

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 262
5623492

BETWEEN MARIA SPILLMAN
Applicant

A N D TANDEM SKYDIVING 2002
LIMITED t/a TAUPO
TANDEM SKYDIVING
Respondent

Member of Authority: TG Tetitaha

Representatives: A Halse, Advocate for Applicant
D MacKinnon, Counsel for Respondent

Investigation Meeting: On the papers

Submissions: 30 August 2017 from Applicant
27 July 2017 from Respondent

Date of Determination: 31 August 2017

COSTS DETERMINATION OF THE AUTHORITY

A. Maria Spillman is ordered to pay Tandem Skydiving 2002 Limited \$9,000 towards its actual legal costs.

Employment relationship problem

[1] The Authority issued two determinations on this matter dated 31 January and 20 July 2017.¹ Both determinations dismissed Ms Spillman's applications for personal grievances, and one also dismissed the breaches of good faith and penalties. Costs were reserved.

[2] The respondent now applies for costs. Its actual costs were in excess of \$25,000 plus GST. It seeks \$15,750 as a contribution to its costs.

¹ *Maria Spillman v Tandem Skydiving 2002 Limited* [2017] NZERA 212; *Maria Spillman v Tandem Skydiving 2002 Limited*[2017] NZERA 25.

What is the starting point for assessing costs?

[3] The Authority has adopted a notional daily tariff based approach to costs.² Matters lodged in the Authority before 1 August 2016 are subject to the daily tariff of \$3,500 for each hearing day. This matter involved a two day investigation meeting. The starting point for assessing costs is therefore \$7,000.

Are there any factors that warrant adjusting the notional daily tariff?

[4] The respondent submits the following factors justifying an increase in the tariff:

- a) Two Calderbank offers –for \$20,056.30 on 24 November 2016 and \$22,556.30 on 2 December 2016 rejected unreasonably; and
- b) Additional costs of attending to preliminary issues.

[5] Ms Spillman submits the following factors as justifying a reduction in costs::

- a) The investigation meeting failed to address serious breaches of employment law and “made a mockery of a process designed to uphold fair and reasonable employment practices”;
- b) Aspects of the statement of problem were overlooked;
- c) Serious breaches of employment law including payment under the minimum wage and not keeping accurate holiday records were dismissed during the investigation and “ironically deemed inadmissible”;
- d) The terms of Ms Spillman’s employment agreement were never enforced during employment;
- e) The respondent admitted to payment under minimum wage and not keeping accurate time or holiday pay records. This was not considered in the investigation or determination;
- f) The applicant is owed money under the Holidays Act 2003;

² *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16].

- g) The respondent unnecessarily delayed matters by seeking the preliminary determination that dismissed some of Ms Spillman's personal grievances and therefore should meet its own costs;
- h) Ms Spillman accepted or alternatively neither accepted nor rejected the offers to settle based upon her correspondence at the time;
- i) She was denied the right to present evidence or to examine her own witness;
and
- j) Ms Spillman has financial constraints. She is currently receiving ACC and is a fulltime student.

Applicants submissions

[6] Costs follow the event and are discretionary. Submissions on costs are not an opportunity to re-litigate matters. Representatives ought to focus their submissions upon the well-known legal tests for costs. Personal viewpoints about the investigation process are both unnecessary and unwarranted.

[7] The majority of Ms Spillman's submissions were irrelevant to costs. For example her stated views about the "mockery" of an investigation process do not assist her defence against an application for costs.

[8] Similarly general allegations Ms Spillman's amended statement of problem "was overlooked" is not a matter for costs.

[9] The submission the breaches of "minimum wage" and not keeping accurate holiday or time records were dismissed and "ironically deemed inadmissible by an Authority given power to enforce fair and reasonable employment standard[s]" is both incorrect and unhelpful in defending a costs determination.

[10] Ms Spillman was found to be a casual employee. It is a consequence of that finding that there was no entitlement to remuneration for her time spent allegedly "on call" between engagements. Therefore she was paid correctly and not in breach of the minimum wage legislation. If Ms Spillman disagrees with this finding, it is a matter for challenge not costs.

[11] Some of the matters complained about were never before the Authority. For example the amended statement of problem does not contain a cause of action of failure to keep accurate holiday records nor did it seek wage arrears under the Holidays Act 2000. Therefore those causes of action could not have been “ironically deemed inadmissible” or dismissed because they were never before the Authority in the first place.

[12] The issue of enforcement of Ms Spillman’s terms and conditions of employment is not an issue for costs. It also appears linked to her view she was a full time worker. This is a matter for challenge of the finding she was a casual employee. It is not a matter for costs.

[13] The respondent did not admit it made payments less than minimum wage or that it kept inaccurate time and/or holiday records. It submitted Ms Spillman was a casual employee, and its wages paid and record keeping was consistent with that. This is again a matter for challenge not costs.

[14] At the investigation meeting, Ms Spillman was offered the opportunity to lead and examine her only witness, Carolin Siedler but she declined to do so. No questions were asked by Authority. Only the respondent sought to cross-examine. At no stage was Ms Spillman prevented from asking questions of Ms Siedler or any other witness. This not a matter for costs.

[15] Financial circumstances are the only issue Ms Spillman raised that are relevant to the assessment of costs. However, as the Courts have repeatedly stated, this must be adequately supported by evidence including evidence as to assets and liabilities, income and expenditure.³ None of this evidence is before me. This matter does not reach the evidential threshold required for any costs reduction.

Respondents submissions

[16] There was an evidential foundation for the respondent to raise time limitation issues about some of the personal grievances. The preliminary determination reduced the amount of hearing time required. There is no basis to allege this was conduct that unnecessarily delayed matters or increased costs.

³ *Lal v The Warehouse Ltd* [2017] NZEmpC 92 at [5].

[17] Preparation and attendances relating to the preliminary issue are encompassed within the notional daily tariff. This matter was dealt with as part of the hearing time. No increase is warranted either.

[18] The only issue that warrants an increase in costs are the offers to settle for substantially more than Ms Spillman achieved at hearing. The offers to settle are reasonable and clear as to their terms.

[19] Ms Spillman rejected the respondent's first settlement offers by counter-offering to settle for \$47,050 plus 5% interest. The respondent then increased its offer. Ms Spillman's correspondence made it clear this offer would never be accepted. This is because she sought to recover fulltime wages, holiday and rest breaks. She also implicitly rejected the offer in continuing to hearing in January 2017.

[20] The Authority has increased its notional daily tariff where a Calderbank offer was unreasonably rejected from adding \$300 to the notional daily tariff⁴ to \$10,000 in total for a two hearing⁵ to uplifting the daily tariff by \$2,000 for a 1 day hearing where two Calderbank offers were unreasonably rejected.⁶

[21] A similar uplift of \$1,000 to the applicable notional daily tariff is warranted here. The first day hearing is uplifted to \$4,500 giving a total of \$9,000 costs.

[22] I have considered the implicit hardship to Ms Spillman in having to meet this costs award. She can apply for payment by instalments but this requires the above supporting financial information to be filed.

[23] Maria Spillman is ordered to pay Tandem Skydiving 2000 Limited \$9,000 towards its actual legal costs.

TG Tetitaha
Member of the Employment Relations Authority

⁴ *Whaiapu v P & W Painters Ltd* [2017] NZERA Christchurch 72.

⁵ *Zhao v Multimarketing Ltd* [2017] NZERA Auckland 121.

⁶ *Online Contractors Ltd v Wetere* [2017] NZERA Auckland 63.