

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 335
3031547

BETWEEN OLGA BELOOUS
 Applicant

AND ESKA LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Len Clapham, Advocate for the Applicant
 Svetlana Strizheva, director of the Respondent

Determination: 31 October 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination on 12 October 2018 the Authority found Eska Limited had unjustifiably dismissed Olga Beloous. It ordered the company to pay remedies and wage arrears to her.¹ Costs were reserved. The parties were encouraged to resolve any costs issue between themselves but a timetable was set for memoranda to be lodged if an Authority determination was needed. An indication was also given of a likely award of costs.

[2] On 25 October Ms Beloous' representative advised the Authority by email that costs were not resolved between the parties and sought a determination. He provided a copy of an invoice for the sum of \$3000, comprising "fees for services rendered" of \$1500 and a further \$1500 for unspecified "expenses".

[3] Eska Limited's director Svetlana Strizheva responded later that day with an email in which she advised the company had filed a challenge to the Authority's determination in the Employment Court on 19 October 2018.

[4] She also wrote that "the execution of the ERA decision was also suspended pending a court ruling". Ms Strizheva's statement was incorrect. Eska Limited's

¹ *Beloous v Eska Limited* [2018] NZERA Auckland 316.

application to the Court included an application for a stay but, as of the date of this determination, no stay had been granted. Even if it had, it is usual for the Authority to provide a determination of costs even when the Authority's substantive determination is under challenge. A plaintiff can, if dissatisfied by the costs outcome, file within 28 days an amended statement of problem to include that costs determination in the challenge.²

[5] An Authority Officer advised Ms Strizheva later on 25 October that the Authority would proceed to determine costs unless a stay of proceedings was issued beforehand. On 30 October Ms Strizheva lodged a copy of a letter sent to Ms Beloous demanding she pay the company \$3600 for "fees and reimbursements of expenses incurred in representation [of] Eska Limited". Her letter said it would also be lodged in the Authority as a memorandum to "make a ruling" if Ms Beloous did not pay the company that amount within seven days.

Costs: legal principles

[6] Costs in the Authority are typically determined on a daily tariff, adjusted for any particular factors or circumstances requiring an upward or downward adjustment.³ The Authority's powers to assess and award costs and expenses are discretionary, exercised on a case by case basis in accordance with established principles. Those principles provide that an assessment of costs should: generally follow the event and set costs at a modest level; not be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award; consider whether all or any of the parties costs were unnecessary or unreasonable; and take account of any without prejudice offers. Costs of parties in preparing for and attending mediation are generally not taken into account.

Assessment of costs in this case

[7] The substantive determination gave a preliminary indication of \$2000 as a likely award of a contribution to Ms Beloous' costs of representation in this matter, considering the nature of, and time taken for, the investigation meeting.

² Employment Court Practice Directions, 11 Amended challenges incorporating costs determinations.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[8] The starting point was that the assessment of costs followed the event, that is who was successful. Ms Strizheva's suggestion, in her memorandum of 30 October, that the company was entitled to recover any costs from Ms Beloous was entirely wrongheaded. Ms Beloous was wholly successful in her case, as demonstrated by the findings and orders for remedies and payment of wage arrears. Eska Limited must contribute to her costs of representation in the Authority, not the other way around.

[9] The investigation meeting was completed before mid-afternoon so the starting point for the assessment was two-thirds of the daily tariff, amounting to \$3000. The content of the statement of problem, the witness statements from Ms Beloous and her husband, and the provision of pay slips and a copy of her employment agreement did not warrant an award at that level. Neither did the limited questions asked by Ms Beloous' representative in the investigation meeting or limited oral submissions made in closing at its end assist in any meaningful way that would have warranted that amount.

[10] The invoice of Ms Beloous' representative for \$1500 in fees for services and \$1500 for expenses was not broken down. No detailed assessment could be made of how those amounts were reached and whether they were entirely necessary. However it was clearly reasonable that some costs had been incurred in preparation for and participation in the investigation meeting. As previously indicated the sum of \$2000 was a modest and appropriate award. There was no information that suggested any further adjustment was needed to take account of any without prejudice offers made to settle the matter prior to the investigation meeting.

[11] Accordingly Eska Limited must pay Ms Beloous \$2000 as a contribution to her costs of representation reasonably incurred for the Authority investigation. This amount must be paid within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority