

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 230
3165361

BETWEEN	KAYLA BISHOP Applicant
AND	CHARCOAL CHICKEN 2020 LIMITED First Respondent
	SAIF ISMAIL Second Respondent

Member of Authority: Marija Urlich

Representatives: Andrea Kelleher, advocate for the Applicant
Eshan Gupta, advocate for the Respondents

Investigation Meeting: On the papers

Determination: 22 April 2024

DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 7 March 2024 which ordered Charcoal Chicken 2020 Limited (CCL) to pay Ms Bishop wage, holiday and alternative holiday pay arrears, calculate and pay interest on those arrears, and ordered a penalty for breach of statutory duty, half of which was to be paid to Ms Bishop.¹ The Authority also found Ms Bishop had established personal grievances for unjustified disadvantage and unjustifiable dismissal and awarded reimbursement of lost wages and compensatory damages. The claim against Mr Ismail was unsuccessful. Costs were reserved and a timetable set if the parties were unable to resolve this issue themselves which they advise has not been possible.

¹ *Kayla Bishop v Charcoal Chicken 2020 Limited* [2024] NZERA 136.

[2] Ms Bishop seeks by way of memorandum filed and served within the timetable a contribution to costs from CCL. CCL and Mr Ismail have not filed memoranda in reply or otherwise engaged with the Authority regarding costs. As their authorised representative, Mr Gupta was served with a copy of the determination on date of issue as well as Ms Bishop's memorandum seeking costs on 3 April 2024. I am satisfied the respondents are aware of the costs timetable and Ms Bishop's claim for costs. They have had a fair opportunity to file a response if that was their intention.

Costs principles

[3] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- 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 judged against a notional daily tariff.

Ms Bishop's claim for costs

[4] Ms Bishop seeks an award of \$18,486.25, as a contribution to costs of representation and disbursements of \$1,821.00. Invoices in support have been provided. She submits the award sought is warranted given:

- Ms Bishop was the successful party and costs should follow the event;
- a significant uplift is warranted due to CCL's conduct including 11th hour adjournments and unreasonable failure to respond to a valid without prejudice save as to costs offer which if had been accepted would have put it in a better position than as determined by the Authority;

- disbursements of \$930 for witness expenses for time off work is reasonable as are parking, mileage travel and photocopying expenses.

Costs analysis

[5] Ms Bishop was the successful party and it is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. A full costs award is sought. The circumstances of this case do not justify an indemnity award. Ms Bishop should receive a contribution to costs which I am satisfied were reasonably incurred.

[6] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500.00 with each subsequent day at \$3,500.00. This matter involved investigation meeting time of approximately 2 days. The appropriate starting point for costs for this matter is therefore \$8,000.

[7] There should be an uplift for the without prejudice save as to costs offer CCL did not accept, having had a reasonable period to consider. The offer was made on 17 March 2023 for \$8,000 gross plus a contribution to costs of \$3,000. The offer was valid. It followed the first investigation meeting in March 2023, which was adjourned at CCL's request and for which an order of costs was made.² CCL's failure to accept the offer was unreasonable - had it accepted it would have been better off financially and Ms Bishop would not have unnecessarily been put to further expense. An uplift of \$3,000 is appropriate.

[8] A further matter warranting a consideration of uplift is the adjournment of the investigation meeting scheduled for 14 September 2023. The circumstances of the adjournment are set out in the Authority directions issued that day and include CCL had fair notice of the investigation meeting but was unable to proceed for reasons within its control. Ms Bishop was ready to proceed that day and it is accepted she incurred costs for which a contribution of \$1,000 is reasonable.

² *Kayla Bishop v Charcoal Chicken 2020 Limited* [2023] NZERA 142.

[9] In this matter the mileage claimed is reasonable and is allowed. The witness loss of 2 days annual leave is not allowed. The loss was not Ms Bishop's and there is no information before the Authority that she met that loss.

Outcome

[10] Charcoal Chicken 2020 Limited is ordered to pay Kayla Bishop \$12,000 as a contribution to costs incurred and \$891 to reimburse disbursements incurred.

Marija Urlich
Member of the Employment Relations Authority