

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 351
3011131

BETWEEN TENESHA BORISOV
 Applicant

A N D MSGS HOLDINGS LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Robert Morgan, Advocate for the Applicant
 Jasdeepak Sandhu, Director of the Respondent

Investigation Meeting; On the papers

Submissions Received: 12 October 2017 and 30 October 2017 from Applicant
 26 October 2017 from Respondent

Date of Determination: 13 November 2017

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A. The Respondent is to pay a contribution towards the Applicant’s costs in the sum of \$2000 together with the filing fee of \$71.56 within fourteen days of the date of this determination.

The substantive determination

[1] By way of a determination dated 10 October 2017¹, the Authority found that Ms Tenesha Borisov was unjustifiably dismissed by MSGS Holdings Limited (“the company”).

¹ [2017] NZERA Auckland 313.

- Ms Borisov was awarded compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (“the Act”) in the sum of \$8,000 which was reduced by 20% to \$6,400 to take into account Ms Borisov’s conduct which contributed to the personal grievance.
- The company was ordered to make payment of the amount of compensation of \$6,400 to Ms Borisov within twenty-one days of the date of determination. In addition, the company was ordered to pay Ms Borisov \$5,142.38 gross in lost remuneration under s.128 of the Act together with \$252.00 gross in respect of unpaid statutory holidays.
- The company was penalised for failing to pay statutory holiday pay pursuant to the Holidays Act 2003. A penalty of \$1,000 was awarded against the company.
- Costs were reserved, and the parties were invited to exchange memoranda as to costs.

Submissions as to costs

[2] On behalf of Ms Borisov the submission is that Ms Borisov was successful in her claim and should be awarded costs based on the Authority’s daily tariff of \$4,500. There is reference to approaches being made on behalf of Ms Borisov prior to the investigation meeting in order to resolve matters, but no details were provided in respects of the approaches or the offers made.

[3] Mr Sandhu submits that costs should lie where they fall or alternatively the maximum of \$500 should be awarded by the Authority. This was on the basis that the proceeding before the Authority was not complex, the investigation meeting took one day, and costs should not be used to punish an unsuccessful party.

Costs determination

[4] The Authority’s power to award costs against a party is set out in clause 15 of schedule 2 of the Act which provides as follows:

15. **Power to award costs**
 - (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such a manner as it thinks reasonable.

[5] The Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² when setting costs awards. These include:

- There is discretion as to whether cost would be awarded and in what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience are to be considered on a case by case basis;
- Costs are not to 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;
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs, and this has resulted in the Authority ordering that cost lie where they fall in certain circumstances.

[6] First, I accept that it is appropriate for the company to make a contribution towards Ms Borisov's costs on the basis that costs follow the event. Ms Borisov was successful in her claims against the company. However, remedies were reduced by 20% to take into account Ms Borisov's contribution to her personal grievance.

[7] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day for matters lodged after 1 August 2016 (which Ms Borisov's statement of problem was).

² [2005] 1 ERNZ 808.

[8] The investigation meeting lasted one full day, so the starting point in this matter is \$4,500.

[9] The advocate for Ms Borisov was asked to produce a detailed tax invoice. This was provided and totals \$11,066. The time record produced shows considerable costs incurred for time spent preparing and attending mediation. Considerable costs have also been incurred and charged in respect of “without prejudice” offers. Costs have been incurred and invoiced for the “creation of wages file on Xcel” and other similar administrative type matters. Other costs incurred relate to a discussion of the determination and the application for costs. The amount spent on preparing for and attending the actual investigation amounted to \$6,490.

[10] I consider the amount being sought on behalf of Ms Borisov to be too high. The case was reasonably straightforward. The facts were not complicated and the legal issues not complex. The issue was whether Ms Borisov had been unjustifiably dismissed. I found that she had been, remedies were awarded and reduced to take into account conduct by Ms Borisov that I considered had contributed to her dismissal.

[11] There was one witness statement filed on behalf of Ms Borisov which was written by her and provided the Authority with the basic information. The witness statements filed by the company were also short and fairly basic. The submissions filed on behalf of Ms Borisov were brief and did not address any complex factual or legal matters.

[12] Costs should be reasonable and awards modest. Costs are not to be used as a punishment.

[13] Taking in to account the above factors and the principles that guide the Authority when assessing costs, I consider a contribution by the company of \$2000 towards Ms Borisov’s costs together with the \$71.56 filing fee, appropriate.

[14] I order the company to contribute the sum of \$2000 towards Ms Borisov’s costs together with the \$71.56 filing fee. These costs are to be paid to Ms Borisov no later than fourteen days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority