

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 264
3019131

BETWEEN JAMES HILFORD
 Applicant

AND THE ORDER OF ST JOHN
 NORTHERN REGION TRUST
 BOARD
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Allan Halse, Advocate for Applicant
 Charlotte Parkhill, Counsel for Respondent

Submissions received: 28 June 2018 and 3 July 2018 from Applicant
 21 July 2018 from Respondent

Determination: 21 August 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The Respondent is ordered to pay to the Applicant a total of \$9,821.56 made up of:**
- i) The sum of \$9,750 towards the Applicant's legal costs;**
 - ii) The sum of \$71.56 for the filing fee the Applicant paid to lodge his Statement of Problem.**
- B. Payment of the sum of \$9,821.56 is to be paid within 28 days of the date of this determination.**

Employment Relationship Problem

[1] On 15 June 2018, I issued a determination in which I found Mr Hilford had suffered an unjustified disadvantage to his employment. This arose as a result of the Order of St John Northern Region Trust Board's (St John) failure to provide him with a safe workplace. I also found Mr Hilford had been unjustifiably dismissed. St John was ordered to pay Mr Hilford for lost wages and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions.

[3] On 28 June 2018, I was advised by Memorandum from Mr Hilford's representative that the parties had been unable to resolve costs. Mr Hilford accordingly applied for costs. His application was opposed by St John through a Memorandum of Counsel dated 21 July 2018.

Application for costs

[4] Mr Hilford claims costs in the sum of \$46,254.97. This sum is made up of:

- a) A sum of \$9,259.37 representing the legal costs paid by Mr Hilford to his former solicitor for the period 30 September 2014 to 29 October 2014;
- b) A sum of \$27,245.60 representing the legal costs incurred (but not yet charged) by Mr Hilford's representative. This is for the period from November 2014 to July 2018;
- c) The Authority's daily tariff for a 2.5 day investigation in the sum of \$9,750.

[5] St John submits that an appropriate award of costs is the sum of \$8,121.10. This sum represents the actual costs incurred by Mr Hilford from the time his statement of problem was prepared by his representative.

Authority's Approach to Costs

[6] The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority considers reasonable.¹ The principles applying to costs are well settled and do not require repeating.²

[7] Recently in *Booth v Big Kahuna Holdings Limited*³ Judge Inglis wrote:

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

[8] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting. For each subsequent day of an investigation meeting the Authority's normal daily tariff is \$3,500.00⁴. The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

Should the daily tariff be adjusted?

[9] The investigation meeting took place over 2.25 days. Taking into account the written submissions filed by the parties thereafter, the starting point is 2.5 days. Using the normal daily tariff this equals a sum of \$9,750.

Upward?

[10] Having considered both parties' submissions, I am satisfied that the daily tariff should not be adjusted upwards.

[11] While I appreciate Mr Hilford has suffered from extreme distress and anxiety, he has already been adequately compensated for this. This is not a reason for the Authority to award increased or indemnity costs.

¹ Employment Relations Act 2000, Schedule 2 clause 14.

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

³ [2015] NZEmpC

⁴ Practice Note 2, Costs in the Employment Relations Authority

[12] St John has not acted in a manner that justifies an increase in the daily tariff or indemnity costs. I am aware of no conduct on the part of St John during the investigation process that unnecessarily increased Mr Hilford's costs or required work outside of the normal course required and taken into account by the Authority in setting its daily tariff. There were no delays in progression of the investigation, no misconduct on the part of St John and I am not aware of any Calderbank offer.

Downwards?

[13] I am also satisfied that the daily tariff should not be adjusted downwards.

[14] It is artificial for St John to argue that costs should only be taken from the time when Mr Hilford's statement of problem was prepared. A reasonable time must be allowed for attendances prior to that date for the taking of instructions by Mr Hilford's representative.

[15] Having reviewed the time records provided by Mr Hilford's representative I am satisfied that Mr Hilford has reasonably incurred costs equalling the daily tariff.

Determination

[16] St John is ordered to pay to Mr Hilford the sum of \$9,750 towards his legal costs. In addition, it is ordered to pay him a sum of \$71.56 being the Authority's filing fee. These sums must be paid within 28 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority