

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 66
5524136

BETWEEN TRACI BOOTH
Applicant

A N D COO-EE DRYCLEANING
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Traci Booth, on her own behalf
Alastair Hall and Joelle Avery, Counsel for Respondent

Submissions Received: 24 March and 14 April 2016 from Respondent
24 March 2016 from Applicant

Date of Determination: 3 June 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] On 10 November 2015 I issued a determination in which I dismissed Ms Booth's claim she had been constructively dismissed by the respondent, Coo-ee Drycleaning Limited (Coo-ee).

[2] Costs were reserved and Coo-ee, as the successful party, now seeks a contribution toward those it incurred in defending the claim.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.¹ The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

¹ refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[4] The investigation took approximately a day and two thirds which, applying the above tariff, would see an award in the order of \$5,845. Coo-ee, however, seeks considerably more. It seeks to recover its significant costs in full.

[5] It support of its claim Coo-ee refers to correspondence to Ms Booth's then advocate stating her claims were flawed and lacked merit and costs would be sought if she pursued them.² It is argued she was well aware her claims lacked merit and this is reflected by a newspaper article which followed the determination and in which Ms Booth is recorded as telling a reporter her claim was always *doomed* and she was expecting to lose.³

[6] It is submitted Coo-ee was therefore put to unreasonable and needless cost in answering Ms Booth's doomed claims.

[7] Ms Booth's response is succinct. I'm impecunious and you have no hope of getting money from a place where none exists. This reflects advice given in response to the letter of 12 May 2014 which records *when it comes to recovery of costs your client has no show as she has no money.*⁴ Ms Booth's impecuniosity was also discussed during the investigation with evidence Coo-ee employed her in the knowledge she was on the verge of insolvency when they engaged her. Finally there is confirmation the situation has not improved via the fact she was accepted into the Insolvency Act's no asset procedure⁵ on 22 March 2016.

[8] Acceptance into the no asset procedure⁶ requires debt and no realisable assets⁶ with the situation being dire enough to warrant existing creditors being precluded from enforcing the debts.⁷

[9] Coo-ee, in response, accepts ability to pay is a relevant issue but should not be considered a *trump card*.⁸ The interests of both parties must be weighed and broader public policy consideration taken into account.⁹ In essence it is argued I should note the response of 15 May 2015 and the implication Ms Booth was going to make trouble as she had nothing to lose.

² Letter dated 12 May 2014

³ Article appearing in the New Zealand Herald on 18 November 2015

⁴ Letter dated 15 May 2014

⁵ Part 5, Subpart 4 of the Insolvency Act 2006

⁶ Section 363(1) of the Insolvency Act 2006

⁷ Section 369 of the Insolvency Act 2006

⁸ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137

⁹ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2

[10] It is submitted Ms Booth's advocates comments, her attitude toward the proceedings and during the investigation along with the newspaper article make it clear she intended proceeding at the respondent's cost. It is submitted such a reckless and foolhardy approach should, as a matter of public policy, be discouraged. That said Coo-ee accepts an award of indemnity costs is now a forlorn hope and the claim is amended to application of the normal tariff.

[11] Coo-ee submission is, in my view, persuasive and the type of reckless approach adopted by Ms Booth should be neither condoned nor encouraged. That said there is a significant problem. Any award I might now make would, if Ms Booth were to become a bankrupt, become a provable debt¹⁰ and would not be recoverable.

[12] The evidence is such I have no doubt bankruptcy is where this would inevitably lead. Any attempt to recover the award would inevitably see Coo-ee incur further costs for no discernible gain. While it goes against my instinct I conclude this is a case where impecuniosity is a decisive factor and there is no merit in making an award that will be of no value.

M B Loftus
Member of the Employment Relations Authority

¹⁰ *Bradbury & Others v Commissioner of Inland Revenue* [2015] NZSC 80