

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 476
3173643

BETWEEN SHELLEY GOLDIE
 Applicant

AND CHIEF EXECUTIVE OF THE
 DEPARTMENT OF
 CORRECTIONS
 Respondent

Member of Authority: Robin Arthur

Representatives: Victor Corbett, counsel for the Applicant
 David Traylor, counsel for the Respondent

Submissions: From the Respondent on 6 September 2022 and from
 the Applicant on 16 September 2022

Determination: 20 September 2022

COSTS DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination Shelley Goldie must pay costs of \$1,500 to the Chief Executive of the Department of Corrections.

[1] By determination on 23 August 2022 the Authority declined leave for Shelley Goldie to raise a personal grievance out of time.¹ The Chief Executive of the Department of Corrections sought an order requiring Ms Goldie to contribute to costs incurred in responding to her leave application.

[2] The determination was issued to the parties but has not yet been placed on the publicly-accessible Employment Law Database as it included orders prohibiting publication of some information regarding a third party. Those orders are now subject to a challenge filed in the Employment Court by the third party so that determination is

¹ *Goldie v The Chief Executive of the Department of Corrections* [2022] NZERA 408.

likely to remain private to the parties until the court has heard and decided that challenge.²

[3] The determination declining Ms Goldie's leave application is now also subject to a separate challenge by Ms Goldie.³ As is the Authority's usual practice, the reserved issue of costs may however be determined and, if the plaintiff wishes, a challenge on costs may then be incorporated into the existing court proceedings.⁴

[4] The intituling of this costs determination refers only to the applicant and the respondent, not a third additional party who was joined for the purposes of the earlier determination. The costs determination is to be published by the Authority in the usual manner as it does not touch on information that was the subject of the orders made regarding publication of certain information concerning the third party.

The parties' positions

[5] Ms Goldie's application for leave to pursue her grievance out of time on the grounds of exceptional circumstances was investigated and determined on the basis of affidavit evidence from her and submissions from counsel. Counsel were heard by audio-visual link in an investigation meeting taking less than two hours, once technical difficulties in establishing reliable electronic connections were resolved.

[6] The determination that declined leave reserved the issue of costs and allowed the parties to lodge memoranda if they were not able to resolve costs themselves. They could not and the Chief Executive sought an order of costs of \$4,500, that is the Authority's current daily tariff for an investigation meeting lasting a whole day. This was said to be warranted because actual legal fees exceeded \$12,000, detailed written submissions were lodged ahead of the investigation meeting and some time was taken in relation to publication issues raised by a third party.

[7] Ms Goldie sought an order for "no costs" on the grounds of "personal impecuniosity" and to reinforce the principle of access to justice. If costs were awarded, she proposed a starting point for assessment at no more than \$1,500 and opposed the upward lift sought by the Chief Executive. She said invoices for legal fees incurred by the Chief Executive were not sufficiently detailed to be assessed.

² EMPC 322/2022.

³ EMPC 326/2022.

⁴ Employment Court Practice Directions, chapter 11.

Factors in assessing costs

[8] The Authority’s jurisdiction to order a party to contribute to costs incurred by another party is exercised by applying some well-established “basic tenets” to the particular circumstances of the case.⁵

[9] Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional ‘daily rate’ or ‘tariff’ as a starting point to assess costs.

[10] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

Assessment

[11] In this case the Chief Executive was entitled to an award of costs as the successful party. Ms Goldie’s submissions referred to her “increasingly impecunious position” but provided no verified information about her finances, assets or ability to pay costs. The conduct of the case did not require an uplift on the daily tariff. Rather the appropriate modest award for an investigation economically carried out on the papers and by hearing submissions from counsel was one-third of the daily tariff, that is \$1,500. This is the amount Ms Goldie is ordered to pay under clause 15(1) of Schedule 2 of the Employment Relations Act 2000.

Robin Arthur
Member of the Employment Relations Authority

⁵ Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].