

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 153  
3022952

BETWEEN ESTHER ALBON  
Applicant  
AND KINETICS GROUP LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Paul Brown, Advocate for the applicant  
Peter Kiely, counsel for the respondent

Costs submissions received: From the applicant on 14 September and 2 October 2018  
From the respondent on 21 September 2018

Determination: 17 October 2018

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Kinetics Group Limited must pay Esther Albon a total of \$2,321.56, being \$2,250 as a contribution to her costs of representation and \$71.56 to reimburse her for the fee to file her claim in the Authority.**

[1] On 21 August 2018, I issued a determination<sup>1</sup> finding that Kinetics Group Limited was liable to a penalty of \$2,000 for breaching a term of a settlement agreement between it and Esther Albon. I ordered Kinetics to pay \$1,000 of the penalty to Ms Albon.

[2] Ms Albon now applies for costs of \$5,500 plus GST as part-payment of costs of \$7,475 (incl. GST) she incurred for Mr Brown's services. Her costs cover the period prior to Kinetics paying the disputed amount on 7 December 2017, the investigation meeting and costs for Mr Brown preparing costs submissions.

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<sup>1</sup> [2018] NZERA Christchurch 116.

[3] Submissions for Kinetics argue instead that costs should be limited to the equivalent of a quarter of the Authority's usual daily tariff of \$1,125. Mr Kiely argues that:

- Advocates who are not lawyers have lower expenses and obligations and a prior Authority case held that an hourly rate of \$350 was excessive for an unregulated advocate.
- For a half-day investigation meeting such as this the appropriate amount of costs is \$2,250. However, the Authority should only order 50% of that amount because there was only one witness and in another case in the Authority, which took a whole day, costs of only \$2,000 were awarded.
- Payment of the disputed amount was made within two days of the mediation and within eight days of lodging the Statement of Problem.
- The claim was for a penalty of \$20,000, which was substantially unsuccessful, and the Authority should take into account the amount awarded as a penalty.

[4] The principles for awarding costs in the Authority are well known.<sup>2</sup> Costs generally follow the event. The usual starting point is a consideration of the usual daily 'tariff' of \$4,500 per day is appropriate as a contribution to a successful party's costs.

[5] In this case, the matter took half a day. Therefore, my starting point is \$2,250.

[6] Ms Albon suggests that amount should increase, while Kinetics submits that I should only award \$1,125.

[7] Ms Albon's costs are considerably greater than the half-day tariff.

[8] One of the costs principles the Authority must consider is that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme and Co Ltd* [2015] NZEmpC 135.

[9] Both parties have asked me to disapprove of certain aspects of each other's behaviour.

[10] I do not agree with Mr Brown's submission that I could have adequately dealt with the matter on the papers. I benefitted from hearing from the parties. I do not agree that there was any behaviour of the respondent that unnecessarily increased costs, so far as the penalty application was concerned.

[11] I need to consider what costs are reasonable.

[12] Costs awards are meant to allow for a modest contribution to reasonably incurred costs.

[13] The matter was a straightforward one considering that Kinetics had already made the disputed payment and no compliance order was necessary.

[14] Mr Brown's hourly rate is \$350. At that rate, it appears that before Kinetics made the payment of the disputed amount he had spent one hour working on the matter, and opened a file for Ms Albon's case. That must have included time spent at mediation. However, before Mr Brown's first invoice of \$460 inclusive of GST was rendered to Ms Albon, Kinetics had paid her \$2,633.46 nett, which was the disputed amount. The \$460 costs incurred to that date seem reasonable as a proportion of what Ms Albon recovered from Kinetics.

[15] After that payment purely in pursuit of the penalty application, Mr Brown's costs increased by \$7,015 including GST. On an hourly rate of \$350, Mr Brown apparently spent approximately a further 18 hours on the matter.

[16] Even if I had imposed a greater penalty, which was unlikely considering the research on levels of penalties that Mr Brown attached to his submissions, there was no guarantee that any of it would have been paid to Ms Albon.

[17] As it is, she has gained \$1,000 personally and perhaps some personal satisfaction from a penalty being imposed on Kinetics. But, she has done so at a cost to her of more than \$7,000. That is unreasonable, and contrary to the advice of the full bench of the Employment Court in *PBO v da Cruz*:

... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.<sup>3</sup>

[18] There can be no criticism of Ms Albon deciding to lodge a claim despite mediation having been arranged. At that point, Kinetics was denying that it would pay her anything further.

[19] Also, Ms Albon had a right to continue with her claim despite there no longer being any issue of compliance. That decision has ultimately been an uneconomic one. The amount of Mr Brown's bill to Ms Albon is a matter between them. However, there is no reason to increase the amount of the half-day tariff.

[20] Nor do I consider there to be good reason to reduce it.

[21] It is appropriate for Kinetics Group Limited to pay Esther Albon \$2,321.56, being \$2,250 towards her costs of representation and reimbursement of \$71.56 for the filing fee.

Christine Hickey  
Member of the Employment Relations Authority

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<sup>3</sup> Note 2, at [47].