

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 83
5467694

BETWEEN RANDALL DAVIES
 Applicant

AND WELLINGTON CITY
 TRANSPORT LIMITED T/A GO
 WELLINGTON
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Tanya Kennedy, Counsel for the Applicant
 Richard McIlraith, Counsel for the Respondent

Submissions received: 15 June and 3 July 2015 from the Applicant
 29 June 2015 from the Respondent

Determination: 27 August 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] In the Authority's determination of 22 October 2014, Member Stapp ordered Mr Davies' reinstatement to his position of bus operator/driver with Wellington City Transport Limited trading as Go Wellington (WCTL). He found Mr Davies was entitled to the sum of \$4,000 in compensation for hurt and humiliation. However, as Mr Davies had contributed to the situation, he deducted half that amount and ordered WCTL to pay him \$2,000. Costs were reserved.

[2] Time and Member Stapp have moved on. The parties have not been able to agree on costs and the Authority has now received a request for costs from Ms Kennedy, acting under instruction from the New Zealand Tramways and Public Passenger Transport Union (Inc), Wellington Branch (the Tramways Union) which represented Mr Davies. She seeks costs of \$3,500 plus reimbursement of the Authority's filing fee. Ms Kennedy has based her costs request on the Authority's

nominal daily tariff, on the basis of her understanding that the investigation meeting occupied one day.

[3] Mr McIlraith, on behalf of WCTL, referred the Authority to *Thornley & Brown v Marlborough College*¹, submitting that similar logic should be applied in this instance. In that case the Authority had found that the applicants were, in principle, entitled to be awarded a contribution to the costs incurred by the union that had represented them. However, as no details of those costs had been provided, costs were declined, although an order for the payment of the applicant's disbursements was made.

[4] In her reply submissions, Ms Kennedy supplied information relating to legal costs incurred by the union in obtaining advice and assistance from external counsel. The total is noted as \$1,380 exclusive of GST.

[5] She noted that Mr O'Sullivan, who is a paid union official of the Tramways Union, would have been otherwise engaged if he had not been preparing for, and representing Mr Randall in, the matter. She says Mr O'Sullivan estimated that he spent at least 20 hours on the matter leading up to the investigation and afterwards in negotiating with WCTL to implement Mr Randall's reinstatement. She submitted that an award of \$2,400 for his time was appropriate based on 20 hours work at a rate of \$120 an hour.

Discussion

[6] The investigation meeting into Mr Davies' claims took place over one day. He was successful and was awarded reinstatement to his employment. The matter does not appear to have been particularly complicated or to have involved complex issues of law.

[7] I have considered the views of the parties in relation to both the outcome of Mr Davies' claims before the Authority, and the principles relevant to costs awards for Authority investigations. These principles are well-known and have been set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*.² While each case falls to be determined on its merits, there has long been authority for the principle that, in

¹ [2015] NZERA Christchurch 67.

² [2005] 1 ERNZ 808.

appropriate cases, an award of costs is not precluded by the fact representation had been provided by in-house counsel, advocates or employees.³

[8] Following that principle, and the principle that costs normally follow the event, I find it is appropriate that an award of costs is made in this instance. I note, however, that many of the attendances and correspondence charged to the Tramways Union by the law firm to which Ms Kennedy belongs relate to the period after the Authority's investigation which took place on 18 September 2014. Fees of \$420 were incurred in the period leading up to the investigation.

[9] I cannot agree with Ms Kennedy's assessment of the calculation to be made in respect of time spent by Mr O'Sullivan. I note she has included an unspecified period he spent after the Authority's investigation and find that inappropriate. I also view Ms Kennedy's suggested hourly rate of \$120 for Mr O'Sullivan as unreasonable for an in-house advocate.

[10] Taking into account the legal fees incurred before the September 2014 investigation meeting, and a moderate sum in respect of Mr O'Sullivan's time, I find a reasonable contribution to the costs incurred by the Tramways Union to be \$650. Reimbursement of the Authority's filing fee is to be added to that sum.

Determination

[11] Wellington City Transport Limited trading as Go Wellington is to pay the New Zealand Tramways and Public Passenger Transport Union (Inc), Wellington Branch, the sum of \$721.56 as a contribution to the costs it incurred on behalf of Mr Davies.

Trish MacKinnon
Member of the Employment Relations Authority

³ Recently restated in *Dumolo v Lakes District Health Board* [2014] NZEmpC 40 at [43].