

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 84
3026071

BETWEEN MICHAEL NICOL
Applicant

AND CANTERBURY CONCRETE CUTTING
NZ LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Robert Thompson, advocate for the Applicant
John Shingleton, counsel for the Respondent

Submissions Received: 21 December 2018 from the Applicant
24 January 2019 from the Respondent

Date of Determination: 15 February 2019

COST DETERMINATION OF THE AUTHORITY

I order Canterbury Concrete Cutting NZ Limited to pay to Michael Nicol the sum of \$4,500 for costs and \$71.56 being reimbursement of the filing fee.

The substantive determination

[1] The Authority in its determination dated 6 December 2018 upheld the applicant's claim that he was unjustifiably dismissed from his employment and made awards for reimbursement of lost wages and compensation. The Authority ordered the applicant to pay a

penalty for a breach of good faith. Costs were reserved and, in the event that agreement could not be reached, a timetable set for an exchange of submissions.

[2] The Authority has now received submissions from the applicant and respondent as to costs.

The applicant's submissions

[3] Mr Thompson submits that the applicant was successful on all matters. The investigation meeting occupied one day at the Authority and submissions were provided following the hearing.

[4] He submits that there appears no reason not to award the daily tariff and asks that costs be awarded in the sum of \$5,000, being the daily tariff of \$4,500 and a further payment of \$500 to reflect additional work in providing submissions after the investigation meeting, together with the lodgement fee of \$71.56.

The respondent's submissions

[5] The respondent agrees that \$4,500 as the daily tariff should be the starting point. Mr Shingleton submits the Authority has discretion to increase or discount from that point and does not accept that the applicant was completely successful because of the finding of a breach of good faith, the penalty awarded and contribution. He submits that both parties had to incur costs for submissions so that should be a neutral matter.

[6] Mr Shingleton submits that there should be an overall discount of \$1,000 to reflect the adverse findings against the applicant and agrees to costs in the sum of \$3,500.

Determination

[7] The representatives agree that the daily tariff of \$4,500 is the appropriate starting point for a matter lodged in the Authority after 1 August 2016.

[8] In the exercise of the Authority's discretion as to costs the next step is to consider whether there should be an increase or a decrease to that sum.

[9] Mr Shingleton submits that there should be a decrease of \$1000 because of contribution and that the applicant was not completely successful. The Court of Appeal in *White v Auckland District Health Board*¹¹ concluded that the Employment Court was in error when it took into account the appellant's contributory conduct to decline to award costs. It is clear from the judgment that remedies and costs should be treated separately as discrete issues. Therefore contribution should not feature in an assessment of costs.

[10] The other reason Mr Shingleton advances for a decrease is that the applicant was not completely successful. That is because there was a finding that the applicant breached the duty of good faith and was awarded a penalty. There was almost a complete overlap with the evidence about a breach and the evidence about the justification of the dismissal. Costs therefore would have been mainly incurred by the respondent in dealing with the good faith matter in submissions. Before considering making any decrease to the daily tariff I want to reflect on and weigh Mr Thompson's submission for an increase to the daily tariff for preparation of submissions.

[11] Although there were some novel aspects to this claim the law is reasonably well settled about covert recording and the issues around the dismissal were largely factual and reasonably contained. This is supported by the fact that there were 12 witnesses and the evidence was able to be dealt with in a day.

[12] I am not minded to increase the daily tariff in the way proposed by Mr Thompson because of the later lodged submissions. In reaching that position in the exercise of my discretion I also take into account that the applicant was not completely successful because of the finding and award of a penalty for the breach of good faith. On that same basis the costs incurred by the respondent were in the main for submissions and I make no decrease to the daily tariff.

[13] In the exercise of my discretion as to costs I find a fair and reasonable award in all the circumstances to be the sum of \$4,500 together with reimbursement of the filing fee of \$71.56.

¹¹ *White v Auckland District Health Board* [2008] ERNZ 635 at [52]

[14] I order Canterbury Concrete Cutting NZ Limited to pay to Michael Nicol the sum of \$4,500 for costs and \$71.56 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority