IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 66
5425621

	BETWEEN	CAROLINE HANGAR Applicant
	AND	REH PROPERTY MANAGEMENT LIMITED (t/a RAY WHITE REAL ESTATE) Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Jenny Murphy, for the Applicant Dave Robb, for the Respondent
Determination:	25 June 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination of 7 April 2014 I found for Caroline Hangar in a number of her claims against REH Property Management Limited, trading as Ray White Real Estate. Ms Hangar now seeks a contribution towards her costs from her former employer.

[2] Her representative provided evidence, by way of an invoice, that she had incurred costs of $10,295.06. This includes $1,960 in pre-litigation costs, including mediation. Ms Hangar seeks a contribution to her costs in the sum of $6,321.56, which includes reimbursement of the Authority's filing fee.

[3] Ray White Real Estate opposes any award of costs, proposing that costs should lie where they fall. In its submission, the case was neither complex nor extraordinary. It notes that Ms Hangar did not succeed in all her claims and submits the costs she incurred were not necessary or reasonable.

[4] Both parties provided written submissions to the Authority, and both cited the well-known *Da Cruz* case[1] in support of their different perspectives on how the application for costs should be treated. I have considered their submissions regarding both the outcome of Ms Hangar's claims before the Authority, and the principles relevant to costs awards as elucidated in that case.

[5] One of those principles is that costs normally follow the event, and I find it appropriate that they do so in this instance. Ms Hangar succeeded in many of her claims, including for constructive dismissal, disadvantage from being unfairly suspended, and failure to pay commission. She was partially successful in her claim to have been underpaid throughout her employment.

[6] Ms Hangar's representative submits that the parties were directed to a second mediation by the Authority and the costs of that should be taken into account. She cites as authority the Employment Court judgment in *RHB Chartered Accountants Limited & ors v Rawcliffe*[2] where Inglis J allowed a challenge to an Authority determination not to award a contribution towards costs incurred by a wrongly-cited party.

[7] The respondents in the Authority proceedings (the plaintiffs in the Employment Court) had been directed to mediation by the Authority. This was after their statement in reply had made it clear they were improperly named, and provided documentation to support that contention. After the mediation the applicant (the defendant in the Court) filed an amended statement of problem naming different respondents.

[8] The Judge observed that *"…it is in the broader interests of justice that those commencing legal proceedings act responsibly and that strategic litigation involving the wrong parties be discouraged. A costs award in such circumstances would likely discourage hopeless (but deliberate) attempts to litigate against the wrong person for the purpose of extracting a monetary settlement*"[3]. She did not form a concluded view of Mr Rawcliffe's motivation for proceeding against the plaintiffs. However, she noted he had been put on early notice of the issue over their party status, and

[1] *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808
[2] [2012] NZEmpC 31
[3] Ibid at [39]

awarded them a contribution of $1,000 towards the costs of preparing a statement in reply and attending mediation.

[9] The current situation is very different. There were no issues as to the correct identity of the respondent or the applicant's motivation in bringing the matter to the Authority. I directed the parties to further mediation in accordance with s. 159(1)(b) of the Employment Relations Act 2000 (the Act) after considering the parties' views.

[10] I did so because of the view I formed in a telephone conference with the parties that further mediation would be of assistance and provide them a real opportunity to resolve their differences. Both parties attended mediation and their inability to resolve the matters between them is not sufficient reason to award costs to the applicant to defray the expense of her attendance.

[11] I take as a starting point the daily tariff of $3,500 usually adopted by the Authority and consider factors that could warrant an uplift or a decrease to that amount. The investigation meeting took place over one reasonably long day that commenced at 9.00 a.m. and ended at 8.00 p.m., with a short break for lunch.

[12] Ms Hangar submits it would be reasonable to consider the investigation meeting as one and a half days because of its length. While that has merit, Ray White Real Estate's submissions regarding Ms Hangar's lack of success with some of her claims are also relevant.

[13] On balance, I consider a small uplift to the daily tariff to be appropriate. Accordingly, I order REH Property Management Limited (t/a Ray White Real Estate) to pay Ms Hanger $4,000 in costs and reimburse her the filing fee of $71.56, pursuant to clause 15, Schedule 2 of the Act.

Trish MacKinnon
Member of the Employment Relations Authority