of \$3,500 should be applied and that, whilst the investigation meeting did not span an entire day, the complexity of the events and timeframes involved, the volume of correspondence and uncertainties as to how the applicant intended to conduct the meeting all meant that significant preparation was required. The respondent incurred \$13,589.09, including GST and disbursements it claims.

### **Determination**

[7] Although I have also been unable to find any published Authority determinations showing that costs have been awarded following a facilitation application, there have been a multitude of facilitation determinations, both granting facilitation and declining it, where costs have been reserved. I surmise that costs have been agreed between the parties in these cases.

[8] I see no reason in principle why costs should not follow the event in this case. The union did fail in its application, and the respondent's arguments against facilitation largely succeeded.

[9] The respondent's GST and disbursement exclusive fees total \$10,932, incurred over 52 hours of work. It is hard to judge whether this is reasonable, and it seems a high figure at first glance, although I am prepared to accept that more work had to be carried out by Ms Copeland than may have otherwise been the case because of uncertainties about some aspects of the union's application. In any event, the respondent seeks only \$3,500 plus disbursements, which is clearly less than what would have been a reasonable sum to have charged for the work carried out by Ms Copeland.

[10] The question is, as the investigation lasted only three hours and 20 minutes, effectively half a day, should the union pay to the respondent a sum which equates to the usual rate for an investigation lasting a whole day; namely, \$3,500?

[11] I am certainly mindful that a significant amount of documentation was put before the Authority and, whilst the matter was not particularly complex from a factual or legal point of view, it was necessary to pick through the events carefully to ascertain what efforts had been made to conclude bargaining. I was assisted by Ms Copeland's clear grasp of events in this exercise. It turned out that the parties had been at cross purposes as to where their differences lay.

[12] I need to balance the fact that significant preparation had been carried out by Ms Copeland against the general principles that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, and that awards will be modest. All in all, I believe that a fair and reasonable amount for the union to pay to the respondent is a contribution of \$2,500.

[13] As for disbursements, whilst I would guess that the disbursements were incurred largely through photocopying, Ms Copeland does not actually identify how they were incurred. In the absence of such information, I am unable to award anything in relation to disbursements.

**Order**

[14] I order the applicant to pay to the respondent the sum of \$2,500 as a contribution to its legal costs.

David Appleton  
Member of the Employment Relations Authority