

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 87  
5389272

BETWEEN SHANNEN BROWN  
Applicant

A N D RICHARD AND JENNIFER  
ADAMS Trading As  
UNTOUCHABLE HAIR AND  
SKIN  
Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant  
Tony Stallard, Counsel for Respondent

Submissions Received: 21 May 2014 from Applicant  
11 June 2014 from Respondent

Date of Determination: 12 June 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The respondent is to pay to the applicant the sum of \$7,000 as a contribution towards her legal costs, together with the sum of \$71.56 in respect of the Authority's lodgement fee.**

[1] By way of its determination dated 10 April 2014, [2014] NZERA Christchurch 58, the Authority determined that Ms Brown had been unjustifiably dismissed and had suffered an unjustifiable disadvantage in her employment. Ms Brown was awarded remedies which were not reduced under s.124 of the Employment Relations Act 2000 (the Act) and costs were reserved.

[2] The parties have been unable to agree how costs should be dealt with as between them and so this determination addresses that issue. Ms Sharma and Mr Stallard have served and lodged their respective submissions. Ms Sharma, in her written submission, *reserves a right of reply to the respondent's submissions*. It is not

usual to allow a right of reply to costs submissions made by counsel for the potentially paying party, and I did not grant that right in this matter. Having read Mr Stallard's submission, I do not believe that Ms Sharma will be prejudiced by not being granted a right of reply. I therefore proceed to determine this matter without further submissions.

[3] Ms Sharma, on behalf of Ms Brown, seeks a contribution towards her client's costs of \$12,000, plus *office expenses* in the sum of \$101, together with the sum of \$71.56 in respect of the Authority's lodgement fee, and a further \$400 in respect of the preparation of the application for costs. Ms Sharma has produced a summary of Ms Brown's fees which amount to \$22,000 plus GST. Ms Brown has incurred a total of \$25,416.15 in legal fees and disbursements in bringing her claim to the Authority.

[4] The rationale for Ms Brown seeking a contribution of \$12,000 towards her costs is that there was a combination of factors which added substantially to the hearing preparation and time spent investigating the matter. These factors were as follows:

- a. The factual complexity of the matter was accentuated by numerous conflicts between the parties;
- b. Mr Adams' evidence had a proliferation of attachments and information not previously shown to Ms Brown;
- c. There were numerous timesheets to peruse in terms of calculating the hours that Ms Brown worked;
- d. The Authority called for extra evidence from the respondent which increased hearing preparation time;
- e. There was increased time in preparing submissions because of the conflicts in the evidence;
- f. Ms Brown was very stressed and is relatively young and inexperienced and so was entitled to be properly informed about the processes.

[5] Ms Sharma makes mention of a settlement offer made by the respondent. Whether the offer was expressed to be *without prejudice save as to costs* is not stated

by Ms Sharma, but in any event I agree with her that it has no bearing on the matter of costs because the amount of the settlement offer was well below the remedies awarded to Ms Brown.

[6] Ms Sharma is to be commended for attaching a detailed breakdown of the time recorded by her in advising and representing Ms Brown. Although Mr Stallard submits that the print out does not enable him to know what costs were reasonably incurred, Ms Sharma's print out goes a lot further than the information usually put before the Authority in support of costs applications. When considered overall, I believe that it does enable me to ascertain whether the costs were reasonably incurred or not.

[7] Mr Stallard's submission accepts that a contribution towards Ms Brown's costs should be made by the respondent, but asserts that it should be limited to the standard daily tariff of \$3,500 usually adopted by the Authority. He essentially submits that there was no reason for Ms Sharma's costs to be in the region of \$25,000, and that excessive time has been spent in preparation and representation.

### **The law and principles of awarding costs in the Authority**

[8] The Authority's power to award costs 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 manner as it thinks reasonable.*

[9] The Authority must follow the principles set out in *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808 when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.

- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. 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.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[10] On perusing the breakdown of costs provided by Ms Sharma, it does not appear to me that there have been any significant costs which have been obviously incurred unreasonably. Ms Sharma is clearly assiduous in recording her time, which is a perfectly understandable and unimpeachable practice. She has obviously spent a great deal of time advising her client by telephone, seeking information and answering questions. Ms Sharma also spent a significant amount of time preparing the evidence, including the briefs of evidence used in the Authority's investigation. Ms Sharma's charge out rate itself is not unreasonable. Overall, I cannot criticise Ms Sharma's costs as being unreasonably incurred.

[11] However, this conclusion does not, in itself, justify imposing a greater costs award on the respondent than is standard practice. I must therefore examine

Ms Sharma's submissions to ascertain whether the factors she has identified justify doing so.

#### *Complexity*

[12] First, although there was a minor element of complexity in the subject matter of the investigation, overall it was not by any means a more complex matter than the majority of contested unjustified dismissal and disadvantage applications investigated by the Authority. Certainly, there was no material legal complexity.

#### *Conflict in evidence*

[13] The degree of conflict of evidence was perhaps greater than is usual, although I do not accept that that fact derives from anything the respondent did that can be criticised. Whilst I ultimately found in favour of Ms Brown, the respondent was entitled to run the defence it did. It was my observation that the passage of time contributed to the conflicts of evidence. The emotional reactions of the parties to the unfolding events may have also been a factor. In any event, the conflicts in evidence cannot be laid solely at the door of the respondent.

#### *Additional evidence produced by the respondent*

[14] There was a small number of extra pieces of evidence which were produced by the respondent in evidence and during the investigation meeting, most of which was useful, but this late production of evidence by parties is fairly common, especially at the brief of evidence stage and especially with small employers, who typically do not have elaborate systems in place. In my view, the respondent producing extra evidence with the briefs of evidence and during the investigation meeting would not have prolonged the duration of the preparation and the investigation meeting unduly. It should not be a factor in justifying an increased costs contribution by the respondent therefore.

#### *Timesheets*

[15] Whilst there may have been numerous timesheets to peruse, again this is common in such matters, and in any event, my analysis of those timesheets came to a different conclusion regarding the hours worked by Ms Brown than Ms Sharma did. This cannot be used to justify an increased contribution to costs by the respondent.

*The Authority calling for evidence*

[16] As an investigation progresses, it is frequently the case that it becomes evident that further evidence is needed from one or more of the parties. Often, no criticism can be levelled at the party if this occurs. I do not believe that the length of the investigation meeting was prolonged unduly in this case and I decline to increase the respondent's costs contribution in respect of this.

*Ms Brown needed extra assistance*

[17] Whilst Ms Brown is relatively young, she is an articulate and intelligent adult who was also supported by her parents during the investigation meeting, and was no doubt supported by them during the preparations for it. I do not believe that this factor justifies increasing the costs payable by the respondent.

**Conclusion**

[18] I do not believe that there are any material factors present in this case which justifies increasing the costs award against the respondent above the sum of the current standard daily tariff. The investigation meeting lasted two days, and so costs are limited to \$7,000.

[19] Ms Sharma does not explain what her *office costs* were. Without knowing that, it is not appropriate to order the respondent to pay them. I accept that the cost of the Authority's lodgement fee should be paid by the respondent.

[20] Finally, I decline to order the respondent to pay a contribution towards Ms Sharma's costs application, on the basis that it was, essentially, unsuccessful.

**Orders**

[21] I order the respondent to pay to Ms Brown the sum of \$7,000 towards her legal costs, together with the sum of \$71.56 in respect of the Authority's lodgement fee.