

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 28
5427709

BETWEEN

CAMPBELL WINTER
Applicant

AND

SANDRA AND JOHN
HANSEN T/A THE GAS
CENTRE HASTINGS
Respondent

Member of Authority: P R Stapp
Submissions received: On the papers
Determination: 20 March 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority reserved costs in [2014] NZERA Wellington 75. It is only recently that the matter has come back to the Authority for determination on the papers. Both parties have had an opportunity to make their submissions and this has been done in writing. The applicant was successful with a claim of unjustified dismissal and was awarded \$864 wages and holiday pay and \$5,000 compensation.

[2] The applicant's actual costs were \$9,342.13. The applicant claims costs in the sum of \$7,500 and filing fee of \$71.56 based on *Okeby v Computer Associates (NZ) Limited* [1994] 1 ERNZ 613, *Reid v NZ Fire Service Commission* [1995] 2 ERNZ 38 and *PBO Ltd (formerly Rush Limited) v Da Cruz* [2005] 1 ERNZ 808. The respondent has not accepted the claim, and there has been no resolution of the matter between the parties. Indeed both parties claim the each other's behaviour has contributed to the level of costs in the matter.

[3] This is a standard matter for assessment based on principle and not to punish any party. The Authority's investigation was of a standard type, but where the respondent was not represented. Costs follow the event. This is because the applicant

was successful in the outcome, and is entitled to the daily tariff. Costs have been incurred and the invoices produced support this. Costs in the Authority are determined based on a notional daily tariff applied accordingly. This is because the Authority is an investigatory dispute resolution body. Costs are determined differently to costs in the Employment Court where costs are based on a contribution and apportioned as a percentage of reasonable costs. Indeed the Employment Court has made it very clear that there is a difference between the Authority and the Court. Her Honour Judge Inglis has reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.¹ Indeed her Honour went further and said that where there is a choice exercised by a party to obtain representation and apply significant legal resources that is a choice that must have regard to the generally applied daily rate. I accept that the case where her Honour is making the comments is different in as much as it involved a respondent applying for consideration of a *Calderbank* letter and the sum of money for costs was significantly more. However, the principles are nevertheless the same.

[4] There is nothing exceptional and/or significant enough for me to change the Authority's approach to costs. Indeed this is not a matter to up lift or reduce the tariff, and my reasons are as follows.

[5] I have assessed the parties' conduct in the investigation. I have found nothing that involves any behaviour leading the applicant to incur unnecessary costs, especially when the usual preparation was required and the investigation meeting involved one day. The criticism that the respondent has been difficult in the conduct of the investigation, including deciding to proceed and argue matters, is not bad behaviour, and does not mean that the respondent has unnecessarily put the applicant to unnecessary expense where the respondent decided to defend the matter on principle. The difficulty was because the respondent decided to act alone and without professional representation. The Authority's investigation meeting was scheduled for one day and I accept that Mr Winter's representative prepared and planned his arrangements around the schedule for a one day meeting, including meeting the timetable for producing statements and documents. Also, I accept that the applicant

¹ *Stevens v Hapag Lloyd* [2014] NZEmpC 28; and Employment Relations Act s 157 (1). Also see *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4.

made an attempt to save costs by attending mediation and making two attempts to settle with offers of settlement prior to filing an application in the Authority.

[6] The offers to settle were for less than the determination made by the Authority and were open to the respondent to consider for a short period of time. Thus, they can be taken into consideration, but it is only one factor amongst a number for consideration. There is no express provision for the Authority to apply *Calderbank* letters or letters of offer to settle (as this is) in the same manner that the Employment Court can. Costs follow the event in the usual way and the applicant's attempts to settle with the offers that he made has to be balanced with the genuine issues the respondent decided to argue. It would have been better for the respondent to have taken up one of the offers to settle, because the offers were less than the amounts ordered by the Authority, and the applicant has been put to the cost of proceeding. The respondent now has to pay more as a result of the Authority's determination, plus paying costs. The respondent genuinely made a decision to defend and argue the issues as they were entitled to do. The respondent had access to legal advice, but chose to represent itself, and of its own, this as a factor is not enough to reduce the tariff.

[7] I therefore determine that the notional daily tariff applies and I assess the cost as \$3,500. Mr Winter is also entitled to the reimbursement of the filing fee.

Order of the Authority on costs

[8] Sandra and John Hansen t/a The Gas Centre Hastings are to jointly and severally pay Campbell Winter \$3,500 to costs and \$71.56 filing fee.

P R Stapp
Member of the Authority