

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 158
3063875

BETWEEN FNN
 Applicant

A N D OES
 Respondent

Member of Authority: Peter van Keulen

Representatives: Debra Hendry, counsel for the Applicant
 Respondent in person

Investigation Meeting: On the papers

Submissions Received: 10 February 2020 from the Applicant
 12 March 2020 from the Respondent

Date of Determination: 21 April 2020

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 27 January 2020¹, I determined that OES had breached a record of settlement between herself and FNN; I made an order for compliance directing OES to comply with the record of settlement and I imposed a penalty of \$1,000.00 against OES for her breach.

[2] In my determination I also reserved costs so that the parties could try to agree costs. The parties were not able to agree costs and FNN seeks costs.

¹ *FNN v OES* [2020] NZERA 32.

Application for costs

[3] Counsel for FNN seeks an order for costs in FNN's favour on the basis that it was successful with its claim against OES, seeking an order for payment of \$4,500.00 - this sum being based on applying the daily tariff.

[4] OES says in response that she does not think she should be responsible for FNN's costs as it only had limited success in its claim against her, and costs should be proportionate to the amount awarded for the penalty FNN sought. Further she says she has no ability to pay any costs as she has significant debt and currently cannot pay the penalty imposed let alone any costs order made against her.

Analysis

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² and other relevant Employment Court and Court of Appeal decisions.³

Costs for FNN

[6] The first principle relating to costs in the Authority is that an award of costs should follow the event, that is, a successful party should normally be awarded costs.

[7] In this case FNN was successful and is entitled to an award of costs. I must now turn to consider the quantum of that award.

Applying the daily tariff

[8] The basic premise for quantifying that amount of a costs award in the Authority is to apply a daily tariff. The daily tariff is an amount awarded for each day of an investigation meeting with the current rate being \$4,500.00 for the first day of investigation and \$3,500.00 for any subsequent day.

² *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

³ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; *GS Tech Limited v A labour Inspector of MBIE* [2018] NZEmpC 127.

[9] I can depart from applying the daily tariff in certain circumstances, such as where the conduct of a case justifies actual or indemnity costs to be awarded. There are no such circumstances here and the daily tariff should be applied.

[10] My investigation into this matter took two thirds of one day and therefore the initial quantum based on the daily tariff is \$3,000.00.

Adjusting the daily tariff

[11] I must now consider if the initial quantum of \$3,000.00 should be adjusted. The daily tariff amount can be adjusted for various reasons - the factors relevant to my consideration of the increase or decrease of the daily tariff include:

- (a) Costs awards in the Authority will be modest;
- (b) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- (c) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- (d) Without prejudice offers can be considered;
- (e) Impecuniosity of the parties may be relevant;
- (f) A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[12] The relevant consideration in this case is the financial circumstances of OES.

[13] In *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)*⁴ the Employment Court said, at paragraph [11]:

Whatever the rights and wrongs of the way the case was managed in the Employment Relations Authority the fact is that costs awards must be realistic and to this end must reflect the ability of the party to pay. Mr Koia's financial situation at the time means that any award of costs at all would have created hardship to him but on the other hand

⁴ *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)* [2004] 2 ERNZ 274

as the losing party he should be required to make some contribution to the department's costs. For this reason I now reassess the costs to be paid by Mr Koia in relation to the Employment Relations Authority investigation meeting. At \$1,000 for each day this makes a cost award of \$2,000 which will I am satisfied Mr Koia will be able to pay even if it is by instalments over a period of time.

[14] In essence, the Court was saying that in some cases regardless of the conduct of the claim, a costs award should reflect the ability of a party to pay.

[15] However, this approach has been tempered somewhat by subsequent Employment Court decisions, including *Tomo v Checkmate Precision Cutting Tools Ltd*.⁵

[16] In *Tomo* Judge Inglis explored the Employment Court's analysis of this factor, considering decisions such as *Koia* and *Merchant v Chief Executive of the Department of Corrections*⁶ concluding that the Employment Court had taken the approach that costs would be reduced to account for undue financial hardship that might otherwise occur to the unsuccessful party if the otherwise standard cost tariff was imposed. Judge Inglis then went on to note that this principle should not be applied without some balance as the principles of equity and good conscience (applying to the exercise of the discretion to award costs) must also account for the countervailing interests of the successful party and broader public policy considerations.⁷

[17] After considering the Employment Court's restrained approach to security for costs applications and contrasting that with the Employment Court's steely approach to *Calderbank* offers⁸ Judge Inglis concluded, at [22]:

There may be circumstances in which a reduced, or no, costs order is appropriate. However, the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.

[18] So, it is clear that whilst the financial situation of the losing party is relevant to the level of any costs award, the exercise of my discretion in terms of setting costs

⁵ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

⁶ *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 (EmpC).

⁷ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [16].

⁸ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [17] and [18].

requires me to consider not just those financial circumstances but other factors including the successful party's interests and the broader public policy considerations.

[19] The relevant circumstances of this case that need to be considered in light of the financial hardship of OES include:

- (a) OES did not commence the claim, rather she responded to it. This is not a situation of the type contemplated by Judge Inglis in *Tomo*, where an impecunious employee has advanced lengthy, and doomed, proceedings.
- (b) OES could not afford to get legal advice and without legal advice about the merits of her position OES took no steps to resolve the claim but rather, without fully appreciating the culpability of her actions, sought to defend her position.
- (c) FNN, being in a stronger financial position was able to retain legal advice and must have embarked on the course of litigation knowing that any penalty imposed and costs awarded would not cover its total cost.
- (d) Yet, FNN had a right to protect its interests and it lodged its claim in order to ensure OES would comply with her obligations.

[20] In short, given the circumstances of this case, particularly FNN's right to protect its interests, OES should pay some of FNN costs. But OES's personal circumstances, in regard to financial hardship and her uninformed view of how best to conduct her response to the claim, requires a reduction in the daily tariff.

[21] On this basis, I reduce the daily tariff to \$2,000.00.

Order

[22] OES is to pay FNN \$2,000.00 as a contribution to its costs in this matter.