

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 219  
3042093

BETWEEN

KATRINA COLE  
Applicant

AND

TRADE DEPOT LIMITED  
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person  
Bridget Smith, Counsel for the Respondent

Submissions received: 8 April 2019 from the Applicant  
No submissions received from the Respondent

Date of determination: 12 April 2019

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Trade Depot Limited is ordered to pay Katrina Cole the sum of \$300.00 as a contribution to her costs and \$71.56 as the Authority's filing fee, within 14 days of the date of this determination.**

[1] The Authority previously issued a determination on Katrina Cole's claims against her former employer Trade Depot Limited (Trade Depot).<sup>1</sup> In that determination Trade Depot was ordered to comply with its obligation under a settlement agreement to provide Ms Cole with a certificate of service. The certificate

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<sup>1</sup> *Katrina Cole v Trade Depot Limited* [2019] NZERA 175

was ordered to be in a form which Trade Depot previously offered in an open offer to settle Ms Cole's claims. Ms Cole's claim to damages or compensation for breach of the settlement agreement was unsuccessful. That determination was made on the papers.

[2] In the determination the parties were invited to attempt to resolve the issue of costs between themselves and a timetable was set for submissions, in the event that they were unable to do so.

[3] No submissions were received for Trade Depot by the date specified but the Authority was copied into an email from a lawyer for Trade Depot suggesting to Ms Cole that costs should lie where they fall. That proposal was not accepted by Ms Cole. She subsequently filed submissions seeking costs.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings, expressed conclusions on issues, and specified orders made as a result.

#### **Submissions from Ms Cole**

[5] Ms Cole seeks full reimbursement or indemnity costs of \$18,072.91. This is made up of:

- (a) What is described as the opportunity cost of lost wages, from 23 July 2018, when the certificate of service was due, to 1 March 2019. Letters from doctors were provided indicating that Ms Cole has had a number of health issues since 23 July 2018. Information regarding her earnings and hours of work when at Trade Depot was also provided. \$17,012.16 is claimed;
- (b) Reimbursement of fees for doctor's appointments of \$223.00;
- (c) Lawyer's fees of \$766.19. A time transactions sheet and an invoice from Ms Cole's former lawyers were filed; and
- (d) The Authority's filing fee of \$71.56.

[6] Ms Cole's submissions referred to compensation orders under s 142J of the Act and to seeking a pecuniary penalty, as provided in ss 142E.

## Costs considerations

[1] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act. There is a wide discretion to award costs, on a principled basis.

[2] The Employment Court set out principles guiding the Authority's approach to costs in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup>, which include:

- The statutory jurisdiction to award costs is consistent with the equity and good faith jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

[7] Ms Cole was successful in her claim to a compliance order but was not awarded the damages or compensation which she sought. Ms Cole could have achieved the same result by accepting Trade Depot's open offer. However, most of the costs which she claims were incurred before that point in time. The open offer did not include any offer of payment by Trade Depot towards Ms Cole's costs.

[8] Costs awards relate primarily to the costs of representation in proceedings. Ms Cole's claim for lost wages and doctor's fees are in the nature of damages and so cannot be sought in a breach of a settlement agreement claim.<sup>3</sup>

[9] The compensation orders and pecuniary penalties referred to by Ms Cole are in Part 9A of the Act. That part provides more efficient means of enforcement for employment standards, especially entitlement provisions.<sup>4</sup> Employment standards are defined in s 5 of the Act and do not include breaches of settlement agreements. In addition, compensation orders and pecuniary penalties under Part 9A may only be

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<sup>2</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

<sup>3</sup> *South Tranz Limited v Strait Freight Limited* [2007] ERNZ 704

<sup>4</sup> S 142A of the Act

sought by Labour Inspectors. I therefore cannot award a pecuniary penalty or compensation order under Part 9A in this case.

[10] What remains are Ms Cole's legal fees. Trade Depot's statement in reply outlines its view that Ms Cole engaged in lengthy and irrelevant correspondence with her lawyer about the certificate of service. I accept that some of the legal fees relate to Ms Cole seeking what amounts to a reference. However, there remain items covered by the transaction record and invoice which I consider can be claimed for. These are the pursuit of the initial certificate which did not arrive within the settlement agreement's specified time and then the pursuit of an amended certificate of service which stated that Ms Cole had resigned, as was required by the settlement agreement but left off the original certificate. More than one email was required to gain an amended certificate of service including reference to resignation.

[11] I am satisfied that Ms Cole is entitled to a contribution towards her legal costs incurred in pursuing the provision of a certificate and then provision of a complying certificate. I order Trade Depot Limited to pay Ms Cole within 14 days of the date of this decision the sum of \$300.00 as a contribution to her costs and \$71.56 as the filing fee.

Nicola Craig

Member of the Employment Relations Authority