

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 650
3159342

BETWEEN RACHEL PATTERSON
Applicant

AND MANE HAIR DESIGN LIMITED
First Respondent

AND LEANNE HAWLEY
Second Respondent

Member of Authority: Lucia Vincent

Representatives: Danny Gelb, advocate for the Applicant
No appearance by the Respondents

Submissions received: 17 October 2022 from Applicant
No submissions received from Respondent

Date of Determination: 08 December 2022

COSTS DETERMINATION OF THE AUTHORITY

Substantive Determination

[1] The applicant was successful in five of her seven claims as set out in a determination dated 4 October 2022.¹ Leave was granted to recover arrears of wages and holiday pay against the second respondent to the extent the first respondent could not pay. The applicant seeks costs at this stage against the first respondent only.

[2] The Authority reserved the issue of costs so the parties could attempt to resolve the issue themselves.² They have been unable to do so. The Authority set a timetable for parties to make submissions on costs in the event they could not agree. These were received from the

¹ *Patterson v Mane Hair Design Limited & Anor* [2022] NZERA 499 (Member Leon Robinson).

² Above n 1, At [53].

applicant. The respondent has not provided any submissions. I have determined this matter on the papers.

Costs Principles

[3] Clause 15 of Schedule 2 of the Employment Relations Act 2000 gives the Authority discretion to order any party to a matter to pay to another party such costs and expenses as the Authority thinks reasonable. The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit and may at any time vary or alter any such order in such matter that it thinks reasonable.

[4] If unsuccessful, a party will usually have to contribute to the costs of the successful party, as well as meeting their own costs. The daily tariff applied by the Authority sets the starting point from which relevant factors and principles may guide an upward or downward adjustment of the amount of costs awarded. Practice Note 2 for the Authority sets the current tariff for costs at \$4,500 for the first day of any matter.³

[5] The Employment Court has endorsed the average daily tariff approach of the Authority and principles applied.⁴ Relevant principles governing costs in the Authority include consideration of whether the conduct of the parties increased costs unnecessarily, warranting an adjustment up or down, without compromising the Authority's otherwise modest approach to costs.⁵ Costs should not punish a party or express disapproval of an unsuccessful party's conduct.

Applicant's submissions

[6] The applicant seeks an uplift to the daily tariff of 50 percent due to the respondents failing to engage meaningfully, making the matter more difficult than it should have been. The applicant engaged a service agent to track down and then identify the second respondent when she initially claimed she was not the second respondent on one of the occasions they attempted service of the Authority documents, resulting in completing an affidavit of service. The applicant also says they incurred additional cost when having to obtain additional advice due to a vexatious and frivolous claim the second respondent filed against the applicant in the

³ See: <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>.

⁴ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [43-47] and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [108].

⁵ *PBO Limited (formerly Rush Security Limited) v Da Cruz*, above n 3, at [43-47].

Disputes Tribunal – a claim the Tribunal dismissed when the second respondent failed to appear.

[7] The applicant seeks a starting point of \$2,250 (half the daily tariff) to reflect that the investigation meeting took half a day. The applicant then seeks an uplift of 50 percent of that for a total costs award of \$3,375 plus the filing fee of \$71.56 as a disbursement.

Conclusion on Costs

[8] The applicant succeeded in her claim of unjustifiable constructive dismissal. She also succeeded in recovering contractual and statutory entitlements including arrears of wages, compensation, and a penalty against the respondents for failing to pay holiday pay and outstanding wages. Although the applicant failed in her unjustified disadvantage claim and one of the penalties claimed, I am satisfied the applicant has succeeded in her application to the extent she is entitled to costs in the absence of any other factors.

[9] I accept the applicant incurred additional cost in serving the statement of problem due to behaviour by the respondents. The applicant has provided copies of invoices including an invoice dated 4 February 2022 for failed and repeated service of the statement of problem on the second respondent. This shows the conduct of the respondent in failing to engage in the attempted service of the applicant's statement of problem resulted in an additional cost of \$247.70 to the applicant. I am satisfied the applicant reasonably incurred this expense.

[10] I do not consider the conduct of the second respondent in relation to a separate civil matter in the Disputes Tribunal to be conduct related to costs involved in bringing a claim in the Authority. I decline to increase the cost award due to that factor.

[11] I do not consider further factors exist that would otherwise warrant an increase to the tariff. Although the respondents did not attend the investigation meeting nor file a statement in reply, this did not necessarily result in additional work warranting an uplift. Having accounted for the additional cost incurred regarding the respondent's failure to engage in the attempted service, I consider the half day fee of \$2,250 appropriate, plus payments for the service fee and filing fee as disbursements.

[12] I order that the first respondent pay the applicant, within 28 days of the date of this determination:

- (a) Costs of a half day tariff of \$2,250; and
- (b) Disbursements consisting of:
 - (i) Document service fee of \$247.70; and
 - (ii) Filing fee of \$71.56

Lucia Vincent
Member of the Employment Relations Authority