

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 514  
3193899

BETWEEN                      LORRAINE FRANCIS  
   Applicant

AND                              SEAFOOD CENTRAL  
   LIMITED t/a SCOTT  
   SEAFOOD  
   Respondent

Member of Authority:        Eleanor Robinson

Representatives:              Simon Greening, counsel for the Applicant  
   Chris Rowe, advocate for the Respondent

Costs Submissions:          25 August 2023 from the Applicant  
   8 September 2023 from the Respondent

Determination:                11 September 2023

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1]     In a determination dated 14 August 2023 ([2023] NZERA 442) it was determined that the Applicant, Ms Lorraine Francis, had not been constructively dismissed by the Respondent, Seafood Central Limited t/a Scott Seafood (Scott Seafood).

[2]     In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately, they have been unable to do so, and both parties have filed memoranda in respect of costs.

[3]     The investigation meeting involved a one-day investigation meeting.

[4]     Ms Rowe on behalf of Scott Seafood cites actual costs of \$6467.11 inclusive of GST. Ms Rowe is seeking a contribution to costs in which the scheduled second day of hearing, which

was not required for investigation but was used by the parties to refine submissions, is taken into account by the Authority when assessing the appropriate level of costs.

[5] Mr Greening on behalf of Ms Francis submits that she has a reduced ability to meet an award of costs due to her adverse financial circumstances. A detailed breakdown of her income, assets and debts was submitted in support. It was also noted that Ms Francis has been granted legal aid in relation to Employment Court proceedings, although there was no legal aid grant in place in respect of the Authority proceedings.

### **Costs Award**

[6] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup> that costs are modest. Principles also include that costs are reasonable and that they normally follow the event.

[7] I see no reason for not applying these principles in this case. Scott Seafood was the successful party in the matter.

[8] As set out in the directions minute of 14 February 2023 the parties were requested to lodge and serve a written copy of their closing submissions just prior to the investigation meeting. This is a standard direction in Authority investigations.

[9] There was therefore no extra requirement for the closing submissions to be submitted following the conclusion of the investigation meeting in this particular case, although the Authority agreed to a request that occur. No additional costs are allowed in respect of this.

[10] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing.

[11] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a one-day investigation meeting as the starting point.

[12] Secondly it is submitted that a costs award against Ms Lawler would be adverse considering her financial situation. I accept that it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, I also note the observation of Chief Judge Inglis that:

---

<sup>1</sup> [2005] 1 ERNZ 808

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.<sup>2</sup>

[13] Scott Seafood was the successful party and is entitled to an award of costs. In considering if this is a case in which it is appropriate for the Authority to use its discretion by making an award below the normal daily tariff, I recognise both the level of the actual costs incurred by Scott Seafood and the merits of the submission regarding Ms Francis' restricted ability to pay.

[14] In balancing these considerations, I consider it appropriate to award costs at the normal daily tariff rate in the Authority as at the date of filing as the appropriate measure for costs.

[15] Accordingly, Ms Francis is ordered to pay Scott Seafood the sum of \$4,500.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

[16] However, I recommend that Scott Seafood consider making an arrangement with Ms Francis to make payment by instalments. It is submitted for Ms Francis that these are made at the rate of \$100.00 per week until payment is made in full. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson  
Member of the Employment Relations Authority

---

<sup>2</sup> *Tomo v Chekmate Precision Cutting Tools Ltf* [2015]EmpC 2 at [22]