

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 236
5375360

BETWEEN

JENNIFER KILPATRICK
Applicant

A N D

FLIGHT ATTENDANTS &
RELATED SERVICES (NZ)
ASSOCIATION (FARSA)
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Blair Edwards, Counsel for Respondent

Submissions received: 24 May 2013 from Applicant
9 May 2013 from Respondent

Date of Determination: 10 June 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive decision

[1] The Authority issued its substantive decision on 28 February 2013 as [2013] NZERA Auckland 70. That decision found for the respondent (the Association).

[2] Costs were reserved.

The application for costs

[3] The Association incurred actual costs of \$6,130.75 plus GST and the Association seeks an award of costs from the date of the statement of problem down to the date of determination being \$6,130.75 or in the alternative, costs from the date of the mediation being \$3,879.25.

The response

[4] Ms Kilpatrick's response focuses first on the substance of the dispute that brought her before the Authority in the first place and concludes with observations about her ability to pay. It is apparent from her submissions that she is unemployed, in debt, and impecunious.

Determination

[5] The legal principles associated with the fixing of cost in the Authority are well settled. The Authority has a discretion which it must exercise in accordance with principle, but generally costs follow the event, that is the unsuccessful party is expected to make a contribution to the costs of the successful party. The Authority generally awards costs on a daily tariff approach whereby \$3,500 is the starting point for a days hearing and the Authority moves that figure up or down depending on the particular circumstances of the case and the arguments made by the parties in regard to costs fixing. One of the reasons that the Authority might apply an uplift in the daily rate is the behaviour of the unsuccessful party.

[6] In the present case, it is contended on behalf of the Association that Ms Kilpatrick's claim was, in part anyway, frivolous and certainly that submission is in accordance with the substantive determination of the Authority. There is no possible basis on which Ms Kilpatrick could claim a personal grievance at law against the Association who was not and had never been her employer.

[7] That said, the Authority is obliged to consider Ms Kilpatrick's circumstances. She advises that she is out of work, has debts and is impecunious.

[8] Despite that submission, which the Authority accepts at face value, the parties need to understand that when they embark on litigation, including in the employment jurisdiction, they are embarking upon an exercise which entails risk. The risk is that if they are unsuccessful, the law may require them to make a contribution to the costs incurred of the successful party in resisting their various claims.

[9] This is the position with Ms Kilpatrick. While she may need time to pay, it is unconscionable for her to expect to mount claims against other parties in this jurisdiction and not have an expectation that she will be asked to contribute to the

costs of the other party, reasonably incurred, in resisting claims she has advanced where she is unsuccessful.

Determination

[10] In all the circumstances, and having regard to Ms Kilpatrick's reduced circumstances, the Authority thinks the proper course is to direct that she make a contribution to the costs incurred of the Association in the sum of \$2,500 but that given her reduced circumstances, she should have time to pay that amount off over time.

James Crichton
Member of the Employment Relations Authority