



Kim Leighton  May 28 3 min read

Employers beware, a costs nightmare - by Lawrence Anderson



Through its advocates, Pets In The City sought against former employee Cassandra Jamison an award of indemnity costs, or alternatively a substantial uplift. The total amount sought was \$41,454.42. The parties had not attended an investigation meeting; they were at the final stages of exchanging witness statements and documents.

JAMISON v PETS IN THE CITY MT WELLINGTON LIMITED [2022] NZERA 203

What brought the substantive motions of Ms Jamison's claim to an end was her withdrawal of the proceeding for personal reasons. The determination refers to a previous alteration of the timetable due to a birth of her child prior to the withdrawal.

The determination records that costs attributable to Ms Monsellier and Ms Climo in taking over representation was an amount of \$25,686.77 which was incurred between 1 and 31 March 2022. This work was primarily for production and filing of witness statements.

Prior to Pets In The City incurring these costs, Ms Jamison had made an offer a few months before asking for \$9,000 total, on 25 January 2022. Pets in the city rejected that offer and it is said to have subsequently incurred further costs over twice that figure.

When defending an employer in a matter like this, which was referred by the Member to Ms Jamison's claim being a modest claim, it is in our view in these circumstances difficult to quantify or justify charging an employer such a large amount of money in assisting an employer in production of witness statements alone.

The witness should be responsible for taking ownership of and writing their witness statement. Some assistance from a representative is reasonable. The witness needs to be prepared to be asked questions with reference to their witness statement during an investigation meeting.

I draw a comparison on costs I refer to a case I defended that was settled before the convening of an investigation meeting. I had spent great efforts to assist seven witnesses for an employer with their witness statements and the employer's bundle of documents. My employer client's costs were under \$15,000 including GST. That included everything in the dispute resolution process up to that point, that being letters, mediation, pleadings, witness statement assistance, and a large document bundle.

For this particular case being a claim for indemnity costs or alternatively a substantial uplift that was being sought in considering the daily tariff in preparation for an investigation meeting, Ms Jamison was alleged to have acted in bad faith by:

- Being motivated by an ulterior motive and to do so with wilful disregard.
- Requesting a second mediation.
- Introducing a new witness at a later stage.
- Being unwilling to engage with Pets In The City.
- Unreasonably declining offers to settle.

None of these allegations were upheld by Member Ulrich. There was no reasonable basis to find that Ms Jamison acted in bad faith or that she was improperly motivated in pursuing and later withdrawing her claim.

The Authority's practice note comprehends that costs are dealt with in a way the Authority thinks reasonable. Contribution towards costs will be modest and not intended to punish. In doing so it uses a notional daily tariff as a starting point, \$4,500 for the first day of an investigation meeting, and \$3,500 for subsequent days. The daily tariff is adjusted upward or downward when taking into consideration party conduct that may have caused increase in costs, or where reasonable offers to settle are rejected and not beaten.

The seeking of indemnity costs is where a party seeks the full amount of costs that they have incurred. This is generally not available in New Zealand's courts unless the unsuccessful party has behaved either badly or very unreasonably during the course of the proceedings. This could include where there has been delaying tactics, timetabling breaches, or conduct that results in a party's preparation being unnecessarily duplicated. A clearly hopeless case could possibly meet the threshold for indemnity costs. Late withdrawal certainly is not a ground for indemnity costs.

These principles that apply to costs in the Authority should be well known to representatives. This knowledge should be shared with the client during the process and should be used effectively so that the employer defending a claim can make informed decisions regarding settlement.

Ms Jamison was only liable for \$2,000 to contribute to the costs of Pets in the city.