

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 326  
5467604

BETWEEN                      KERRY BURROWS  
   Applicant  
  
A N D                              BUNNINGS LIMITED  
   Respondent

Member of Authority:      T G Tetitaha  
  
Representatives:              A Bendall, Counsel for Applicant  
   D France, Counsel for Respondent  
  
Submissions received:      26 September 2014 from applicant  
   10 October 2014 from respondent  
  
Investigation meeting:      On the papers  
  
Date of Determination:      19 October 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A.      The respondent is ordered to pay the applicant \$3,000 towards her actual legal costs.**

**Employment relationship problem**

[1]      The Authority in its substantive determination dated 15 September 2014<sup>1</sup> held that the applicant was unjustifiably disadvantaged in her employment by the respondent. The respondent was ordered to pay compensation of \$5,000 pursuant to s.123(c)(i) of the Employment Relations Act 2000 (the Act).

[2]      The applicant now applies for costs. She seeks a contribution of \$8,450.00 towards her total costs of \$11,706.84 including GST and disbursements.

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<sup>1</sup>      *Kerry Burrows v. Bunnings Ltd* [2014] NZERA Auckland 384

## Issues

[3] The following issues are to be determined:

- (a) Should the applicant be awarded indemnity costs?
- (b) What is the starting point for assessing costs?
- (c) Are there any factors that warrant adjusting the notional daily tariff?

### **Should the applicant be awarded indemnity costs?**

[4] The applicant's actual costs were \$11,706.84 including GST and disbursements. The costs sought of \$8,450.00 exclude mediation and the time of a law clerk. In short the applicant seeks an award of indemnity costs for the remaining fees.

[5] The leading case on an indemnity costs is the Court of Appeal decision in *Bradbury & Ors v. Westpac Banking Corporation*<sup>2</sup>. Indemnity costs are exceptional so require “*exceptionally bad behaviour*” or may be awarded where a party has behaved either badly or very unreasonably<sup>3</sup>.

[6] This matter does not meet the very high threshold required before indemnity costs may be imposed.

### **What is the starting point for assessing costs?**

[7] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs<sup>4</sup>. The current notional daily tariff is \$3,500. This matter involved a one day investigation meeting. The starting point for assessing costs is therefore \$3,500.

### **Are there any factors that warrant adjusting the notional daily tariff?**

*Factors which warrant a reduction in the notional daily tariff*

[8] Ms Burrows succeeded on one of her two claims. The breach of good faith claim was dismissed in its entirety. Therefore success needs to be reflected in costs

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<sup>2</sup> [2009] NZCA 234

<sup>3</sup> *Supra*

<sup>4</sup> *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16]

awarded. The notional daily tariff shall be reduced from \$3,500 to \$2,000 to reflect that.

*Factors which warrant an increase to the notional daily tariff*

[9] The applicant submits she incurred a significant amount of costs in attempting to resolve the matter prior to the investigation without success. The respondent did not engage legal advice early and failed to accept the health and safety issues raised at the meeting. The applicant was forced to file a statement of problem incurring \$1,500 legal fees in that regard. She also refers to the legal costs incurred prior to urgent mediation including attendances at a telephone conference on 4 July 2014.

[10] The applicant further submits that other conduct of the respondent contributed to the increase in the applicant's costs including late engagement of legal counsel necessitating additional time and attendances, preparation and attendance at a further telephone conference on 21 July 2014 and submitted the matter could have been dealt with on the papers.

[11] The only matter which warrants an increase in costs is the additional attendance at the telephone conference on 21 July 2014. This was primarily due to the late instruction of Mr France.

[12] The remaining matters do not warrant an increase in the notional daily tariff. My Minute dated 21 July 2014 determined the matter was not appropriate to be heard on the papers due to the disputed facts. The necessity to engage with respondent counsel is part of the ordinary course of matters in the Authority. Although this matter had originally been set down for two days, both parties were concise and helpful in ensuring this matter took only one day to resolve including a site visit. I can detect no other conduct prior to or during hearing which increased the costs for either party.

[13] In the circumstances, an uplift of \$1,000 to the daily notional tariff to reflect the additional attendance at the telephone conference is appropriate.

**Outcome**

[14] The respondent is ordered to pay the applicant \$3,000 towards her actual legal costs.

**TG Tetitaha**  
**Member of the Employment Relations Authority**