

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 638
3050332

BETWEEN ELIZABETH WILSON
 Applicant

AND ORANGA TAMARIKI
 – MINISTRY FOR CHILDREN
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
 June Hardacre, Counsel for the Respondent

Submissions and
additional documentation 18 October 2019 from the Applicant
received: 17 October 2019 from the Respondent

Date of Determination: 27 November 2019

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 4 October 2019 I issued a determination in which I found Elizabeth Wilson had not suffered an unjustified disadvantage to her employment with The Chief Executive, Oranga Tamariki – Ministry for Children (Ministry).

[2] Costs were reserved with the parties being encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions.

Authority's Approach to Costs

[3] The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority considers reasonable.¹

[4] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs.² These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.³ The principles 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 is 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 increases 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) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- 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.

¹ Employment Relations Act 2000, Schedule 2 clause 14.

² *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

³ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

[5] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500 for the second day.⁴ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[6] This matter took place over two days. The starting point for consideration of costs is therefore \$8,000. This is the sum sought by the Ministry.

[7] Ms Wilson did not respond to the Ministry's application for legal costs other than to ask the Authority for compassion due to "serious financial harm".

Should the daily tariff be adjusted?

[8] I am satisfied that no adjustment to the daily tariff should be made. An award of the daily tariff is fair and reasonable taking into account:

- a) The legal fees expended by the Ministry - The Ministry provided the Authority with a copy of its invoices for legal fees. The combined total of these invoices were more than four times that for which they are claiming recovery. The Ministry's decision to only pursue recovery of the daily tariff is appropriate given the on-going employment relationship and the forum for which it appeared. As stated by Chief Judge Inglis in *Booth v Big Kahuna Holdings Limited*:⁵

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 particularly 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 ...

- b) The attendances that the Ministry was required to undertake. These include attendances in relation to the preparation of witness statements for its six witnesses, preparation of legal submissions, and preparation for and attendance at the two-day investigation meeting.

⁴ Practice Note 2, Costs in the Employment Relations Authority.

⁵ [2015] NZEmpC.

- c) There was no evidence that the Ministry caused the Applicant to incur unwarranted legal expense.
- d) The Ministry was successful on all accounts.

Outcome

[9] Ms Wilson is ordered to pay the Ministry the sum of \$8,000 towards its legal costs. This sum must be paid within 28 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority