



- Warning the Applicant prior to mediation and her application to the Authority, that there were serious problems with her claims in correspondence via the legal representative acting for her at that time;
- specifically warning the Applicant on 30 June 2014 that it had problems with her claims against it and requesting further particulars;
- that on 1 June 2014 the Applicant had refused to provide further particulars or information as requested; and
- as a consequence on 1 July 2014 it had placed the Applicant on notice as to costs, including an application for increased costs as a result of her failure or refusal to engage on matters raised by it and to resolve the claim in a prompt, cost effective manner.

[5] The Respondent accordingly seeks an increase on the normal daily tariff to reflect the Applicant's failure to accept, settle or concede on the preliminary issue of relationship status in the sum of \$1,500.00.

*Submissions of the Applicant*

[6] The Applicant submits that the behaviour of the Respondent increased her costs by:

- declining to attend mediation until further particulars of her claims were received, thereby demonstrating an unwillingness to settle the matter in a cost-effective and timely manner; and
- increasing her costs as the result of two separate case management calls being required with the Authority.

[7] The Applicant submits that she has incurred high legal costs, had an inability to bring legal representation to the investigation meeting, and has limited financial ability to meet a costs claim at the level claimed by the Respondent.

[8] The Applicant further submits the costs should not be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[9] On this basis the Applicant submits that costs should lie where they fall.

## *Principles*

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

### *s. 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.*

[11] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>2</sup>.

[12] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup>.

[13] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>4</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*<sup>5</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

## **Determination**

[14] The normal rule is that costs follow the event and the Respondent is entitled to a contribution to its costs.

[15] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a one and a half day investigation meeting this would normally equate to \$5,250.00.

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<sup>2</sup> [1996] 2 ERNZ 622

<sup>3</sup> [2005] 1 ERNZ 808

<sup>4</sup> [2005] 1 ERNZ 808

<sup>5</sup> [2001] ERNZ 305

[16] There has been no *Calderbank*<sup>6</sup> offer in this case, and whilst I note that there has been correspondence between the parties prior to the investigation meeting, this of itself I do not find to be an argument for an uplift in the normal daily tariff rate, being not an unusual occurrence in matters which come before the Authority.

[17] Equally I find the necessity for case management conference calls in the Authority to be a normal part of the investigative process and not to impact on a costs determination unless they have been convened on the basis of uncooperative or frivolous behaviour by a party. I do not find that to be the case here.

[18] I observe in response to the high legal costs the Applicant has incurred, that there is no requirement that parties to an Authority process are legally represented, although they may choose to do so. Whilst I accept that the legal costs incurred by the Applicant prior to the investigation meeting are high, I do not accept that they are a determinant in the issue of costs to be applied.

[19] I accept that it is a principle in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*:<sup>7</sup> that costs are not to be used as a punishment or expression of disapproval. However it is also a principle as stated that costs normally follow the event<sup>8</sup> and in circumstances in which the Applicant was wholly unsuccessful in her claims before the Authority, I do not find that this is a case in which that principle should be displaced.

[20] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings, and I acknowledge that the Applicant has filed details of her personal financial situation with the Authority, including the legal costs she had incurred, which establish that she will have difficulty in meeting a costs award.

[21] Having considered all of the submissions and circumstances, I can see no justification for not making the costs award to the Respondent as the successful party in the proceedings, although having regard to the Applicant's financial situation; I do not order an uplift in the daily tariff rate normally applied in the Authority. I do however consider it appropriate that the Applicant is ordered to pay the Respondent costs at the normal daily tariff rate in the Authority.

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<sup>6</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

<sup>7</sup> [2005] 1 ERNZ 808 at para [44]

<sup>8</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[2005] 1 ERNZ 808

[22] Ms Driver is ordered to pay the Respondent the sum of \$5,250.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[23] Given Ms Driver's financial circumstances, she requests she be allowed to make payment by way of instalments. I acknowledge therefore that an arrangement may need to be made for her to pay the costs by way of instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are sought and cannot be agreed.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**