

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 198
3022896**

BETWEEN JULIO RIBEIRO
Applicant

AND PINE HARBOUR LIMITED t/a
FORMOSA GOLF RESORT
Respondent

Member of Authority: Eleanor Robinson
Submissions received: 8 June from Applicant
22 June 18 from Respondent
Determination: 25 June 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] In determination [2018] NZERA Auckland 140 it was determined that the Applicant, Mr Julio Ribeiro, had been unjustifiably dismissed by the Respondent, Pine Harbour Ltd (Pine Harbour) t/a Formosa Golf Resort (Formosa).

[2] In that determination costs had been reserved in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so, and the Applicant has filed submissions in respect of costs.

[3] The matter involved a one day Investigation Meeting.

[4] Mr Kersjes, citing actual costs of \$12,366.63 (inclusive of GST and disbursements), is seeking an uplift of \$3,000.00 in the Authority's usual daily tariff of \$4,500.00 for a 1 day hearing to \$7,500.00.

[5] In support of his claim Mr Kersjes submits that during the Investigation Meeting the Member outlined the main and essential issue for determination, however the Advocate for the Respondent, Ms Moncur, refused to consider this and chose instead to pursue additional lines of enquiry.

[6] It is also submitted that during the investigation, the Member repeatedly warned the Advocate for the Respondent that she was protracting the length of the Investigation Meeting

by her method of presenting her client's case, however this had no effect, and the length of the meeting was thereby unnecessarily protracted.

Principles

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² (*Da Cruz*) as confirmed in *Fagotti v Acme & Co Ltd*.³

[9] It is a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct. However: "*conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award*".⁴

Determination

[10] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. For a one day investigation meeting the tariff would normally equate to \$4,500.00.

[11] Costs normally follow the event and Mr Ribeiro is entitled to a contribution towards its costs.

[12] Just prior to the lunch break on the day of the Investigation Meeting I provided the parties with a verbal indication of the case as requested by the Applicant to assist with the parties' deliberations over the lunch break.

[13] The Respondent, despite this indication, chose to pursue other issues. Whilst this may have protracted the length of the meeting, I fully accept that representatives may choose to follow other lines of witness questioning in their presentation of the case for their clients.

[14] However when advised that I had sufficient information on an issue and it was indicated to proceed to another issue, the Advocate for the Respondent ignored this advice.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2015] NZEmpC 135 at [114]

⁴ *Da Cruz* at [44]

[15] In addition, the Advocate for the Respondent choose to repeatedly interrupt the Authority's duly appointed and sworn Interpreter during the giving of the Respondent witnesses' evidence, ignoring all advice to the effect that she was impeding the giving of that evidence and that she was neither qualified nor unbiased to act as an interpreter herself.

[16] These actions had the effect of seriously impeding the Authority's investigation, and whilst the meeting was concluded within a one day investigation meeting as allocated, they did protracted the Investigation Meeting and result in witnesses, in addition to the Interpreter, becoming unnecessarily further stressed in what is in its very nature an inherently stressful situation for the parties. This required adjournments which impeded the smooth flow of evidence.

[17] Accordingly I consider it appropriate to increase the usual daily tariff amount.

[18] **I order that Pine Harbour pay to Mr Ribeiro the sum of \$5,500.00 costs, pursuant to clause 15 of Schedule 2 of the Act.**

Eleanor Robinson
Member of the Employment Relations Authority