

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2022] NZERA 344
3142505

BETWEEN JANE WYLES
Applicant

AND KAYLEE INVESTMENTS
LIMITED
First Respondent

AND MARK COWAN
Second Respondent

Member of Authority: Antoinette Baker

Representatives: Paul Mathews, advocate for the Applicant
Mark Cowan, for the first respondent
Penny Shaw, counsel for the second respondent

Submissions received: 28 June 2022 from the Second Respondent
14 July 2022 from the Applicant

Determination: 25 July 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] Ms Wyles was unsuccessful in her applications for a compliance order against the first respondent (“Kaylee”) and an order under s 137(2) of the Employment Relations Act 2000 (“the Act”) against the second respondent, the director of Kaylee, Mr Cowan (“compliance applications”)¹. The issue of costs was reserved. I now have submissions.

[2] In a substantive determination the Authority ordered Kaylee to pay Ms Wyles \$22,591.86² (“substantive orders”). The orders have not been paid.

¹ *Wyles v Kaylee Investments Limited and Anor* 2022 NZERA 246.

² *Wyles v Kaylee Investments Limited and Anor* 2021 NZERA 200.

[3] Mr Cowan seeks \$750.00 towards his legal costs for defending the compliance application against him personally. He says Ms Wyles was granted an adjournment just before a scheduled investigation meeting based on a request to amend her claims. He says this put his counsel to extra time to prepare again for the eventual investigation meeting some six months later. Mr Cowan also says Ms Wyles was provided with financial evidence of the company's status before she applied for compliance.

[4] Ms Wyles says that costs should not be awarded because she was successful in the substantive matter and has no likelihood of recovering the substantive orders. She also says that the investigation meeting did not last for the one hour claimed by Mr Cowan.

[5] Mr Cowan was legally represented in the compliance applications. Kaylee was not represented.

[6] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. Costs generally follow the event and are discretionary. The principles and approach adopted by the Authority have been approved by the Employment Court.³

[7] The Authority often applies a 'notional daily tariff' based approach to assessing costs.

[8] I am satisfied that costs should lie where they fall. This is because:

- a. While Mr Cowan's counsel may have had to repeat preparation for the adjourned investigation meeting, the meeting lasted (according to the Authority record) approximately 35 minutes and largely centred on whether Kaylee was in a financial situation to make payment.
- b. The claim under s 137(2) of the Act against Mr Cowan failed because the compliance application failed. Mr Cowan appeared and answered questions about Kaylee's financial position. This was supported by

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

financial evidence in affidavits filed by his counsel. This evidence supported my finding that a compliance order should not be made.

- c. I accept Ms Wyles' submission that she is unlikely to recover the substantive orders. Ms Wyles went through the substantive investigation process, incurred costs, and was awarded those costs together with compensation and lost earnings after showing she had been treated unfairly by her employer Kaylee. Mr Cowan is the sole director of Kaylee. His human actions were the subject of the substantive determination findings. Kaylee chose not to appear and present its position at the substantive investigation meeting. In these circumstances, it would be unfair to Ms Wyles if she were made to contribute to Mr Cowan's costs after trying to have the substantive orders paid.

[9] Accordingly, for the above reasons, the costs application is dismissed.

Antoinette Baker
Member of the Employment Relations Authority