

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 86
ARC 105/13**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WAIKATO DISTRICT HEALTH BOARD Plaintiff
AND	SYLVIA ANDERSEN Defendant

Hearing: By written memoranda filed on 5, 21 and 28 May 2014

Appearances: G Peplow, advocate for plaintiff
SF Scott, counsel for defendant

Judgment: 30 May 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This is a challenge to a determination of the Employment Relations Authority issued on 10 December 2013 directing the Waikato District Health Board (the Board) to pay Sylvia Andersen \$3,571.56 towards her legal costs and disbursements, being what the Authority described as its “daily tariff” of \$3,500 plus the Authority filing fee.¹

[2] Ms Andersen had earlier been successful in defeating the Board’s case that she had not raised her personal grievance within time or, alternatively, was not entitled to a grant of leave to do so out of time.

[3] The Board is recorded as not having made any submissions on costs in the Authority.

¹ *Andersen v Waikato District Health Board* [2013] NZERA Auckland 563 [Costs determination].

[4] The Authority's brief determination indicated that Ms Andersen's actual costs of representation had been \$3,450 and that she had paid disbursements (including the Authority filing fee) of \$136.56. The Authority reiterated its earlier criticism of the Board which it said justified an uplift from its usual daily tariff.² It considered that Ms Andersen should not have been put to the expense of establishing that she had raised a timely grievance, saying that "a more practical approach from the respondent Board would have been to deal with the merits of her personal grievance".³

[5] The Board's challenge notes that the sums ordered by the Authority in favour of Ms Andersen amount to 99.58 per cent of her actual costs. It submits that this was unreasonable and inconsistent with "normal costs principles" in that the award was "excessive and punitive". The Board seeks a "reversal" of the Authority's costs' determination.

[6] Mr Peploe for the Board submits that the Authority's investigation meeting occupied about two hours and the Authority considered the contents of one affidavit. He concedes that the Board did not file submissions in response to the opportunity given to it by the Authority on the question of costs. Mr Peploe criticises the Authority's award, in effect one of indemnity costs. He invites the Court to find that the only reasonable conclusion that can be drawn from the Authority's determination is that it was seeking to penalise the Board for its actions by what counsel submitted was "highlighting the legal inadequacies of the original grievance submission" by Ms Andersen. The advocate argues that whilst it may be appropriate to award uplifted costs for a party's actions in defending or initiating legal proceedings, the Authority is only able to do so after proceedings have been commenced and not before such time. No authority is cited for this proposition.

[7] The Board accepts that the daily tariff of \$3,500 was the appropriate starting point for the Authority and, in this case, that should have been \$1,750 in view of the fact that the investigation meeting lasted less than a half-day. Mr Peploe submits that the Board has been criticised unfairly and improperly by the Authority which

² *Andersen v Waikato District Health Board* [2013] NZERA Auckland 386 at [33].

³ Costs determination, above n 1, at [13].

said, in effect, that an employer has a positive obligation to highlight the shortcomings of an employee's imperfect submission of a grievance. Further, he submits that the effect of the Authority's substantive determination (which has not been challenged by the Board) is that a failure to highlight such a deficiency can cure an inadequate response.

[8] Citing what is still the leading case on costs in the Authority, *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, Mr Peplow submitted that the Authority's award was excessive and punitive, and inconsistent with the fifth and ninth principles listed in *Da Cruz* which are as follows:⁴

- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- ...
- That awards will be modest.
- ...

[9] Finally, the Board proposes that if an award of costs is made against it in the Authority, this should be no more than \$1,750.

[10] For the defendant, Mr Scott submits that the Authority, in its substantive determination, concluded that Ms Andersen did everything within her power to raise her personal grievance within the 90 day period and that there was a substantial delay on the part of the Board in producing information requested of it which imposed unnecessary costs on Ms Andersen.

[11] Although neither party has provided it to the Court, their submissions turn, in part, on the Authority's reasoning in its substantive determination issued on 28 August 2013 and I have had regard to this.⁵

[12] The plaintiff is correct that the Authority's award was, in effect, of indemnity costs. It is also correct that it exceeded, by as much again, the "tariff" award for the

⁴ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

⁵ *Andersen v Waikato District Health Board*, above n 2.

time engaged in the investigation meeting, at least if this can be calculated by reference to parts of a day. Was the Authority justified in doing so?

[13] I cannot fault the Authority's reasoning that the Board was badly advised, unwise, and wrong in advancing fully, at a separate investigation meeting, the argument that Ms Andersen should not get the opportunity to have the merits of her grievance examined, rather than engaging with those substantive questions. I do not consider that the Authority's award was either punitive or expressed improperly its disapproval of the Board's conduct. Although more than what might have been awarded in other circumstances, the amount did not constitute a punishment. The Authority's determination reflected its assessment of the Board's conduct which increased costs unnecessarily. In the circumstances, the award was still a modest one. When one reads the Authority's substantive determination on the limitation issue, together with its costs' determination, I consider that its award was warranted and its challenge is dismissed.

[14] Because of the effect of s 183(2) of the Employment Relations Act 2000, I make the same award of costs for the Authority proceedings as it did, \$3,571.56.

[15] Ms Andersen is also entitled to have a contribution to her costs of successfully defending the challenge, which I set at \$750.

GL Colgan
Chief Judge

Judgment signed at 9 am on Friday 30 May 2014