

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 187
3009853

BETWEEN BARRY HANLEY
 Applicant

A N D JOHNNY FISHER & PETER
 SUCKLING t/a FISHER
 PAINTERS
 Respondent

Member of Authority: David Appleton

Representatives: Peter Cahill, Advocate for Applicant
 Robert Thompson, Advocate for Respondent

Submissions Received: 10 October 2017 from the respondent
 None from the applicant

Date of Determination: 6 November 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 28 September 2017¹ the Authority declined to grant Mr Hanley leave to raise his personal grievances after the expiry of the statutory 90 day period. I invited the parties to seek to agree how costs were to be dealt with but the parties have been unable to do so.

[2] Submissions on costs were received by the Authority from Mr Thompson on 10 October 2017, but Mr Cahill has been unable to obtain instructions from Mr Hanley, who is in Ireland, and so, understandably, has not provided any. Accordingly, I make this determination having regard to Mr Thompson's submissions alone.

¹ [2017] NZERA Christchurch 166

[3] Mr Thompson submits that there should be an uplift applied to the starting point based on the daily costs tariff that usually applies in the Authority. This is because, Mr Thompson says, Mr Hanley failed:

- a. to comply with timetabling;
- b. to comply with a Notice of Direction with regard to the waiver of legal privilege; and
- c. to provide evidence of a demonstrable case.

[4] Mr Thompson wrote a memorandum to the Authority on 19 September 2017 protesting that Mr Hanley had not produced sufficient information to enable the respondent to understand and properly defend the claims. I agreed with that complaint and directed Mr Hanley to state what exceptional circumstances he relied on to argue that he should be granted leave to raise his grievances outside of the 90 day limit. Mr Thompson chased for a response on 25 September (the day before the Authority's investigation meeting) and Mr Cahill replied that morning, providing the information.

[5] I am not sure that there was a breach of the Notice of Direction with regard to the waiver of legal privilege, as I did not stipulate a date by which Mr Hanley was to communicate that waiver, if he wished to make it. Mr Hanley did serve and lodge his statement of evidence in time.

The legal principles to apply when determining costs in the Authority

[6] The Authority's power to award costs is set out in paragraph 15 of Schedule 2 of the Employment Relations Act 2000 (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.

[7] Mr Thompson referred to the very well-known principles which the Authority must take into account when determining how legal costs and expenses should be dealt with, and which are set out in *PBO Ltd v. Da Cruz*². These principles include the following:

- 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.
- 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.

[8] First, I accept that costs should follow the event, and that the respondent is entitled to a contribution to its costs. Second, I accept that Mr Thompson had to ask for clarity on the scope of Mr Hanley's arguments, which would have incurred an extra cost on the part of the respondent. I accept also that it is just to reflect that extra cost by imposing an uplift on the starting point, based on the daily tariff.

² [2005] 1 ERNZ 808

[9] The investigation meeting lasted 2 hours 40 minutes. This is effectively a third of a full day. The daily tariff for the first day of an investigation meeting is \$4,500. Therefore, the starting point is one third, which would amount to \$1,500. By how much should that be uplifted to reflect the extra work which had to be done by the respondent because of the inadequacy of the initial pleadings and the brief of evidence? I do not accept that an extra \$1,000 should be added, as is requested by Mr Thompson, as that is excessive. I believe that a more just uplift would be to increase the starting point of \$1,500 by \$500 to \$2,000.

Order

[10] I order Mr Hanley to pay the sum of \$2,000 to the respondent as a contribution towards its legal costs in successfully defending his application. This payment is to be paid with 28 days of the date of this determination.

[11] In making this order I recognise that the respondent may not recover this award due to the current whereabouts of Mr Hanley being unknown, together with the fact that he is likely to be residing outside of New Zealand.

David Appleton
Member, Employment Relations Authority