

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 511  
3194799

BETWEEN TYLER BRANFORD  
Applicant

AND THE PHO HOUSE LIMITED T/A  
ZEKE  
Respondent

Member of Authority: Nicola Craig

Representatives: Mike Harrison, advocate for the applicant  
Noel King, counsel for the respondent

Submissions Received: 22 August 2023 from the applicant  
5 September 2023 from the respondent

Date of Determination: 8 September 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In August 2023 the Authority issued a determination finding that The Pho House Limited (TPL or the company), trading as the Zeke Café, had unjustifiably dismissed Tyler Branford.<sup>1</sup>

[2] The parties were encouraged to resolve any issue of costs between themselves. They did not do so, and Ms Branford applied for costs. Submissions were received from both parties.

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<sup>1</sup> *Tyler Branford v The Pho House Limited t/a Zeke* [2023] NZERA 427.

### **Submissions for Ms Branford**

[3] The submissions state that Ms Branford's costs should be fully compensated as she was dismissed through no fault of her own. I did not take this to be an application for indemnity costs, as the tariff plus additions were sought.

[4] A deduction of 10% was made in the determination for Ms Branford's contribution to the situation giving rise to her dismissal. It is submitted that an increase of the same percentage should be made to the Authority's daily tariff due to difficulties trying to secure mediation with TPL. This is said to have resulted in an unnecessary delay in having her matter heard.

[5] An additional \$150 plus GST is sought for costs incurred in having to make submissions on costs, with a reasonable costs offer being refused (by TPL).

[6] Total costs of \$5,194.06 are therefore sought - \$4,950 for the daily tariff plus 10%, \$172.50 for the costs application and \$71.56 for the Authority's filing fee.

### **Submissions for TPL**

[7] TPL argues that whilst Ms Branford was partially successful, she was only awarded around 65% of what she had sought. Costs should be proportional to a party's success.<sup>2</sup>

[8] In TPL's view Ms Branford should receive 65% of the \$4,500 daily tariff, which amounts to \$2,925.00 plus the disbursement of the Authority's filing fee.

### **Costs discussion**

[1] The Authority has the power to award costs.<sup>3</sup> This power is discretionary and is to be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the principles guiding the Authority's approach to costs are described as including:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.

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<sup>2</sup> *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

<sup>3</sup> Employment Relations Act 2000, Schedule 2, cl 15.

- Equity and good conscience is to be considered on a case by case basis
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are based on a notional daily tariff.<sup>4</sup>

[9] I begin by establishing the Authority's daily tariff rate for this matter. The investigation meeting lasted most of a day. I consider it appropriate to start at the first day rate of \$4,500.

[10] An uplift is sought in relation to mediation. It is hard to see that delay in getting an employment relationship problem to mediation, particularly where that occurred before the matter was lodged in the Authority, can be covered by a costs award which concerns costs incurred in the litigation. Delay could be recompensed by interest in an appropriate situation. As a general rule costs are not awarded for attendance at mediation. In addition, I do not have sufficient evidence regarding the reported delays and responsibility for those. I make no increase on this ground.

[11] I now look at TPL's argument that a reduction should be made for the percentage by which Ms Branford's monetary claims were unsuccessful. I consider that to be too blunt an approach. A nuanced assessment is needed.<sup>5</sup>

[12] Ms Branford succeeded in her arguments that she was not bound by a valid trial period and that she was unjustifiably dismissed.

[13] The period of lost wages claimed in her statement of problem was 13 weeks, a common reflection of the three months' lost wages identified in s 128(2) of the Act. As noted in the determination, at the investigation meeting it became apparent that Ms Branford obtained other work relatively quickly. As a result, only two weeks of total lost wages were considered, along with 11 weeks of the difference between her average TPL

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<sup>4</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

<sup>5</sup> *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156 at [37].

earnings and her earnings from new jobs.<sup>6</sup> Ms Branford's calculation at the top end of the hours' range specified in the employment agreement was rejected in favour of the average actual hours worked.

[14] The amount sought for compensation under s 123(1)(c)(i) of the Act was accepted as appropriate but both that sum, and lost wages were subject to a 10% reduction for contribution.

[15] As Ms Branford's grievance claim was established, the alternative claim for payment of two weeks' notice did not need to be considered.

[16] I do not see that a significant portion of time was spent on the questions of the Ms Branford's post-TPL earnings or the appropriate rate for lost wages calculation.

[17] The subjects of notice and lateness (which was the basis of a contribution deduction) were relevant to the dismissal grievance, which Ms Branford was successful in and so would need to have been considered in any event.

[18] Ms Branford's success could not have been achieved without her pursuing her matter in the Authority. Standing back and looking at all the factors above, I do not consider that a reduction should be made for unsuccessful aspects of Ms Branford's case.

[19] The Authority does not usually award costs for the preparation of costs submissions and there are no circumstances here which would justify departing from that practice.

[20] Ms Branford is entitled to be reimbursed for the Authority's filing fee.

[21] I conclude that The Pho House Limited is to pay Tyler Branford the following amounts within 28 days of the date of this determination:

- \$4,500 as a contribution to her costs; and
- \$71.56 for the Authority's filing fee.

Nicola Craig  
Member of the Employment Relations Authority

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<sup>6</sup> Above, at n 1 at [47] – [51].