

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 336
3023017

BETWEEN	Yvonne Desmond Applicant
AND	Association of Salaried Medical Specialists Respondent

Member of Authority: Trish MacKinnon

Representatives: Paul McBride, counsel for Applicant
Peter Cranney, counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 6 June 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 28 September 2018 I dismissed Ms Desmond's claims to have been unjustifiably disadvantaged by actions of her employer and to have been constructively dismissed. I reserved the issue of costs.

[2] The Association of Salaried Medical Specialists (ASMS or the Association) now seeks an award of costs against Ms Desmond. It asks the Authority to award \$8,000 as a contribution to its costs.

[3] Ms Desmond submits costs should lie where they fall as she does not have the means to pay. She refers to her financial situation, health and associated consequences of the events

leading to her departure from the Association as factors the Authority should take into account when determining this matter.

[4] Through counsel, Ms Desmond submits that, following the loss of her longstanding employment with ASMS, she has secured some part-time work only and her circumstances are such that even a lower award of costs against her than that sought by the Association would require substantial time for her to pay.

[5] As evidence of her financial situation, Ms Desmond has provided an unnamed, unsigned, undated portion of a Statement of Means document used in the District Court criminal jurisdiction. This purportedly contains details of her income and expenses.

[6] The Association describes Ms Desmond's claims about her financial situation as problematic and incorrect. It notes she had many years of very high paying employment with ASMS, one of the benefits of which included a superannuation scheme to which the Association had contributed substantially over 22 years.

Applicable law

[7] The Authority has the discretionary power to order any party to a matter to pay to any other party such costs and expenses as the Authority thinks reasonable.¹ The discretion is to be exercised in accordance with principle, and not arbitrarily.

[8] The principles that are applicable to an award of costs in the Authority were identified in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*.² The Full Court of the Employment Court re-examined those principles 10 years later and confirmed they were still appropriate and applicable to costs awards in the Authority.³

[9] The principles are well established and need not be repeated in full here. They include that costs generally follow the event, which normally results in the successful party being entitled to a reasonable contribution to its costs from the unsuccessful party.

¹ Schedule 2, clause 15 of the Employment Relations Act 2000.

² [2005] 1ERNZ 808.

³ *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

[10] Costs for each case are considered in the light of the particular circumstances. They are to be modest and are frequently judged against a notional daily tariff. Where a party's conduct has increased costs unnecessarily, that may be taken into account in the award made. However, costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.

Should costs be awarded?

[11] I find no reason in this instance to diverge from the principle that costs follow the event. The claims Ms Desmond brought against her employer were wholly unsuccessful. It is reasonable that she contribute to the costs incurred by ASMS in successfully defending those claims. This is not a situation where the circumstances dictate, or even strongly suggest, costs should lie where they fall.

[12] Nor, in the absence of any supporting information or evidence, do I accept the submission that I should take into account factors such as "health and associated consequences of the events" for Ms Desmond, which were alluded to as having been, and continuing to be, immense.

[13] I am not persuaded by the partial and incomplete statement of means form submitted by, or on behalf of, Ms Desmond that she does not have the means to contribute to the Association's costs.

[14] The Authority operates a notional daily tariff which is \$4,500 for the first day of an Authority hearing, and \$3,500 for the second and subsequent days. In this instance Ms Desmond's claims were heard over two full days and the amount sought by ASMS as a contribution to its costs represents the Authority's notional daily tariff for that period.

[15] I find the Association's request for costs to be reasonable and moderate. Having rejected Ms Desmond's submissions regarding the appropriateness of a lesser, or no, award of costs, I find there is no good reason for awarding any more or any less than the daily tariff.

Order

[16] I order Ms Desmond to pay the Association of Salaried Medical Specialists the sum of \$8,000 as a contribution to the costs it incurred in successfully defending her claims.

Trish MacKinnon
Member of the Employment Relations Authority