

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 123
3010491

BETWEEN IAN HEINE
Applicant

AND THE CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Peter van Keulen

Representatives: Nicole Ironside, for Applicant
Peter Chemis, for Respondent

Submissions received: 14 June 2018 from the Applicant
28 June 2018 from the Respondent

Determination: 27 August 2018

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

The substantive determination

[1] In a determination dated 11 June 2018, I determined that the Department of Corrections had unjustifiably dismissed Ian Heine. I also determined that Corrections had not acted in an unjustifiable way causing disadvantage to Mr Heine, it had not discriminated against Mr Heine and there was no basis to impose penalties against Corrections.

[2] In my determination, I reserved costs in order to give the parties an opportunity to try and resolve the question of costs. The parties have been unable to agree costs and Mr Heine now seeks costs.

Application for costs

[3] Counsel for Mr Heine says:

- a. Despite not succeeding with all of his claims, Mr Heine was the successful party, primarily because he succeeded in his main claim of unjustified dismissal¹. On the basis that costs should follow the event, I should award costs to Mr Heine.
- b. I should apply the daily tariff to the time spent on the investigation meeting, suggesting a total of \$10,500.00 for two full days and one part day.
- c. There is no basis to reduce the daily tariff and, in particular, any reduction because Mr Heine lost other aspects of his claim, is not appropriate. In fact, there may be a basis for an increase in the daily tariff because of Mr Heine's attempts to settle his claims and Corrections conduct in relation to disclosure issues.
- d. I should award GST on the amount of costs awarded. Mr Heine is unable to recover any GST paid by him on his legal fees and based on the legal principles relating to GST payable on the daily tariff, he should be awarded the GST amount on any order for costs².
- e. I should award disbursements of \$1,027.36 plus GST³.
- f. I should award additional costs of \$1,000.00 plus GST for the preparation of cost submissions as Corrections did not engage in discussions over costs.

[4] Counsel for Corrections says:

- a. Mr Heine was largely unsuccessful; he was only successful on his unjustified dismissal claim and only on a procedural basis, which means on any analysis his success was very limited.

¹ Citing *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 256 and *Weaver v Auckland Council* 2000 NZCA 330.

² Citing *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 159, in support of this proposition.

³ Citing *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 147

- b. In particular, Mr Heine pursued and was unsuccessful with a discrimination claim, which required extensive analysis of the evidence and the law and detailed submissions. This claim was never viable, evidenced by the fact that Mr Heine failed in every aspect of this claim.
- c. And, Mr Heine pursued a disparity of treatment claim, seeking extensive disclosure, which occupied a significant amount of time and resources of counsel, the parties and the Authority, only for Mr Heine to abandon that claim at the end of the investigation meeting.

[5] For these reasons, counsel for Corrections says costs should lie where they fall.

[6] In the alternative, counsel says if Mr Heine is to be awarded costs then the daily tariff should be reduced to reflect these circumstances.

Discussion

[7] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*⁴ and have been affirmed by the Full Court in *Davide Fagotti v. Acme & Co Ltd*⁵.

[8] I have considered the power to award costs and the principles expressed in *Da Cruz*, *Fagotti* and other relevant Employment Court and Court of Appeal decisions⁶, on the approach to be adopted by the Authority on costs.

Successful party

[9] I accept that this is a case where both parties have had a measure of success. However, after applying the guidance from the Employment Court in *William Coomer v JA*

⁴ [2005] 1 ERNZ 808

⁵ [2015] NZEmpC 135

⁶ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305, *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

*McCallum and Son Limited*⁷ and *Best Health Products Limited v Cherie Nee*⁸ I have decided that Mr Heine was the successful party.

[10] Mr Heine's primary complaint was that his dismissal was unjustified. He chose to express this complaint by saying, amongst other things, that the decision to dismiss was based on discrimination including that this was evident by disparity of treatment and the decision to dismiss was not justified. Mr Heine also alleged that his treatment was unjustified and this caused disadvantage to him and finally he alleged various breaches of statutory and contractual obligations owed to him.

[11] A large proportion of the allegations and claims related to the same events, those relating to Mr Heine's compulsory medical retirement, albeit that the legal issues to be considered differed. So at its simplest, despite not succeeding on particular claims, Mr Heine was right in complaining about his dismissal.

[12] Ultimately, Mr Heine was awarded compensation as I found Corrections had not acted justifiably. This is success, albeit limited success compared to what he sought⁹.

[13] I am satisfied that it is appropriate to award costs to Mr Heine, as he was the successful party in this claim.

Daily tariff

[14] Having decided to award costs to Mr Heine, the starting point for quantum is the daily tariff. I can depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a Calderbank offer are more appropriate. There are no such circumstances in this case and the application of the daily tariff is the appropriate course.

[15] I accept counsel for Mr Heine's calculation of the applicable daily tariff rate and the number of days of investigation, so my starting point for the award of costs to Mr Heine is \$10,500.00 for two full days and one part day of investigation.

⁷ [2017] NZEmpC 156

⁸ [2016] NZEmpC 16

⁹ In this regard, Judge Smith's analysis of the Court of Appeal decision in *Weaver v Auckland Council* [2017] NZCA 330 in *Coomer v JA McCallum & Son Limited* is instructive.

[16] I must now consider whether this should be increased or decreased based on the submissions of counsel.

Calderbank offers

[17] I am not satisfied that the Calderbank offer that counsel for Mr Heine has referred to has any impact on the costs in this matter. Mr Heine made offers which he says were reasonable and those offers were not accepted by Corrections. However, Mr Heine did not achieve the same result or better than those offers in my determination (including any costs award I may make now), so Corrections did, on the face of it, reasonably refuse those offers.

Disclosure

[18] There was a large amount of time and resource devoted by both parties to the disclosure of relevant documents. This was largely because counsel for Mr Heine sought documents relating to disparity of treatment.

[19] On reviewing the various requests for documents, the responses and the documents that were actually provided I conclude that there is nothing in the conduct by either party that impacts on the questions of costs.

[20] In summary, counsel for Mr Heine believed certain documents would assist my investigation, particularly into the allegation of disparity of treatment. A wide-ranging request was submitted that required some analysis and discussion but there was nothing untoward in this. Counsel for Corrections was helpful and responsive and I was able to make directions to facilitate the provision of some of the documents requested. The requests were modified and revisited but again I do not find that to be problematic. This was simply one of those cases where, given the nature of the claims, extensive disclosure was required and it took some time to work through that. And I do not believe that either party should pay more or receive less for costs because of this.

Reducing the daily tariff

[21] I am however satisfied that the daily tariff should be reduced to reflect Mr Heine's limited success. To this end, I am persuaded by counsel for Corrections submission regarding

the Employment Court's judgment in *Coomer* and consider it appropriate to reduce the tariff by 40%, to a total of \$6,300.00.

GST

[22] In *Stormont v Peddle Thorp Aitken Limited*¹⁰ Chief Judge Inglis summarised the Employment Court's approach to GST on costs. The Chief Judge referred to the Court of Appeal decision in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*¹¹ and judgments of the Employment Court¹² before summarising the position as follows (at paragraph [37]):

The position in respect of GST can be summarised as follows. The GST registration status of a successful party is a material factor in determining whether or not an uplift is appropriate, whether from scale or otherwise. The plaintiff is not able to recover GST. It is appropriate to take this into account and uplift costs to reflect that.

[23] The Chief Judge then made the following statement on the issue of GST in connection with awards of costs in the Authority (at paragraph [44]):

It appears that the Authority does not tend to take into account a party's ability, or otherwise, to recover 15 per cent of its costs in applying the daily rate. I accept, essentially for the reasons set out above, that there should be an uplift in costs to reflect the plaintiff's GST status in determining a just contribution to costs in the Authority. I see no reason in principle to adopt a different approach in each forum, including having regard to the underlying objectives of the legislation. It is appropriate to take the plaintiff's GST status into account and to uplift costs in the Authority to reflect that.

[24] Applying this, I consider the circumstances of this case make it appropriate to apply an uplift to the daily tariff to reflect the fact that Mr Heine is not registered for GST and he cannot recover the GST amount of his costs. I will uplift the award of costs by 15% to \$7,245.00.

Disbursements

[25] I am satisfied that the disbursements sought by counsel for Mr Heine are disbursements of the kind that can be claimed in the Authority. They are disbursements in

¹⁰ [2017] NZEmpC 159

¹¹ [2016] NZCA 282 at [10], (2016) 23 PRNZ 260.

¹² *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120 and *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10

“the true sense of the term involving the payment of money to a third party.”¹³ I award Mr Heine disbursements in the sum of \$1,027.36 plus GST.

Costs for preparing cost submissions

[26] I am not satisfied that the circumstances giving rise to Mr Heine seeking orders for costs from the Authority warrant an additional award of costs for the preparation of the submissions seeking costs.

Determination

[27] Corrections must pay Mr Heine:

- a. \$7,245.00 as a contribution to the costs he has incurred in this matter.
- b. \$1,027.36 plus GST for disbursements paid in this matter.

Peter van Keulen
Member of the Employment Relations Authority

¹³ *Air New Zealand Limited v Kerr* [2013] NZEmpC 237 at [33].