

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 77
5559490

BETWEEN NATASHA DONALDSON
 Applicant

A N D GLYNN BRICK trading as
 BELLFIELD THOROUGHBREDS
 Respondent

Member of Authority: Nicola Craig

Representatives: Ken Usmar, Advocate for the Applicant
 Glynn Brick, the Respondent

Submissions: 24 February 2016 from the Applicant
 29 February 2016 from the Respondent

Date of Determination: 10 March 2016

**COSTS DETERMINATION OF
THE AUTHORITY**

**A. The respondent, Glynn Brick is ordered to contribute \$1750
towards the applicant, Ms Donaldson's costs.**

The substantive determination

[1] In a determination of the Authority dated 19 February 2016¹ the Authority determined that:

- Ms Donaldson has an unjustified disadvantage personal grievance due to Mr Brick's failure to provide her with a written employment agreement. No other remedies were awarded.

¹ [2016] NZERA Auckland 49

- Mr Brick must pay Ms Donaldson \$649.02 for KiwiSaver contribution and interest at a rate of 5% from 28 May 2015 to the date of payment, and \$1,610.72 for holiday pay.
- The parties mutually agreed that Ms Donaldson's employment would be terminated, so there was no dismissal.

Costs submissions

[2] Mr Usmar for Ms Donaldson sent an application for costs to the Authority on 24 February 2016 attaching two invoices, one for costs incurred to the completion of mediation (\$3,762.33) and another for costs between that time and the final determination (\$6,853.72).

[3] In light of my comments in the 19 February 2016 determination regarding Ms Donaldson's only partial success in this case and my view that the costs award in Ms Donaldson's favour would likely reflect her degree of success, Ms Donaldson has claimed \$1,750 costs.

[4] Mr Brick filed a memorandum on 29 February 2016 submitting that any costs incurred by Ms Donaldson in bringing this action were equalled by him in time and loss of earnings as a result. Mr Brick considered that any award of costs to Ms Donaldson is unfair and unreasonable considering the determination regarding her credibility.

[5] Mr Brick further submitted that all costs post mediation could, and should, have been avoided as he was prepared and made an offer to pay outstanding holiday pay and KiwiSaver. On enquiry from the Authority, the advice was that there was no written offer.

Determination on costs

[6] The Authority's power to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs on a principled basis.

[7] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*².

[8] The principles include:

- The discretion regarding costs is to be exercised in accordance with principle and not arbitrarily.
- 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 to 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.

[9] Although costs generally follow the event, in this case both parties had a degree of success. Ms Donaldson successfully established that she had an unjustified disadvantage claim (albeit that no remedies other than a declaration were ordered), that she was entitled to outstanding holiday pay and that she was entitled to the employer's KiwiSaver contributions that should have been paid on her behalf. However, Mr Brick was successful in defending the applicant's unjustified dismissal claim.

[10] Ms Donaldson was represented during this hearing whereas Mr Brick was not.

[11] The total costs incurred by Ms Donaldson are claimed to be \$10,616.05. However, it is clear from the earlier invoice that some of the costs on that invoice relate to attendances at mediation.

² [2005] 1 ERNZ 808

[12] The nominal notional daily tariff for the Authority is \$3,500 per day. This matter involved an investigation meeting of slightly less than one day.

[13] In the circumstances of both the parties having partial success, I order the Mr Brick to pay to Ms Donaldson \$1,750 towards her costs.

Nicola Craig
Member of the Employment Relations Authority