

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 378
3045557

BETWEEN MARTYN HORTON
Applicant

A N D ST & CJ BELL LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Allan Tobeck, counsel for the Applicant
Sara Jamieson, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 11 September from the Applicant
18 September from the Respondent

Date of Determination: 21 September 2020

REPLACEMENT COST DETERMINATION OF THE AUTHORITY

The Determination

[1] This costs determination replaces a one issued on 26 August 2020 on the same matter. The reason for this is counsel for Martyn Horton was not adequately served a cost submission by the Authority from ST & CJ Bell’s counsel and thus did not have an opportunity to take instructions and file a submission as to what costs would be appropriate to award. As such, utilising Section 4, Schedule 2 Employment Relations Act 2000 (“the Act”) I have decided to reopen the investigation on the issue of costs and submissions were re-timetabled.

[2] To recap, on 16 January 2020 the Authority issued a determination finding that:

Mr Horton's employment was governed by an employment agreement that contained a valid 90 day trial period clause. His dismissal was effected in a manner consistent with that clause and as a result, he was not unjustifiably dismissed.

Having found that Mr Horton was not unjustifiably dismissed, it is not necessary to consider remedies.

Original submission from ST & CJ Bell Limited

[3] ST & CJ Bell Limited's counsel, Ms Jamieson, briefly submitted that having successfully resisted Mr Horton's unjustified dismissal claim they seek a contribution to costs of \$4,500 (the notional daily tariff). Ms Jamieson provided a further submission pointing out that whilst the investigation meeting did not take a full day, closing submissions were timetabled thereafter and required further legal analysis and that:

... if this had been a case where it was appropriate for parties to present its submissions at the end of evidence, then it would have increased the duration of the investigation to a full day hearing.

Submission from Martyn Horton

[4] Mr Tobeck submitted on his client's behalf that a claim for the daily tariff was not supported by evidence of actual costs incurred or copies of invoices and counsel's hourly rate and that the investigation took half a day.

Costs principles

[5] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Act. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ including: that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.²

¹ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

² Section 160(2) Employment Relations Act 2000.

Assessment

[6] A general principle for a successful party is that costs should 'follow the event' and here ST & CJ Bell Limited were wholly successful on a threshold issue (the existence of a valid and enforceable trial period) that prevented Mr Horton's personal grievance claim proceeding and they are entitled to a contribution to their costs of representation that had to be incurred due to the moderate complexity of the issues involved that Mr Horton's counsel highlighted and had to be re-butted by evidence and legal submissions.

[7] Mr Horton's counsel contested the above premise of complexity and a claim that additional issues were only raised during the investigation meeting. Counsel attempted to persuade that his client's case was consistent with what had been raised during mediation and that the main issue was whether or not an oral agreement being reduced to writing later invalidated the 90 day trial provision of s 67 of the Act.

[8] I reiterate that costs are discretionary and I am persuaded that what counsel for ST & CJ Bell Limited submitted was an acceptance of a daily tariff approach that did not necessitate the production of detailed billing and time records. It should be a well understood principle that the daily tariff is not to reflect actual costs incurred and I deem that it is appropriate to apply it in the circumstances without such detailed evidence if an uplift in costs is not sought.

[9] Dealing with the suggestion that this was a only a half day hearing - the matter went beyond four hours and as the respondent's counsel rightly observed, with timetabled submissions thereafter so if oral submissions had taken place it is likely that a full day's hearing would have occurred and it would be inequitable to round down the daily tariff.

[10] I am not prepared to adjudicate on what occurred or did not occur, during mediation and reiterate that costs are not generally to be used as a reflection of how the parties ran their case otherwise I would have to consider the fact that Mr Horton's case was advanced in an area of well-established law and it failed both on conceptual and factual grounds.

[11] In these circumstances, I consider that the daily tariff should approach should remain undisturbed as no extraordinary circumstances have been brought to my attention that would persuade me otherwise and this was a hearing that took over four hours with additional timetabled submissions and in such circumstances is treated for costs purposes as a full day hearing.

Award

[12] I order Mr Horton to pay ST & CJ Bell Limited the sum of \$4,500.00 as a contribution to their legal costs incurred.

David G Beck
Member of the Employment Relations Authority