

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2024] NZERA 74
3208899

BETWEEN CHERY LINO
 Applicant

AND RESTAURANT BRANDS
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Kalesita Lino, representing the Applicant
 Laura Briffett, counsel for the Respondent

Costs Submissions 7 February 2024 from the Applicant
 24 January 2024 from the Respondent

Determination: 9 February 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 10 January 2024 ([2024] NZERA 5), the Authority found that the Applicant, Ms Chery Lino, had not been unjustifiably disadvantaged in her employment with the Respondent, Restaurant Brands Limited (RBL).

[2] In the determination, I indicated that this might be a case in which costs should lie where they fell, or that submissions should be made if costs were sought.

[3] Ms Briffett, on behalf of RBL, submits that it is not an appropriate case for letting costs lie where they fall on the basis that Ms Lino was represented by a family member and incurred no costs.

[4] RBL also submits that it has attempted to settle the issue of costs with Ms Lino, but agreement not having been reached, it is seeking costs at the rate of the notional daily tariff in the Authority for a day and a half's investigation, despite its actual costs having significantly exceeded the daily tariff amount.

[5] Accordingly RBL is seeking a contribution to costs in the amount of \$6,250.00 in respect of a day and a half of an investigation meeting.

[6] Ms Kalesita Lino, on behalf of Ms Lino submits that Ms Lino is unable to pay any costs award on the basis that it will cause her extreme financial hardship and stress.

[7] It is submitted that Ms Lino is a full-time high school student and has no income, being financially supported by her parents. A bank statement has been filed in support of this submission.

The Calderbank Offer

[8] RBL submits that on 23 November 2023 it made a Calderbank¹ offer, that is a “without prejudice save as to costs” offer to settle that matter, to Ms Lino. The Offer was not accepted by Ms Lino.

[9] A Calderbank offer can be taken into consideration by the Authority as providing a basis for an uplift in the daily tariff. This is because it provides the parties with the opportunity to settle matters without incurring the costs of a matter proceeding to a hearing.

[10] However in this case, RBL is not seeking to rely upon the Calderbank Offer as a basis for an uplift in the daily tariff amount.

Principles

[11] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) 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 manner as it thinks reasonable.

[12] Costs are at the discretion of the Authority². The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

[13] The principles include that costs normally follow the event, and they are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

Costs Award

[14] RBL was the successful party in determination [2024] NZERA 5.

[15] It is submitted that a costs award against Ms Lino will be adverse considering her limited economic means. I accept that it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings.

[16] However I also note the observation of Chief Judge Inglis that:

... 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.⁴

[17] RBL 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 level indicated by RBL as appropriate despite the actual costs it occurred in defending this matter, I recognise the merits of the submission regarding Ms Lino's ability to pay.

[18] I also recognise however that RBL, which made an unsuccessful attempt to settle the matter in advance of the Investigation Meeting, incurred significant costs in respect of the time and resources taken by it in defending the disadvantage claim brought by Ms Lino.

[19] In balancing all of these considerations 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 third of a day investigation meeting as the appropriate measure for costs.

[20] Accordingly Ms Lino is ordered to pay RBL the sum of \$3,000.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

⁴ *Tomo v Chekmate Precision Cutting Tools Ltd* [2015]EmpC 2 at [22]

[21] It may be that RBL is willing for Ms Lino to make payment by instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

[22] RBL is not seeking costs in respect of its costs application.

[23] **I order Ms Lino to pay to RBL the sum of \$3,000.00 as a contribution to its actual costs pursuant to clause 15 of Schedule 2 of the Act.**

Eleanor Robinson
Member of the Employment Relations Authority