

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

**Attention is drawn to the
order prohibiting publication
of certain information in this
determination**

[2020] NZERA 30
3059614

BETWEEN CHERYL BAILEY
 Applicant

AND TRADESTAFF GROUP
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: John Shingleton, counsel for the Applicant
 Anna Oberndorfer, advocate for the Respondent

Submissions Received: 12 November 2019 from the Applicant
 8 November 2019 from the Respondent

Date of Determination: 27 January 2020

COST DETERMINATION OF THE AUTHORITY

**A I order Cheryl Bailey to pay to Tradestaff Group Limited the sum of
 \$2,700 being costs.**

Prohibition from publication

[1] I prohibit from publication under clause 10(1) of the second schedule to the
Employment Relations Act 2000 (the Act) the financial information provided by the applicant
for the purposes of costs on this application.

Substantive determination

[2] The Authority in its determination dated 25 October 2019¹ found in favour of the respondent in its defences to personal grievance claims of unjustified disadvantage and constructive dismissal and a claim that there was a breach of the obligation to provide a healthy and safe workplace. Costs were reserved and the Authority has now received submissions from Ms Oberndorfer on behalf of the respondent and Mr Shingleton on behalf of the applicant.

The respondent's submissions

[3] On behalf of the respondent Ms Oberndorfer seeks a contribution to legal costs in accordance with the daily tariff. She refers the Authority to the leading case of costs in the employment area² and the relevant considerations from that case for the Authority in determining costs.

[4] These include that the Authority has discretion as to what costs, if any, it should award and that costs generally follow the event. Further that conduct that increases costs unnecessarily can be taken into account in inflating or reducing an award and the nature of the case can influence the award of costs. Although costs are often determined on the basis of a daily tariff, now set at \$4,500 for the first day and \$3,500 for each subsequent day, that approach should not be applied on a rigid basis but with respect to the characteristics of the case for determination.

[5] Ms Oberndorfer submits that the investigation meeting was approximately 1½ days and seeks an award of costs in the amount of \$6,250.

The applicant's submissions

[6] Mr Shingleton on behalf of the applicant submits that in addition to the factors set out by Ms Oberndorfer in her submissions the applicant's ability to pay should be considered. He has supplied information about the applicant's income and outgoings. Mr Shingleton notes this is an update of information already provided to the Authority in a related but different investigation meeting.

¹ *Cheryl Bailey v Tradestaff Group Limited* [2019] NZERA 613.

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

[7] He submits that the discretion is available to the Authority to either award no costs or reduce costs based on the impecuniosity of a liable party.

[8] Mr Shingleton refers the Authority to an Employment Court judgment in *X v The Chief Executive of the Department of Corrections*.³ He notes that whilst the Court in that case appeared to be reluctant to deprive a successful party of the benefit of an order, the Authority does still have a discretionary power and that the information provided by Ms Bailey is more transparent than that provided by X. Mr Shingleton submits there is a significant economic imbalance between the applicant and respondent and an award of the amount sought by Ms Oberndorfer could “*financially cripple*” the applicant.

[9] He submits that employees from a public policy point of view should not fear raising a personal grievance or lodging the grievance with the Authority because of an apprehension they could suffer significant financial consequences by way of costs.

[10] Mr Shingleton submits the applicant has offered to pay a cost award by instalments lower than that which would ordinarily be awarded, but that has not been accepted. He acknowledges it was the respondent’s right to reject that offer.

[11] Mr Shingleton submits that a reduced cost award of \$2,000 would be a balanced outcome, taking into account all material factors.

Determination

[12] There is no good reason why the usual principle that costs follow the event should be departed from in this matter. The respondent was the successful party and it is entitled to consideration of a contribution towards its costs incurred in defending the claims.

[13] The investigation of this matter followed the investigation of a related but different matter between the parties and one other party. I have recorded in my minute book that the investigation meeting for this matter commenced at 1.45pm on 24 July 2019 and concluded at 1.35pm on 25 July 2019.

[14] The starting point for an assessment of costs therefore should be \$4,500.

³ *X v Chief Executive of the Department of Corrections* [2018] NZEmpC 159 at [25].

[15] The applicant has provided up to date financial information that confirms that she is on a fixed income, pays rent, has a number of other outgoings and her ability to pay a significant contribution towards costs in a lump sum is very limited. As that conclusion will be readily apparent to the respondent from the information provided I do not need to set out more detail about the financial situation of the applicant in this determination.

[16] As Mr Shingleton submits there was reference to cases where the financial position of the liable party has led to either no award or a reduced award of costs in *X v Chief Executive of the Department of Corrections*.⁴ Judge Smith went on to state that the approach is not universal and he referred to two cases⁵ that he relied on, together with a conclusion that the financial information disclosed by the plaintiff was inadequate, to make an order for costs in favour of the defendant stating that it will be for the defendant to decide if and when it will seek to enforce it.

[17] I accept as was stated by Judge Inglis, as the Chief Judge was then, in *Tomo v Checkmate Precision Cutting Tools Limited*⁶ that a broader approach should be taken to exercising the Authority's discretion as to costs than simply the interests of one party and their financial hardship.

[18] In the exercise of my discretion as to costs in this matter I consider that the financial situation of the applicant should be weighed but that there should still be an award of costs made. The respondent faced a wide ranging and significant claim that it successfully defended and incurred costs in doing so.

[19] Payments could be by way of instalments but in the exercise of my discretion I do not consider the period over which payment could be made should become unduly lengthy.

[20] The financial position of the applicant is such that I am satisfied that the daily tariff of \$4,500 should be reduced by 40% and that a fair and reasonable award of costs is \$2,700.

⁴ Above n 1 at [27]

⁵*Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196 at [16] and *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [38].

⁶ *Tomo v Checkmate Precision Cutting Tools Ltd* above n 5.

[21] I order Cheryl Bailey to pay to Tradestaff Group Limited the sum of \$2,700 being costs.

Helen Doyle
Member of the Employment Relations Authority