

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 169  
5391334

BETWEEN ASSOCIATION OF  
PROFESSIONAL AND  
EXECUTIVE EMPLOYEES  
Applicant

A N D WEST COAST DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: David Appleton  
Representatives: Michele Stanton, Counsel for the Applicant  
Penny Shaw, Counsel for the Respondent  
Investigation Meeting: Determined by consideration of the papers  
Submissions Received: 19 October 2015 from the Applicant  
8 October 2015 from the Respondent  
Date of Determination: 6 November 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The applicant is to make a contribution of \$3,500 to the respondent's costs.**

[1] By way of a determination dated 11 September 2015<sup>1</sup>, the Authority found that the applicant had succeeded in one of its claims that there had been a breach of the relevant collective agreement, but that no remedies were due to named members of the applicant association. In addition, two other claims made by the applicant failed.

[2] In my determination I reserved the question of costs in the hope that the parties could agree how they would be disposed of. As they have been unable to do so, I now determine the issue of costs.

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<sup>1</sup> [2015] NZERA Christchurch 135

[3] Ms Shaw lodged very succinct submissions which ask for a contribution of \$5,000 towards the respondent's costs, on the basis that the applicant lodged extensive submissions.

[4] The applicant's equally succinct submissions state that the respondent failed to communicate with the applicant about costs within the deadline set by the Authority. It also submits that the Authority should make an order that costs should lie where they fall as the respondent achieved only partial success in the Authority, and that the applicant's actions brought to the attention of the respondent other matters which were in breach of the relevant collective agreement, and which the respondent subsequently rectified.

### **Discussion**

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[6] The Authority is bound by the principles set out in *PBO Ltd v Da Cruz*<sup>2</sup>, when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in 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 are to be considered on a case by case basis.

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<sup>2</sup> [2005]ERNZ 808

- 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.

[7] First, I accept that costs should follow the event. Whilst the respondent did not succeed wholly in defending the claims of the applicant, the outcome was significantly in its favour. It is certainly not a question of the matter being finely balanced, which might have justified costs lying where they fell. Whilst a further (inadvertent) breach of the collective agreement in relation to Mr Hope's pay did emerge during the investigation meeting, that was an unintended but fortunate outcome of the proceedings, and I do not accept is relevant to the question of costs.

[8] The next question is whether the respondent's costs were reasonable. Unfortunately, Ms Shaw has not given any indication of what the costs were that her client has had to pay; this may have been deliberate, for reasons of confidentiality. On occasion, such a failure would present a serious impediment to the Authority being able to fix costs, as it must assess the reasonableness of the costs sought. On this occasion, however, as Ms Shaw is seeking a relatively modest contribution, I am able to be satisfied that the sum of \$5,000 in respect of her costs would not be unreasonable in defending the claims made by the applicant, which were relatively involved, both factually and legally.

[9] The final question is whether there is any reason to depart from the usual daily tariff of \$3,500, by decreasing it by reference to the time the investigation meeting lasted, or by uplifting it, as requested by Ms Shaw. The investigation lasted from 10.30 am until 4.15 pm, with an hour's break for lunch, so less than five hours, which is not a full day. However, subsequent information was received from the respondent in response to allegations raised in the investigation meeting, and submissions were then received. I accept that, when one includes the additional information that was received from the respondent, the investigation should be treated as a full day, attracting the full daily tariff.

[10] It is true that the submissions from the applicant's previous counsel were lengthy (70 pages in total), but they were not irrelevant or unnecessarily verbose, and they were very helpful in part. I do not think that their length alone merits an uplift in the daily tariff therefore.

[11] There is no other cogent reason from uplifting the daily tariff that I can see; although relatively complex factually and legally, the matter did not fall outside of the usual range of complexity that matters of this kind present.

[12] In conclusion I fix the contribution that the applicant must make to the respondent's costs at \$3,500.

### **Order**

[13] The applicant is to pay to the respondent the sum of \$3,500 as a contribution towards the legal costs incurred by it in defending the applicant's claims.

David Appleton  
Member of the Employment Relations Authority