

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 678
3129735

BETWEEN HOLLY BELL (née)
 MELVILLE
 Applicant

AND INKDROP LIMITED
 Respondent

Member of Authority: Peter Fuiava

Representatives: Simon Davies-Colley, counsel for the Applicant
 Anton Baker for the Respondent

Submissions received: 3 October 2023 from the Applicant
 15 October 2023 from the Respondent

Determination: 15 November 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination dated 18 September 2023 I found that some of Holly Bell's claims against Inkdrop Limited (Inkdrop or the company) established on the facts and ordered it to pay her \$1,000 in availability compensation under s 67D(6) of the Employment Relations Act 2000 (the Act), interest, total compensation of \$7,000 for loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act, a \$1,000 penalty for a breach of the Minimum Wage Act 1983 (MWA) and reimbursement of the filing fee of \$71.56.¹

[2] However, Ms Bell was not successful with several other claims. In addition to contributing to her own grievance which warranted a reduction in compensation for availability and for hurt and humiliation, her claims of a breach of the express health and safety obligations of her employment agreement, unjustified disadvantage arising

¹ *Holly Bell (née) Melville v Inkdrop Limited* [2023] NZERA 533.

from working overtime, unjustified constructive dismissal, a claim for penalties for alleged breaches of the Holidays Act 2003 and Wages Protections 1983, and a breach of her employment agreement relating to portfolio display rights, were all dismissed. Of the 10 claims Ms Bell made against Inkdrop, it was submitted that she succeeded with only five.

[3] The question of costs were reserved and if the parties were not able to reach their own agreement regarding costs, the Authority would make a determination for them having regard to any submissions. This determination resolves the issue of costs.

Costs principles

[4] The Authority has the power under clause 15 of Schedule 2 of the Act to award costs. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.² Those principles are as follows:

- a. The Authority has a discretion whether to award costs, and how much, but the discretion must be exercised in accordance with principle and not arbitrarily.
- b. The statutory jurisdiction toward costs is consistent with the Authority's equity and good conscience jurisdiction.
- c. Equity and good conscience are to be considered on a case-by-case basis.
- d. Costs are not to be used to punish or express disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- e. The Authority can consider whether all or any of the parties' costs were unnecessary or unreasonable.
- f. Costs generally follow the event (i.e. the unsuccessful party will normally be required to contribute to the costs of the successful party).
- g. *Calderbank offers* may be taken into account when setting costs.
- h. Awards will be modest.
- i. Frequently costs are judged against the notional daily tariff.
- j. The nature of the case can influence costs, which means the Authority may order those costs should lie where they fall.

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

[5] On 25 August 2023, the Authority released its consolidated Practice Direction which includes its approach to costs and the use of a notional tariff. The current tariff is \$4,500 for the first day of any matter and \$3,500 for any subsequent day of the same matter. Various factors and principles may have the effect of increasing or decreasing the amount of costs awarded.³

Costs submissions

Ms Bell's submissions

[6] In summary, counsel for Ms Bell submitted that the matter was heard over two full days in Tauranga on 5-6 May 2022 and that a third day of meeting (by audio-visual link) was required to complete evidence and to hear closing oral submissions. On a pure tariff basis, it was submitted that the Authority adopt as its starting point \$11,500 based on the notional tariff of \$4,500 for the first day and \$3,500 for every subsequent day.

[7] I am advised that Ms Bell's actual costs were in excess of \$30,000 (plus GST). Because the tariff is sought (plus a modest uplift as described below) I have not requested copies of the invoices to be provided.

[8] Ms Bell seeks an uplift of the tariff because of the way Inkdrop conducted its case in the Authority which unnecessarily increased her costs, for example, it lodged what was referred to as a 'hybrid pleading' that ran to 189 paragraphs and comprised 421 pages. Counsel submits that the document comprised largely irrelevant material and evidence. Reference was made to a second minute from the Authority (4 August 2021) in which it was noted that on its face, the hybrid document would take counsel and Ms Bell considerable time, energy and expense to sift through every paragraph and every page.

Inkdrop's submissions

[9] Briefly stated, it was submitted that of the *Da Cruz* principles noted above namely the Authority's discretion to award costs, that costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct, it is open to the Authority to consider whether all or any of the party's costs were

³ Employment Relations Authority Practice Direction, August 2023;
<https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

unnecessary or unreasonable, that without prejudice offers may be taken into account, cost awards will be modest, and that the nature of the case can influence costs resulting in the Authority ordering that costs lie where they fall in certain circumstances — are particularly relevant.

[10] Inkdrop further submitted that it fully engaged with the Authority’s investigation to the best of its ability, acting in good faith at all times and that it disagrees with counsel’s start and finish times for each day of the investigation meeting particularly for the third day. In its view, costs should lie where they fall because of the nature of the case, that Ms Bell contributed to her own grievance, had declined opportunities to resolve the matter at an earlier stage in the process, rejected fair and reasonable without prejudice offers, raised other claims after the Statement of Problem was lodged, filed additional documents that were unnecessary and superfluous, 50 percent of her claims were unsuccessful, and that the time spent on Ms Bell’s unjustified constructive dismissal was time intensive and wasted because the claim was ultimately unsuccessful.

Costs analysis

[11] The starting point in the costs setting exercise is determining who won which can be ‘problematic’ as the Employment Court observed in *William Coomer v JA McCallum and Son Limited*.⁴ In that case Mr Coomer appealed a costs award made against him by the Authority despite being successful with his personal grievance. It was observed by the court that where both parties have had a measure of success determining which of them were entitled to costs was often a nuanced assessment of competing considerations.⁵

[12] In determining the appeal, the court relied on *Weaver v Auckland Council* [2017] NZCA 330, a leaky home case where the High Court said the appellants had succeeded because of a monetary award made in their favour and a finding that the Council had breached a duty owed to them. It was immaterial that the appellants had not succeeded to the full extent of their claim because “... success on more limited terms is still success”.⁶

⁴ *William Coomer v JA McCallum and Sons Limited* [2017] NZEmpC 156 at [37].

⁵ Above [37].

⁶ *Coomer* at [37].

[13] Relying on *Weaver* particularly that mixed success is still success, the Employment Court set aside the Authority's costs award against Mr Coomer and granted him costs as the successful party.

[14] In the present case, I regard Ms Bell to be the successful party. She may not have succeeded with all her claims but it is not uncommon for an applicant to have won some and lost some. This is to be expected when a party may not know what claims will be found to be successful so a belt and braces approach is adopted in the hope that some causes of action may stick. One could be critical of such an approach for its inefficiencies particularly here where only 50 percent of Ms Bell's claims were successful and Inkdrop was put to unnecessary expense defending matters that were dismissed by the Authority.

[15] However, such a view of course enjoys the benefit of hindsight and after the facts have been established following an investigation meeting and a determination. Until then, all issues remain live. Standing back, Ms Bell succeeded by any realistic appraisal especially when she was able to demonstrate that her employment agreement contained a non-compliant availability provision and that her wages had fallen below the minimum wage on two occasions during her employment for which a penalty under the MWA was warranted. Her success as limited as it was could not have been achieved without lodging a claim in the Authority particularly when Inkdrop was steadfast in its denials of those claims.

[16] As for the Calderbank offers, which have been considered, it is not necessary to set these out in great detail because none, if accepted, would have placed the party accepting the offer in a better position when compared against the orders made by the Authority. In other words, neither party made an effective settlement offer the effectiveness of which must be measured against the Authority's determination. Although Inkdrop urges me to let costs lie where they fall, this case does not fall into any of the categories in the Authority's Practice Direction where the daily tariff would not apply resulting in parties having to bear their own costs.⁷

⁷ n 3 at p 5.

[17] Having found Ms Bell to be the successful party, costs generally follow the event and there is no reason for that not to be the case here. In the end, according to my notes, the investigation meeting, including the third day, were full days. The notional tariff for three days of investigating meeting time which I adopt as my starting point is \$11,500 (\$4,500 for the first day and \$3,500 for each of the two subsequent days).

[18] The beauty of the notional tariff is that it fosters consistency, transparency and predictability and therein lies its value for lawyers and employment advocates alike. However, the notional tariff is not to be rigidly applied and must be tempered in accordance with principle as set above in *Da Cruz* and reiterated in the Authority's consolidated Practice Direction. Ms Bell seeks a modest uplift of 25 percent because of how Inkdrop conducted its case particularly because of its voluminous hybrid document noted above. However, on balance and taking into account that several of Ms Bell's claims were unsuccessful which need to be recognised in some way in the final analysis, there is to be no uplift in costs.

Conclusion and Orders

[19] Cost awards are modest and are not intended to punish or express disapproval of an unsuccessful party's conduct. While mixed success is still success to engage the notional tariff, the limited nature of Ms Bell's success is such that an uplift would not be appropriate in all the circumstances.

[20] The Authority orders Inkdrop Limited to pay Holly Bell (née) Melville \$11,500 as a contribution towards her legal costs by Friday 15 December 2023.

Peter Fuiava
Member of the Employment Relations Authority