

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 517
3047072

BETWEEN DAWN LANGDON
Applicant

AND MIKE PINK TRADING AS
JUNCTION HOTEL
Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, counsel for Applicant
Mike Pink, self –represented

Submissions received: 6 August 2019 from Applicant
No submissions from Respondent

Determination: 2 September 2019

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A I order Mike Pink trading as Junction Hotel to pay to Dawn Langdon the sum of \$1,425 costs and reimbursement of \$71.56 being the filing fee.

Substantive determination

[1] The Authority in a written determination dated 23 July 2019 found that the applicant was unjustifiably disadvantaged in employment and unjustifiably constructively dismissed

and remedies followed.¹ Costs were reserved and a timetable set for an exchange of submissions. The Authority received submissions in accordance with the timetable from Ms Sharma on behalf of the applicant. The respondent did not provide submissions by 20 August 2019 as timetabled or indeed after that date although I am satisfied that he was served with a copy of Ms Sharma's submission.

[2] The Authority intends to proceed to determine the issue of costs.

[3] Ms Sharma did not attend the Authority investigation meeting however was involved in the lodgement of proceedings on behalf of the applicant, communication thereafter with the Authority, attendance at a case management conference with the Authority in January 2019 and preparation of a statement of evidence.

The applicant's submissions

[4] Ms Sharma in her submissions refers to the power the Authority has to award costs in clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act). She recognises that the Authority may exercise its discretion in clause 15 (1) to order any party to pay any other party costs and expenses. Ms Sharma confirms there were no settlement offers for consideration and says this was because the applicant was not confident this would be a "fruitful pathway" because of the respondent's approach to proceedings.

[5] Ms Sharma says that there was no initial agreement to mediation and then when a date was agreed by the respondent he declined to attend. Proceedings were therefore lodged. A statement in reply was lodged only after enquiry and then in an email letter form. Ms Sharma attended a case management conference with the Authority. She submitted that the respondent indicated his intention not to participate in the conference but said that he would attend an investigation meeting when notified of the dates.

[6] Costs were then incurred to meet the timetable for an exchange of evidence and preparation for the investigation meeting. Ms Sharma submits that the applicant continued to incur legal costs right up until the investigation meeting. Ms Sharma submits that any cost award should be uplifted to reflect there was no opportunity to mediate the issues and this in turn increased the legal costs for the applicant and she had to lodge proceedings. Ms Sharma

¹ [2019] NZERA 438

seeks uplift to the equivalent of a full day of hearing in the sum of \$4,500 together with GST and the reimbursement of the filing fee in the sum of \$71.56.

Analysis and conclusions

[7] The leading case on costs in the Authority is the judgment of the full Court of the Employment Court in *PBO v Da Cruz*.² It was recognised in *PBO* that the Authority is able to set its own procedure and that it has held to some basic tenets when considering costs. These include that there is discretion as to whether costs will be awarded and in what amount. The discretion should be exercised in accordance with principle and not arbitrarily. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority and equity and good conscience is to be considered on a case by case basis. Costs are not to be used as a punishment or an expression of disapproval and costs generally follow the event. Frequently costs are judged against a notional daily rate set for current matters at \$4,500 per day for the first day and \$3,500 for each subsequent day

[8] In the exercise of its discretion as to costs the Authority considers costs on the basis of a contribution to actual costs incurred. The applicant did not incur legal costs for the investigation meeting as she attended without her representative. The focus for the Authority in exercising its discretion should be on a contribution towards the actual costs incurred up to but not including the investigation meeting.

[9] In terms of any assessment of costs there were legal costs incurred in attempting to arrange mediation, lodging a statement of problem, communication with the Authority, attendance on a case management conference and preparation of a statement of evidence up to the date of investigation. The respondent did not lodge a statement of evidence so there was no cost involved with perusal of that. There were no submissions lodged after the investigation meeting. Ms Sharma became involved again with attempting to resolve costs.

[10] Taking those factors into account I have undertaken the following assessment as to costs in the exercise of my discretion. If the applicant had been represented at the investigation meeting a half day award for a meeting of that length, on the basis of the notional daily tariff, would have been the appropriate starting point in the sum of \$2,250. In

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808

all probability I may have inflated the award on a modest basis recognising that because the respondent did not attend mediation or engage otherwise in any meaningful way this resulted in some additional legal costs.

[11] There were no legal costs incurred by the applicant at the investigation meeting itself but there were legal costs incurred up to the point of the investigation meeting. I find that a fair and reasonable award is half of \$2,250 for preparation to the point of the investigation meeting with an increase of \$300 because of the respondent's failure and reluctance to engage or attend mediation.

[12] In all the circumstances I find that a fair uplift and award of costs is the sum of \$1,425.

GST

[13] Ms Sharma seeks a further uplift for GST as the applicant is not personally registered and therefore cannot recover the GST amount of her costs.

[14] The Authority exercises its discretion as to costs on the basis that the daily tariff it has set is an all-inclusive GST neutral figure. Therefore I do not intend to make uplift on that basis. It is however appropriate to make an order for reimbursement of the filing fee of \$71.56.

Order made

[15] I order Mike Pink T/A Junction Hotel to pay to Dawn Langdon the sum of \$1,425 being costs and \$71.56 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority