

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 462
3030192

BETWEEN TANIA MILLER
 Applicant

AND KIWI ELDERLY CARE LIMITED
 TRADING AS KIMBERLEY
 REST HOME
 Respondent

Member of Authority: Helen Doyle

Representatives: Jock Lawrie, counsel for Applicant
 Rebecca Scott, counsel for Respondent

Submissions received: 26 June and 1 August 2019 from Applicant
 11 July 2019 from Respondent

Determination: 6 August 2019

COSTS DETERMINATION OF THE AUTHORITY

A I order Kiwi Elderly Care Limited trading as Kimberley Rest Home to pay to Tania Miller the sum of \$2340 being costs and \$71.56 being reimbursement of the filing fee.

Substantive Determination

[1] The Authority in its determination dated 13 June 2019 found that the applicant was unjustifiably dismissed and awarded remedies.¹

¹ *Miller v Kiwi Elderly Care Limited trading as Kimberley Rest Home* [2019] NZERA 349

[2] Costs were reserved and submissions received from Mr Lawrie and Ms Scott on behalf of the applicant and respondent.

The applicant's submissions

[3] The applicant seeks costs of \$4,500 on the basis of the daily tariff. Mr Lawrie submits there was no behaviour on the part of the successful party to create unnecessarily incurred costs and that the investigation meeting took the best part of a full day's hearing.

[4] He refers to work undertaken on the applicant's behalf including two written briefs of evidence and preparation of a bundle and supplementary bundle of documents. Written submissions were presented at the close of the investigation meeting.

[5] Mr Lawrie, when asked by the Authority, advised that no hourly rate is set for him as in-house counsel for the New Zealand Nurses Organisation (NZNO). The NZNO is a membership organisation and members are not charged for legal representation. He noted that it was the practice of NZNO as part of the membership service it provides to indemnify members for any cost award that may be made against them or alternatively retain any award made in their favour to offset costs incurred as part of the member's representation.

[6] He refers the Authority to the Employment Court judgment in *O'Malley v Vision Aluminium Ltd (No 3)*² and a principle that unions may be compensated for their representation of their members notwithstanding they are not party to the proceedings.

The respondent's submissions

[7] Ms Scott on behalf of the respondent opposes an award of costs on the grounds that there is no evidence that the applicant incurred any legal costs.

[8] She submits that costs should only be awarded where they have been actually incurred relying on a Supreme Court judgment.³

² *O'Malley v Vision Aluminium Ltd (No 3)* [1992] 2 ERNZ at 1043

³ *McGuire v Secretary for Justice* [2018] NZSC 116 at [71] to [72].

[9] Ms Scott refers to the Authority determination in *Graham v Airways Corporation New Zealand Limited*⁴ where the Authority said when determining any question of costs:

- (a) First consider the actual legal costs and the associated expenses of the party entitled to costs;
- (b) Next consider if the expenditure was reasonably incurred, and if not, what proportion of the costs was reasonable; and
- (c) Then consider what amount would be a fair contribution to the cost reasonably incurred.

[10] She submits that it is important that an application for costs is supported by material such as copies of invoices showing fees or other expenses that have been incurred, the time taken by the practitioner and the relevant hourly rate. She noted the absence of this information and submits that Mr Lawrie is an employment lawyer employed by NZNO and provides legal services to members without charge.

[11] Ms Scott submits that an award of costs to the applicant who has suffered no expense would result in an unjustified windfall to her and would be contrary to a core principal of costs that they can only be recovered when actually incurred.

[12] The respondent submits that costs should lie where they fall.

Analysis and conclusion

[13] Ms Scott directed the Authority to certain paragraphs in the Supreme Court judgment in *McGuire v Secretary for Justice*⁵ about the judgment of the Court of Appeal in *Joint Action Funding Ltd v Eichelbaum*.⁶ The Court of Appeal in *Joint Action Funding*⁷ construed High Court rule 14.2(1)(f) to limit costs to those “actually incurred” and a consequence of that being a lawyer acting in person would not be entitled to costs.

[14] Ultimately the Supreme Court in *McGuire* concluded that *Joint Action Funding* was wrongly decided although any reform should be by the legislature or the Rules Committee. In

⁴ *Graham v Airways Corporation New Zealand Limited* (2004) 7 NZELC 97, 421

⁵ Above n 3

⁶ *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 270

⁷ Above n 5 at [71] and [72]

the meantime the Supreme Court stated the primary rule, the lawyer in person exception and the employment lawyer rule are to be applied.⁸

[15] The Authority has its own costs regime. Clause 15 of the second schedule to the Employment Relations Act 2000 (the Act) provides that the Authority may order any party to a matter to pay to any other party such costs and expenses as it thinks fit.

[16] The leading case on costs in the Authority is the Full Court of the Employment Court judgment in *PBO v Da Cruz*.⁹ *PBO* followed the *Graham*¹⁰ determination. It was recognised in *PBO* that the Authority is able to set its own procedure and had 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. Further that the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority and that equity and good conscience is to be considered on a case by case basis. Costs are not to be used as a punishment or expression of disapproval and costs generally follow the event. Frequently costs are judged against a notional daily rate set for current matters at the moment at \$4,500 per day for the first day and \$3,500 for each subsequent day.

[17] The Employment Court in *O'Malley v Vision Aluminium Ltd (No 3)*¹¹ found that a union that had met the legal costs of representation for its members was not precluded in equity and good conscience from an award of costs even though the union was not a party to the proceedings. Weight was placed in the judgment on the recognition that the union would reimburse its member in the proceedings for any orders made against him in favour of the employer. The approach on the basis of equity and good conscience was subsequently approved by the Full Court of the Employment Court in *Unkovich v Air NZ Ltd*.¹²

[18] The applicant was the successful party. In line with *O'Malley*¹³ I do not find that the fact NZNO has met her costs of legal representation precludes in equity and good conscience an award of costs being made. I do not therefore agree with Ms Scott that costs should lie where they fall.

⁸ Above n5 at [88]

⁹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808

¹⁰ Above n 4

¹¹ *O'Malley v Vision Aluminium Ltd (No 3)* [1992] 2 ERNZ 1043

¹² *Unkovich v Air NZ Ltd* [1995] 1 ERNZ 336 at 340

¹³ Above n10

[19] Mr Lawrie does not have an hourly rate but as a salaried employee of NZNO there can be no question he has spent time on the applicant's matter both in preparation and representation at the Authority investigation meeting. Spending time on this matter has diverted him away from other work. I do need to reflect in any award the fact that Mr Lawrie is an in-house lawyer employed by NZNO. In the exercise of my discretion therefore I have taken a nominal hourly rate of \$250 and adjusted to \$180 per hour to reflect this. I note that in the *O'Malley* case the in-house counsel considered an appropriate rate was \$110 and the Judge agreed. Given the considerable passage of time since that case was decided in 1992 I find the adjusted rate of \$180 both fair and reasonable and reflective of the experience of Mr Lawrie as counsel.

[20] The investigation meeting took place from 9.30am to 3.37pm with almost a full hour for lunch. That is a period of five hours. It would be fair and reasonable in the exercise of my discretion to additionally allow for a further eight hours of work for preparation. Thirteen hours multiplied by \$180 is the sum of \$2340. There should also be an order for reimbursement of the filing fee of \$71.56.

[21] I order Kiwi Elderly Care Limited trading as Kimberley Rest Home to pay to Tania Miller the sum of \$2340 as costs and \$71.56 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority