

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 274
3000412

BETWEEN MARGARET JOYCE FREE
Applicant

AND SHELF COMPANY NO 5
LIMITED (FORMALLY GK
ACCOUNTING (COUNTIES)
LIMITED)
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: M Nutsford, Advocate for Applicant
K Gould, Counsel for Respondent

Costs Submissions received: 15 August 2017 from Applicant
No submissions received from Respondent

Determination: 11 September 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. The Respondent is ordered to pay to the Applicant a total of \$4,776.01 made up of:**
- i) The sum of \$4,500.00 towards the Applicant's legal costs;**
 - ii) The sum of \$204.45 being the cost of reinstating the Respondent to the Company Register.**
 - iii) The sum of \$71.56 for the filing fee the Applicant paid to lodge her claim.**
- B. Payment of the sum of \$4,776.01 is to be paid within 14 days of the date of this determination.**

Employment Relationship Problem

[1] On 8 August 2017, I issued a determination in which I found Shelf Company No 5 Limited (formally GK Accounting (Counties) Limited (GK Counties)) breached the record of settlement between the parties. GK Counties was ordered to comply with the record of settlement and to pay a penalty.

[2] I reserved costs and set a timetable for submissions. The parties were encouraged to resolve costs by agreement. If that was not possible, then Ms Free had seven days to file a costs memorandum. GK Counties then had a further seven days to file its costs memorandum.

[3] On 15 August 2017 Mr Nutsford filed submissions on behalf of Ms Free. He submits he made contact with Mr Gould, following receipt of the determination, in an attempt to resolve agreement on costs. He submits Mr Gould agreed to take instructions and to revert back to him but this has not occurred. The Authority has not received any costs submissions from GK Counties.

The Application for Costs

[4] Ms Free claims \$9,000.00 towards the costs she has had to pay to her Advocate. She further claims a fee of \$204.45 being the cost of reinstating GK Counties to the Company Register and the Authority's filing fee of \$71.56.

Applicable Legal Principles

[5] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act. This confers a wide discretion on the Authority to award costs on a principled basis.

[6] The principles to be applied by the Authority are well settled. They are outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.¹ These principles were affirmed by the Employment Court in *Fagotti v Acme & Co Limited*.²

[7] Costs principles include:

¹ [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

² [2015] NZEmpC 135

- a) A discretion on whether to award costs and if so what amount.
- b) The discretion must be exercised in accordance with principle and not arbitrarily.
- c) The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d) Equity and good conscience must be considered on a case-by-case basis.
- e) Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct that 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) Without prejudice' offers can be taken into account.
- h) Awards of costs will be modest, and must be reasonable.
- i) Frequently costs are judged against a notional daily rate.
- j) Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k) The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[8] Recently in *Booth v Big Kahuna Holdings Limited*³ Judge Inglis wrote:

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

³ [2015] NZEmpC

Applicant's Submissions

[9] Mr Nutsford submits he has charged Ms Free a sum of \$9,577.76 including GST. In addition, he submits Ms Free has incurred costs of \$204.45 being the cost to make an application to the companies' office. Evidence was produced to establish these charges. Lastly, Mr Nutsford submits Ms Free has lost 65 hours of worktime which equates to a sum of \$10,400.00.

[10] Mr Nutsford submits the Authority should apply its daily tariff multiplied by two days. He mistakenly submits that the daily tariff is \$4,500.00 per day. \$4,500.00 only applies for the first day of an investigation meeting. For each subsequent day of an investigation meeting the Authority's normal daily tariff is \$3,500.00.⁴

Findings on costs and other claims

[11] I have taken into account the applicable law as well as Mr Nutsford's submissions. The case was not overly complex and required little input from Mr Nutsford during the investigation itself. I agree with Mr Nutsford that the daily tariff should apply.

[12] I have recorded in my minute book that the first day of the investigation took place from 10.00am to 1.45pm and the second day from 10.00am to 12.50pm. Combined this equates to one full day.

[13] Applying the tariff I find a sum of \$4,500.00 is payable by GK Counties to Ms Free. This is a reasonable contribution towards her costs. I do not consider an uplift for the costs memorandum to be reasonable.

[14] The Applicant was required to apply to the companies' office to reinstate GK Counties to the company register. The cost to do this was \$204.45. I find this sum was reasonably incurred and is payable by GK Counties. The filing fee paid by Ms Free on lodgement of the Statement of Problem is also payable by GK Counties.

[15] I do not accept Ms Free's claim for lost worktime is recoverable from GK Counties. The time Ms Free spent on preparing her witness statement was an ordinary consequence of these proceedings.

⁴ Practice Note 2, Costs in the Employment Relations Authority

Determination

[16] GK Counties is ordered to pay to Ms Free a total of \$4,500.00 towards Ms Free's legal costs. In addition, it is ordered to pay Ms Free a sum of \$204.45 being the cost of reinstating GK Counties to the Company Register and the sum of \$71.56 being the Authority's filing fee. These sums are payable within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority