

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 39
5424187

BETWEEN

ANNA DOLAN
Applicant

A N D

THE ROMAN CATHOLIC
BISHOP OF AUCKLAND
Respondent

Member of Authority: T G Tetitaha

Representatives: J Dolan, Advocate for Applicant
P Kiely, Counsel for Respondent

Submissions Received: 13 January 2014 from Applicant
17 December 2013 from Respondent

Date of Determination: 3 February 2014

COSTS DETERMINATION OF THE AUTHORITY

A. Anna Dolan is ordered to pay a contribution of \$4,083.33 towards the Roman Catholic Bishop of Auckland legal costs, by way of instalments of \$50 per week commencing 28 days from the date of this determination.

Employment relationship problem

[1] The Roman Catholic Bishop of Auckland applies for costs following the successful defence of Ms Dolan's personal grievance claim.¹ The respondent seeks costs of \$8,000.

[2] The applicant submits costs should lie where they fall.

¹ *Dolan v. The Roman Catholic Bishop of Auckland* [2013] NZERA Auckland 572

Issues

[3] The following issues are to be determined:

- (a) Should there be an award of costs?
- (b) What is the starting point for assessing costs?
- (c) Are there any factors that warrant adjusting the notional daily tariff?

Should there be an award of costs?

[4] Costs would normally follow the event.² There are no factors for the Authority to depart from that general principle. In the circumstances, contribution towards the respondent's actual legal costs is appropriate.

What is the starting point for assessing costs?

[5] The starting point for assessing costs in this matter is the Authority's usual daily tariff. The current notional daily tariff is \$3,500. This matter involved 1¾ days of investigation hearing time.

[6] The starting point for assessing costs is therefore \$6,125.

Are there any factors that warrant adjusting the notional daily tariff?

Factors which warrant a reduction in the notional daily tariff

[7] Ms Dolan submits the respondent did not substantially respond to her allegations until immediately prior to the investigation meeting. This prevented her from adequately assessing the position. She also deposes to limited financial means and continued unemployment. Her husband is also unemployed. Ms Dolan has a family of five children aged between 15 and 23 living in the household. Two are attending secondary school and two university students. One has commenced work and pays board. Her estimated income, including income from rental properties, is \$20,000. Her estimated expenses are \$40,000. Her savings are being used to meet her estimated shortfall in budget.

² *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808

[8] Any costs award must take into account the ability to pay.³ A party's ability to pay costs is a relevant consideration as a matter of equity and good conscience in awarding costs.⁴

[9] On the limited information before the Authority, there is a sufficient basis to reduce costs by one-third, having regard to equity and good conscience. This also appears an appropriate matter for the Authority to exercise its equity and good conscience jurisdiction to order payment by instalments of \$50 per week.

Factors which warrant an increase in costs

[10] The respondent seeks an increase in the notional daily tariff rate due to the following features:

- (a) The investigation meeting was granted urgency accelerating the timeline and increasing the costs for the respondent.
- (b) The applicant was wholly unsuccessful in her claim.
- (c) The applicant raised a number of irrelevant issues which nevertheless required a response from the respondent, increasing the respondent's preparation time and costs.

[11] The matter was granted an early substantive hearing as opposed to urgency. Both parties consented to the early substantive hearing. The amount of preparation should have been the same if the matter had proceeded to a substantive hearing in the usual way.

[12] The fact the applicant was wholly unsuccessful does not justify an increase in costs. 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.⁵

[13] The applicant was represented by her husband, John Dolan, who was not legally qualified. The allegedly irrelevant issues raised are not particularised by the

³ *Richardson v. Board of Governors of Wesley College* [1999] 2 ERNZ 199, 229 1.12 and following

⁴ *Shepherd v Scan Audio New Zealand Ltd* [1999] 2 ERNZ 374, p 379, line 41

⁵ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

respondent. Prior to and at hearing there was no conduct obvious to the Authority which would have unnecessarily increased costs. It is difficult, without more detail, to identify and assess the conduct alleged to have unnecessarily increased costs.

[14] Given the above, the Authority declines to increase costs.

[15] Anna Dolan is ordered to pay a contribution of \$4,083.33 towards the Roman Catholic Bishop of Auckland legal costs, by way of instalments of \$50 per week commencing 28 days from the date of this determination.

T G Tetitaha
Member of the Employment Relations Authority