

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 601
3129476

BETWEEN	WTW Applicant
AND	JOHN ROAD INVESTMENTS LIMITED First Respondent
AND	NEIL STANLEY BLAIR Second Respondent

Member of Authority: Helen Doyle

Representatives: Chrissy Gordon, advocate for the Applicant
Hugh Matthews, counsel for the First and Second
Respondents

Submissions Received: 2 November 2022 from the Applicant
19 October 2022 from the Respondent

Date of Determination: 17 November 2022

COSTS DETERMINATION OF THE AUTHORITY

Substantive determination

[1] In its substantive determination of 11 October 2020, the Authority found that the real nature of the relationship between the applicant and respondents was that of a contractor and not of an employee.¹ The Authority did not have jurisdiction to consider the applicant's claims of personal grievance, minimum wage, and holiday entitlements. The Authority reserved the issue of costs and set a timetable for an exchange of submissions.

¹ *WTW v Johns Road Investments Limited and Neil Stanley Blair* [2022] NZERA 521.

[2] The Authority has now received submissions on behalf of both parties.

[3] The non-publication order in respect of the applicant's name in the substantive determination continues for this determination.

The respondents' submissions

[4] The respondents seek an award of costs for a one and a half day hearing at the daily tariff rate in the sum of \$6,250.

[5] Mr Matthews submits on behalf of the respondents that they faced a significant monetary claim and that actual costs incurred by the respondents were significantly more than the amount claimed.

[6] Mr Matthews submits there is no principled reason why the standard tariff ought not to apply and costs be awarded.

The applicant's submissions

[7] Ms Gordon on behalf of the applicant submits that costs are discretionary and the daily tariff can be adjusted up and down in a principled way.

[8] Ms Gordon submits that there was a valid question to be answered whether the applicant was a contractor or an employee and the uncertainty of the relationship was due to a failure to reduce its nature to a written agreement.

[9] She submits that the applicant is receiving a pension and has taken custody of a newborn child. She receives a benefit of \$277 for the child on top of her pension. Ms Gordon submits that the applicant will struggle to pay any costs awarded against her and that costs should lie where they fall.

[10] A page from the applicant's bank statement showing two days of transactions is attached to submissions and shows the account is in overdraft.

Discussion and conclusion

[11] Costs are a matter of discretion. The discretion is to be exercised in accordance with principle and not arbitrarily. The main principle in the exercise of the discretion is that costs

follow the event. If a party is successful, they will be entitled to an award of costs. The respondents were successful.

[12] The Authority's minute book reflects that the first day of investigation was a full day and the second day of investigation commenced at 9:30 am and concluded at 10:30am.

[13] The starting point for costs based on the Authority's daily tariff is \$4,500 for the first day and a quarter day for the second day which is \$875. The daily tariff in the Authority for each second and subsequent day is \$3,500.

[14] The Authority can from that starting point of \$5,375 consider whether there are factors that justify an increase or decrease to costs.

[15] I do not conclude there are factors that support an increase to the tariff.

[16] The applicant submits that she is unable to pay costs. The financial information provided is limited to a statement from a bank account showing activity over two days and the account in overdraft. I accept that there are personal circumstances for the applicant that need to be weighed.

[17] Sometimes the financial circumstances of the unsuccessful party may result from the exercise of a discretion in no or a reduced award of costs.

[18] The Employment Court of more recent times has indicated that a broader approach than the interest of one party is required. In *Scarborough v Micron Security Products Ltd* a statement was made by the Employment Court as follows:²

There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action or may wish to see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decision as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[19] I accept that the applicant will struggle to pay costs awarded and I am not satisfied that it is sufficiently clear that the applicant's personal circumstances will change at least in the

² *Scarborough v Micron Security Products Ltd* [2015] ERNZ 812 at [38].

immediate future with the care of a very young baby. The financial information however is not sufficient for me in the exercise of my discretion to make no award at all.

[20] I consider in the exercise of my discretion a fair award would be achieved by reducing the starting point for costs by half to arrive at an award of \$2,687.50.

[21] It is likely that payment of the award will have to be met by instalments and the parties should discuss that matter.

Order made

[22] I order that WTW pay to Johns Road Investments Limited and Neil Blair in equal amounts costs in the total sum of \$2,687.50.

Helen Doyle
Member of the Employment Relations Authority