

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 48  
5624155

BETWEEN                      KERRY COLLINS  
Applicant

A N D                              CHIEF EXECUTIVE OF THE  
MINISTRY OF SOCIAL  
DEVELOPMENT  
Respondent

Member of Authority:        Helen Doyle

Representatives:              Andrew McKenzie, Counsel for Applicant  
Hamish Kynaston, Emma Rose Luxton and Inna  
Zadorozhnaya, Counsel for Respondent

Submissions Received:        29 March 2018 from Applicant  
21 February 2018 from Respondent

Date of Determination:        18 April 2018

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**A        Kerry Collins is to pay to the Chief Executive of the Ministry of  
Social Development costs in the sum of \$8000.**

**Employment relationship problem**

[1]        In its determination dated 25 January 2018 the Authority found in favour of the respondent that a final written warning issued to the applicant was justified. It reserved the issue of costs.

[2]        Submissions have now been received from both parties and the Authority will proceed to determine the issue of costs.

[3] The respondent seeks costs of \$8,000 based on the Authority's notional daily rates for a two day investigation meeting together with uplift as the Authority deems reasonable to reflect its successful defence and significant expenses incurred.

[4] The respondent's actual costs are \$29,160 plus GST. The respondent refers to attempts to resolve the matter with two separate mediations and two "Calderbank" offers.

### **The applicant's submissions**

[5] Mr McKenzie submits that a notional starting point of \$8,000 is appropriate but that rather than an uplift, a discounting is required. He takes no issue with the quantum of actual costs incurred by the respondent but says that the case is one that could have been dealt with by in-house counsel. Mr McKenzie refers to the judgment of the full Court of the Employment Court in *PBO Limited v De Cruz*.<sup>1</sup> In that judgment the Employment Court identified appropriate principles relevant to the Authority in determining an appropriate cost award. One of these was that awards will be modest.<sup>2</sup>

[6] Mr McKenzie submits a total cost award of \$4,000 to the respondent is appropriate with \$2,000 being paid in a lump sum and the remaining \$2,000 paid in instalments over the following 12 months. He submits that there are several factors that justify a reduction from the sum of \$8,000 and these are set out below.

#### *Test case*

- (a) Mr McKenzie submits that there were elements of a test case about the right of NUPE to represent its members in the respondent's internal fraud investigation which is a previously undetermined issue of benefit to the parties particularly the respondent. It is on that basis Mr McKenzie submits that NUPE is offering \$2000 as a lump sum towards costs.

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<sup>1</sup> *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

<sup>2</sup> *PBO v Da Cruz* above n 1 at [44]

*Ability to pay*

- (b) Mr McKenzie submits that the applicant is unable to pay a cost award other than by instalments because of her financial position.

*Ongoing relationship of the parties*

- (c) Mr McKenzie submits that the ongoing relationship of the parties and the union with the respondent is a factor that militates against an award of costs.

*Partial success*

- (d) Mr McKenzie submits that there were aspects of the case where the applicant was able to demonstrate some unfairness, although not sufficiently serious to render the warning unjustified.

*Suspension*

- (e) Mr McKenzie submits that a factor which can properly be brought into consideration for costs is the suspension, although he recognises that the raising of this as a personal grievance was out of time.

*Responsible litigation*

- (f) Mr McKenzie also submits that the applicant pursued her claim with appropriate caution and withdrew components of the claim before hearing where it was unlikely to succeed, such as the out of time suspension grievance. Further, that her evidence was concise and didn't stray from central issues.

[7] In relation to the "without prejudice" offers Mr McKenzie submits that they came at the last minute when costs had already been substantially incurred and that the parties had prepared and re-prepared for the hearing and aspects of the case were worthy of determination beyond the specifics. Further, he submits that the respondent did not include a withdrawal of the warning or any similar component of vindication.

[8] Mr McKenzie submits that recognising the test case aspect of the case NUPE proposes to pay \$2,000 of any cost award forthwith and that the balance should be met in weekly payments over 12 months from the date of determination.

### **Determination**

[9] The administration file confirms the date the original statement of problem was lodged with the Authority was on 6 May 2016. The parties were then referred to mediation. An amended statement of problem was lodged on 6 January 2017. Dates set for investigation meetings in July and August 2017 were vacated for appropriate reasons that I do not need to set out here. Counsel did not object to the dates being vacated. The matter proceeded to an investigation meeting on 18 and 19 October 2017.

[10] The Authority may under clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act) order any party to pay to any other party such costs and expenses as the Authority thinks reasonable .

[11] The exercise of the discretion to award costs is to be undertaken in accordance with principle and not arbitrarily. Counsel recognise in their respective submissions that the Authority has used a notional daily tariff approach as a starting point in exercising its discretion. The Employment Court in *Da Cruz* did not consider there was anything wrong in principle with such an approach as long as it is not applied in a rigid manner and the Authority has regard to the particular characteristics of the case.<sup>3</sup> A more recent judgment of the full Court of the Employment Court confirmed the value of a commonly applied and well publicised notional daily rate for costs in the Authority.<sup>4</sup>

[12] The daily tariff for matters lodged in the Authority prior to 1 August 2016 was \$3,500. In a practice note about costs from the Chief of the Authority he confirmed that for matters lodged in the Authority from 1 August 2016 the daily tariff will be \$4,500 for the first day of any matter and \$3,500 for any subsequent day of the same matter.<sup>5</sup>

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<sup>3</sup> *PBO v Da Cruz* above n 1 at [46]

<sup>4</sup> *Fagotti v Acme & Co Limited* [2015] NZEmpC 135, (2015) NZELR 1

<sup>5</sup> Practice Note 2 - James Crichton Chief of the Employment Relations Authority

[13] There was no suggestion that costs should not follow the event. Both counsel agreed that the appropriate starting point in this matter was the notional daily tariff of \$8000 assessed for the two day investigation meeting. As the matter was lodged before 1 August 2016 in accordance with practice note 2 the appropriate starting point is \$7000 being two days at \$3,500 per day.

[14] The respondent seeks an increase to the daily tariff and the applicant a decrease. I will start with considering whether there should be an increase to the daily tariff. The main basis advanced for that was the fact that offers were made in the nature of “Calderbank” offers.

#### *Calderbank offers*

[15] On 9 October 2017 the respondent made a “without prejudice except as to costs” offer to the applicant for payment of a sum of \$2000 under s 123 (1)(c)(i) of the Act and a sum of \$4000 as a contribution towards costs. The offer was accompanied by a settlement agreement and was to remain open until midday on 12 October 2017. The offer was rejected by the applicant.

[16] On 16 October 2017 the respondent made a further “without prejudice except as to costs” offer to the applicant of \$5000 under s 123 (1)(c)(i) and \$5000 for costs. This offer was also accompanied by a settlement agreement and was to remain open until 3pm 17 October 2017. This offer was also rejected by the applicant.

[17] Mr McKenzie in his submission refers to the offers coming at the “last minute” when costs had already been substantially incurred.

[18] I accept that offers were made very close to the investigation meeting and the second offer particularly so. In those circumstances a considerable amount of preparation would have been undertaken on behalf of the applicant and I will weigh that. I do not find the proximity of the second offer to the investigation meeting is fatal to giving the offer any weight at all as it followed the earlier offer and was simply an increase to the amounts offered previously. As both offers were sent to Mr McKenzie I conclude there was opportunity for reflection by both parties.

[19] Mr McKenzie submits that there was no offer to withdraw the warning or other element of vindication as part of the “Calderbank” offer. The remedies sought in the amended statement of problem were a finding that the applicant was

unjustifiably disadvantaged, global compensation in the sum of \$15,000 and any other determination the Authority deemed reasonable. I do not find therefore that matter militates against giving the offers some weight.

[20] Finally Mr McKenzie submits on this matter that whether the union had a right to represent employees in internal fraud investigations is an issue by itself worthy of a determination. I will consider this matter again when I consider whether this could fall within the definition of a test case. The respondent in its statement in reply stated that the applicant's union representative was present at the internal fraud investigation meeting and was recognised by the respondent as the support person for the applicant. I am not persuaded by this matter the offers should not be given any weight..

[21] I find in conclusion that the "Calderbank" offers were clear and it would have been reasonable for the applicant to have accepted one of the offers. Had an offer been accepted then the respondent would not have had to incur the costs of attendance by its legal representatives at a two day investigation meeting. I do however weigh the proximity of the offers to the investigation meeting and the fact that the applicant was completely unsuccessful. I find in the exercise of my discretion an appropriate increase to the daily tariff considering all matters in the round is \$1000. I find no other grounds for an increase to the tariff.

*Decrease to the tariff?*

*Test case*

[22] The matter was lodged as a personal grievance and it was not clear that there was an intention that elements of it were being brought as a test case to be applied to other individuals in similar comparable circumstances. The factually specific claim was that the respondent refused/failed to recognise the applicant's union official as her representative at a meeting held with her. I do not find that this case has the features of a test case where costs may not necessarily follow the event. There is no basis for a decrease to the tariff on the basis that the case has features of a test case.

*Ability to pay*

[23] Mr McKenzie submits that the applicant is unable to pay a cost award other than by instalments because of her financial situation. He set out that further information about those circumstances is available. The Authority has already

provided a considerable extension to the applicant for cost submissions and I am not minded to extend that time further for provision of an affidavit about the applicant's financial position. I am strengthened in that view by the fact that the applicant remains in employment with the respondent. I accept that her circumstances may be such that any award will have to be paid by way of instalment. I am sure the respondent would be amenable to that. The parties can return to the Authority if required.

[24] Aside from noting the above I make no decrease to the daily tariff on the basis of ability to pay.

*Ongoing relationship*

[25] I acknowledge that there is an ongoing relationship between the parties and NUPE and the respondent. In matters where there is a dispute about the interpretation, operation or application of a provision of the collective agreement, the type of matter Mr McKenzie refers to in submissions, costs will often lie where they fall. This was not such a matter where it was clear the result would have wider application and benefit both parties. There was no agreement referred to in submissions that costs would not be sought. I do not make a decrease to the daily tariff on the basis of the ongoing relationship.

*Partial success*

[26] I accept that there were some arguments that required careful consideration advanced on behalf of the applicant. There were some defects to the process but these were found to be minor and did not result in unfair treatment.

[27] The applicant was however unsuccessful and I do not make a decrease to the daily tariff on this basis.

*Unjustifiably suspended*

[28] This grievance was raised out of time and by agreement it was not pursued. It cannot be a factor in an assessment of costs simply on the basis that if pursued it may have had some success.

*Responsible litigation*

[29] I accept that Mr McKenzie made clear at the investigation meeting what the issues were. Some components of the claim were not pursued. No grounds exist to increase costs because of the conduct of the parties. Equally however there are no grounds on this basis to decrease costs. This is a neutral factor in this case.

[30] In conclusion I find in the exercise of my discretion as to costs a fair and reasonable award of costs in favour of the respondent to be the sum of \$8000. As set out earlier the financial position of the applicant may require the award to be paid by way of instalment.

[31] I order Kerry Collins to pay to the Chief Executive of the Ministry of Social Development the sum of \$8000 being costs.

Helen Doyle  
Member of the Employment Relations Authority