

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 1  
5546635

BETWEEN                      MOIRA BAUER  
   Applicant  
  
A N D                              C B J (NELSON) LIMITED  
   (Formerly known as TOZZETTI  
   2014 LIMITED)  
   Respondent

Member of Authority:        David Appleton  
  
Representatives:              Luke Acland, Counsel for the Applicant  
   Anjela Sharma, Counsel for the Respondent  
  
Submissions Received:        2 December 2015 on behalf of the Applicant  
   None received from the Respondent  
  
Date of Determination:        6 January 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] By way of a determination dated 29 October 2015<sup>1</sup>, the Authority found that Ms Bauer had been unjustifiably constructively dismissed and had suffered an unjustified disadvantage in her employment. Ms Bauer was awarded remedies totalling \$19,015.45 without any deduction for contribution.

[2] The parties have been given an opportunity to agree how costs would be dealt with between them, but have been unable to do so. Mr Acland's costs submissions were received on 2 December 2015, and on 21 December Ms Sharma informed the Authority that the respondent company would not be filing a memorandum in reply, and that the company was no longer trading and has no assets to pay the Authority's awards.

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<sup>1</sup> [2015] NZERA Christchurch 161

[3] It is noted that the respondent company changed its name to C B J (Nelson) Limited on 17 December 2015 but remains on the Companies Office register. Although a new entity was incorporated by Mr Carpenter, the respondent's director, on 30 October 2015 (named Tozzetti Limited) any costs award can only be made against C B J (Nelson) Limited.

[4] Ms Bauer seeks a contribution towards her costs of \$3,500 together with a further \$400.20 in respect of the costs submissions.

### **The law and principles of awarding costs in the Authority**

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

#### ***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.*

[6] The Authority must follow the principles set out in *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808 when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. 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.

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

### **Ms Bauer's submissions**

[7] Mr Acland, on behalf of Ms Bauer, submits that she should be entitled to a further \$400.20 in relation to the costs of arguing that she should be awarded \$3,500 as he had made what was effectively a Calderbank offer to the respondent when seeking to persuade the respondent that \$3,500 was a reasonable sum to pay in respect of her costs.

### **Determination**

[8] First, I accept that Ms Bauer should be awarded costs as she was wholly successful in her claims before the Authority, on the principle that costs follow the event. Second, I accept that the appropriate starting point is the Authority's usual daily tariff approach. Third, I agree that the investigation lasted a full day, and that the current daily tariff of \$3,500 is appropriate. Fourth, although Mr Acland did not produce a breakdown of the costs incurred by Ms Bauer, the sum of \$3,500 seems eminently reasonable, and it is below the sum claimed by Ms Bauer in her legal aid application.

[9] The only other question, therefore, is whether it is appropriate to award an additional \$400.20 in relation to the cost of preparing the costs submissions. The Authority does not usually award costs in relation to the preparation of costs

submissions, but it is not precluded from doing so, provided that there is a principled reason for doing so. Whether Mr Acland's offer to settle costs for \$3,500 was technically a Calderbank offer or not need not be determined. What is clear from the correspondence he adduced is that he attempted to settle costs at a reasonable level, and that he made it clear that, if the offer to do so was not accepted, Ms Bauer would claim the additional costs of having to prepare a costs submission.

[10] There was no substantive reply to Mr Acland's offer to settle costs at \$3,500 (although Ms Sharma did seek clarity more than once about what Ms Bauer's legal grant had been). No reference was made until 21 December to the respondent company no longer trading. On balance, I believe that it is appropriate to award the additional costs sought.

### **Order**

[11] I order that the respondent pay to Ms Bauer, within 14 days of the date of this determination, costs in the sum of \$3,900.20.

David Appleton  
Member of the Employment Relations Authority