

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2014] NZERA Auckland 3  
5419277**

BETWEEN CINDY BLACK  
Applicant

AND TRISTRAM WHIMP as  
TRUSTEE FOR THE DOME  
TRUST t/a MY FLATPACK  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Judith Moore, Counsel for Applicant  
Tristram Whimp, Advocate for Respondent

Submissions received: 2 December 2013 from Applicant  
17 December 2013 from Respondent

Determination: 8 January 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] By determination [2013] NZERA Auckland 512 the Authority found that the Applicant, Ms Cindy Black, had been unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, Mr Tristram Whimp as Trustee for the Dome Trust t/a Myflatpack (the Dome Trust).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

**Costs**

[3] This matter involved a one day investigation meeting. Ms Moore, on behalf of Ms Black, is seeking full indemnity of costs in the sum of \$3,960.00 (including disbursements of \$485.30 and GST) on the basis that the Authority should award costs for mediation.

[4] Ms Moore submits that had the Dome Trust obtained legal advice and representation at the Mediation attended by the parties, there may have been a negotiated settlement of the

matter due to that advice, and the subsequent costs associated with the Authority Investigation process avoided.

[5] Mr Whimp, on behalf of the Dome Trust, submits that the Dome Trust was unable to appoint legal representation at either mediation or the Authority Investigation due to financial constraints.

### *Principles*

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

#### ***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[7] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>1</sup>.

[8] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup>.

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>4</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[10] It is also a principle that costs are not to be used to punish the unsuccessful party.

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<sup>1</sup> [1996] 2 ERNZ 622

<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> [2005] 1 ERNZ 808

<sup>4</sup> [2001] ERNZ 305

## **Determination**

[11] Ms Moore has submitted that had the Dome Trust been legally represented at the Mediation, the matter may have settled at that point and the costs of the subsequent Investigation Meeting not incurred.

[12] I note that whilst parties may choose to be legally represented at either a mediation or an Authority investigation process, this is entirely a matter for each party. There are no requirements that a party be legally represented.

[13] Mediation is a confidential process and it a matter of public policy that the parties meet their own costs. It is a matter of speculation only whether or not the involvement of legal representation by the Dome Trust would have resulted in a settlement.

[14] I find that there are no circumstances in this case which persuade me that I should depart from the established principle of not awarding costs in respect of mediation.

[15] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day investigation meeting this would normally equate to \$3,500.00.

[16] In determination [2013] NZERA Auckland 512 the amount awarded by the Authority to Ms Black for hurt and humiliation under s 123(1)(c )(i) of the Act had been reduced by 70% on the basis of contributory conduct. To also take that fact into consideration when assessing the level of costs to be awarded I consider would have the effect of further 'punishing' Ms Black, which is not a principle to be used when assessing costs.

[17] The normal rule is that costs follow the event and having considered all of the circumstances, I can see no justification for not making the costs award to Ms Black as the successful party in the proceedings.

[18] Taking the notional daily tariff rate as the starting point, I find that the amount claimed in respect of costs by Ms Black approximates to that amount plus the disbursements incurred by Ms Black.

[19] Accordingly, the Dome Trust is ordered to pay Ms Black the sum of \$3,960.00 (including disbursements of \$485.30 and GST) as costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**