

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2025] NZERA 302
3280079

BETWEEN TRACEY DEANS
Applicant

AND TM & JL DAIRY FARM LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Alex Kersjes, advocate for the Applicant
Terry McBride, for the Respondent

Investigation Meeting: On the papers

Submissions Received: 24 April 2025 from the Applicant
24 April 2025 from the Respondent

Date of Determination: 29 May 2025

COST DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By way of a determination of 28 March 2025¹ the Authority found that Tracey Deans did not establish an unjustified dismissal claim. Tracey Deans, however, did establish a claim for arrears of holiday pay owed and two penalty actions were established against TM & JL Dairy Farm Limited for them failing to provide Ms Deans with an employment agreement and a failure to keep compliant wage and time records. Penalty amounts of an accumulated \$2,000 were ordered to be paid directly to Tracey Deans.

[2] Costs were reserved. The parties were encouraged to seek agreement on costs but have not done so.

¹ *Tracey Deans v TM & JL Dairy Farm Limited* [2025] NZERA 19.

The application for costs

[3] Ms Deans' advocate seeks costs in the amount of the Authority's notional daily rate of \$4,500.00 and the \$71.55 Authority filing fee. The investigation meeting took a day and legal submissions were timetabled.

[4] Mr McBride submitted that his company had successfully resisted Ms Deans' predominant unjustified dismissal and unjustified disadvantage claims and that TM & JL Dairy Farm Limited should be awarded costs for the time Mr McBride took to advocate on their behalf. In the amount of \$13,800 inclusive of GST.

Assessment

The Authority's costs approach

[5] The Authority's discretion to award costs is well established and arises from Section 15, of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² including that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.³ These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*. The principles include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

³ Section 160(2) Employment Relations Act 2000.

- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.⁴

The dilemma of ‘mixed success’

[6] To assess costs where one party as is here, has only mixed success can sometimes be problematic. It is arguable that Ms Deans’ success was partial and compensation modest as she failed to establish her predominant claim that she had been unjustifiably dismissed from what the Authority deemed to be a permanent role. However, the Authority is of the view that regardless of the partial success cited, this was a situation where the Authority found no employment agreement had been provided which robbed Ms Deans of knowledge of her statutory entitlements and she should not have had to incur the costs of obtaining a ruling on the nature of her employment status. Regardless of also obtaining an order that holiday pay owed be paid, Ms Deans was deprived of the statutory right to take holidays for rest and recreation purposes. These are significant issues and there is a public interest in ensuring compliance.

[7] In addition, Judge Smith in *William Coomer v JA McCallum and Son Limited* noted (omitting citations):

Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any ‘realistic appraisal’. That conclusion followed because they obtained a monetary award It was immaterial that they had not succeeded to the full extent of their claim because’ ... success on more limited terms is still success.⁵

Costs for Ms Deans

[8] A starting point is that costs normally follow the event and, as Ms Deans was partially successful in her personal grievance on key statutory entitlement claims, she is entitled to consideration of an award of costs.

⁴ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

⁵ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

Applying the daily rate

[9] As outlined in the substantive determination,⁶ the Authority's approach is to apply a notional daily rate and only adjust this if persuaded that particular circumstances or other factors require an upward or downward movement.⁷ The discretion it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁸ including costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.⁹ The current Authority notional daily rate is \$4,500 for the first day of an investigation meeting.

Assessment

[10] Taking all the factors identified in submissions into account and applying the Authority's discretion, I consider that Ms Deans is entitled to a costs contribution for the one-day investigation meeting at the notional rate of \$4,500. I see no reason to depart from this approach.

Order

[11] Within 28 days of this determination being issued, TM & JL Dairy Farm Limited is to pay Tracey Deans a contribution to her costs in the amount of \$4,500 and \$71.55 as reimbursement of the Authority filing fee.

David G Beck
Member of the Employment Relations Authority

⁶ Ibid at [103].

⁷ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁸ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁹ Section 160(2) Employment Relations Act 2000.