New Zealand Employment Relations Authority Decisions

Gillan v Birchleigh Management Limited (Christchurch) [2018] NZERA 1184; [2018] NZERA Christchurch 184 (12 December 2018)

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Last Updated: 19 December 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 184
3001328

BETWEEN KAYE GILLAN Applicant

AND BIRCHLEIGH MANAGEMENT LIMITED

Respondent

Member of Authority: Christine Hickey

Representatives: Russell Hyslop and Allan Halse, advocates for the Applicant

Rachel Brazil, counsel for the Respondent

Costs submissions received:

From the applicant on 9, and 26 November 2018
From the respondent on 23 and 26 November 2018

Determination: 12 December 2018

DETERMINATION OF THE AUTHORITY

[1] On 8 October 2018, I issued a determination finding that Birchleigh

Management Limited (Birchleigh) had unjustifiably dismissed Kaye Gillan.1

[2] I found that Mrs Gillan had contributed to the situation giving rise to her dismissal. Because of that I reduced the compensation I otherwise would have awarded by 25%.

[3] I also awarded three months' lost wages. This determination sets out the amount of lost wages Birchleigh must pay Mrs Gillan and also orders Birchleigh to pay a reasonable contribution to Mrs Gillan's costs of representation at the

investigation meeting.

1 [2018] NZERA Christchurch 142.

Amount of lost wages

[4] In the first determination I was unable to calculate the amount that Birchleigh must pay to Mrs Gillan in lost wages as I did not have all the information I needed, such as payslips. At paragraph [173], I set out how the amount should be calculated. I gave leave to Mrs Gillan to return to the Authority if the parties could not agree on how much she was owed.

[5] The parties have not been able to agree on the amount of lost wages to be paid and have requested me to calculate and determine the correct amount.

[6] Mrs Gillan submits that Birchleigh must pay her a total of $4,960.54 gross, including holiday pay and the employer's contribution to KiwiSaver. In contrast, Birchleigh submits that it must pay Mrs Gillan $4,493.82 gross.

[7] Both parties reached different average hours per week that Mrs Gillan had worked over the year prior to her dismissal. I consider that Birchleigh's calculations are correct in that Mrs Gillan worked an average of 39.78 hours a week at $17.50 per hour over the previous 52 weeks. Therefore, her average weekly rate was $696.15.

[8] Mrs Gillan would have received $9,050.34 (13 weeks x $696.15) had she remained employed by Birchleigh.

[9] In Mrs Gillan's final pay from Birchleigh, she received 3 days in lieu, pay for

6.5 hours on her last day of work on 4 July and two weeks' pay in lieu of notice (for

78 hours), as well as her remaining annual leave allocation.

[10] Birchleigh paid Mrs Gillan $1,365.00 for the two weeks' notice. In Birchleigh's submissions they acknowledge that they under paid the two weeks' notice by $27.35 gross, which needs to be included by me in calculating her lost wages.

[11] For the 3 lieu days Mrs Gillan was paid for in her final pay, based on the same reasoning as the notice pay, being an adjustment for actual hours worked per day of

7.956 rather than the 7.5 hours paid, Birchleigh owes her a further $23.94 gross.

[12] I am satisfied Mrs Gillan earned $3,664.17 gross from her new job over the 13 week period, which must be deducted from the 13 week amount she would have earned had she remained at Birchleigh.

Order on lost wages

[13] **I order Birchleigh Management Limited to pay Kaye Gillan total lost wages of $4,072.462 gross, and $325.80 holiday pay and $122.45 KiwiSaver, being a total of $4,520.71 by 4pm, Friday, 21 December 2018.**

Costs

The parties' positions

[14] Mrs Gillan claims indemnity, or full, costs of $35,878.97 for representation, of which Mr Hyslop's fee makes up $12,500, with Mr Halse's fee being the balance of

$23,378.97.

[15] Mrs Gillan submits that an award of costs of the daily tariff of $11,500 for the three-day investigation meeting would be "completely inappropriate in this case." The reasons she is seeking indemnity costs are:

• The Authority process lasted nearly two years3;

• On 30 August 2017, Mrs Gillan engaged Culturesafe NZ Ltd, Mr Halse's company, and from that time she "required regular contact with Culturesafe, which incurred considerable cost";

• Birchleigh "ignored the pleading of a Queens Counsel who is now a High Court Judge and that clearly has a massive impact on the costs application. In effect, Birchleigh, without conscience, forced Kaye to undergo a full trial (and bear the cost, both financial and psychological thereof) in full knowledge of

her extremely fragile mental state."; and

2 $9050.34 – $1,365.00 = $7,685.17 - $3,664.17 = $4,021.17 + $23.94 + $27.35 = $4,072.46 gross.

3 Mr Hyslop lodged the Statement of Problem on 19 December 2016 and the determination issued on 8

October 2018.

• Co-representation at the Authority was necessary to support Mrs Gillan because she is a suicide-attempt survivor.

[16] Birchleigh submits that indemnity fees are not appropriate for the following reasons:

• The claimed costs include costs leading up to and at mediation, which cannot be claimed in the Authority;

• The respondent's costs to date are $21,842.81, including GST and would increase by $4,000 plus GST if a claim for costs leading up to and including mediation could be made. These fees are significantly greater than in more usual personal grievance proceedings because of the ongoing interlocutory matters caused by Mrs Gillan's advocates;

• In addition, the respondent spent $4,280 plus GST to engage another lawyer to address potentially inaccurate media statements and defamatory statements to the media and interlocutory matters arising from such actions and threats;

• The case was one of unjustified dismissal. The Authority found, as Birchleigh had, that Mrs Gillan committed serious misconduct although finding that a fair and reasonable employer would not have dismissed her;

• The proceedings did not require the significant amount of additional interlocutory matters that were raised by the applicant. They caused the respondent a significant amount of additional cost;

• Additional legal advice was necessary to address the various attempts and threats from Mrs Gillan's advocate to attempt to get Birchleigh to settle outside of the Authority's processes by using the media. Most recently there was a threat that unless Birchleigh agreed to pay indemnity costs the advocate would go to the media;

• The length of time it took for the matter to progress through the Authority is not the respondent's doing. The respondent adhered to all timeframes prescribed and did not act outside its obligations;

• Costs should not be more than the usual daily tariff. However, Birchleigh considers costs should only be awarded for two days because witness evidence would have been finished within two days but for the incident with Mrs Gillan, meaning the proceedings could not carry on that day. The parties had already agreed they would make submissions in writing later; and

• Any amount above the daily tariff would be punitive in nature and costs should not be used as a punishment.

The applicable law

[17] The Authority's jurisdiction to award costs arises from clause 15 of Schedule

2 of the Employment Relations Act 2000.

[18] The principles the Authority applies are well-settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.4 In *Fagotti v Acme & Co Limited,*5 the Employment Court re-affirmed these principles.

[19] Costs principles the Authority considers include:

a. Whether to award costs and, if so, what amount.

b. The discretion must be exercised in accordance with principle and not arbitrarily.

c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.

d. Equity and good conscience must be considered on a case-by-case basis.

e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in

inflating or reducing an award.

4 [2005] NZEmpC 144; [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

5 [2015] NZEmpC 135.

f. It is open to the Authority to consider whether all or any of the parties'

costs were unnecessary or unreasonable.

g. 'Without prejudice' offers can be taken into account.

h. Awards of costs will be modest and must be reasonable.

i. Frequently costs are judged against a notional daily rate, which is currently $4,500 for the first day of an investigation meeting, and

$3,500 for subsequent days. This is usually the starting point for considering the amount of costs.

j. Costs generally follow the event; that is, the unsuccessful party is likely to be ordered to pay a reasonable contribution to the successful party's costs are.

k. The nature of the case can also influence costs. That means that the

Authority may order that costs lie where they fall in certain circumstances.

Issues

[20] I will consider the following issues in exercising my discretion on costs: (i) Should Birchleigh pay Mrs Gillan indemnity costs?

(ii) Is the daily tariff the appropriate starting point? (iii) Should I order any uplift in the daily tariff?

(iv) Should there be any downward adjustment to the award of costs based on the daily tariff?

Should Birchleigh pay Mrs Gillan indemnity costs?

[21] Indemnity costs are not awarded in New Zealand's legal system unless the other party's behaviour meets the standard set out in the Court of Appeal case of *Bradbury v Westpac Banking Corporation*6. The Court stated that the general

proposition is that:

6 [2009] NZCA 234.

- increased costs may be ordered where there is failure by the paying party to act reasonably; and
- indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[22] I have given careful consideration to Birchleigh's conduct of its defence in these proceedings and I conclude that there is no basis to award indemnity costs. Birchleigh's case was conducted in a thoroughly usual manner and neither counsel, nor Birchleigh's witnesses behaved badly and certainly did not behave unreasonably. Mrs Gillan's submissions for indemnity costs seem to be premised on the fact that Birchleigh did not settle the matter. I deal with that view below. However, it is not any basis to award full costs.

Is the daily tariff the appropriate starting point?

[23] The matter took two full days, and a half-day,7 at a later date, to investigate. Therefore, based on the daily tariff approach, the starting point for my consideration of costs is $9,750.8 I need to consider whether there are factors requiring me to either increase or decrease that amount.

[24] I consider that Mrs Gillan's submissions mean I need to consider whether an uplift is required, despite having already rejected indemnity costs.

Should I make any uplift to the daily tariff?

Relevance of a QC's involvement

[25] Mr Hyslop's invoice records the cost of an opinion from Peter Churchman Q.C., as he then was. Mr Churchman's invoice was not produced. It is apparent that in June 2017, six months after the proceedings were lodged in the Authority, Mr Hyslop engaged Mr Churchman on Mrs Gillan's behalf. What I know about

discussions between the parties is that there was an attempt to negotiate a settlement.

7 9.30am to 12.30pm.

8 $4,500 for the first day, $3,500 for the second day and $1,750 for the third day.

However, at that stage Birchleigh's board did not wish to make an offer to settle.9 I take it that there were no *Calderbank*, or "without prejudice save as to costs", offers exchanged because none have been produced.

[26] *Calderbank* offers, or any other offers to compromise proceedings, are not mandatory. The relevance of a *Calderbank* offer, if any is made, is that it is an attempt by a party, usually the respondent, to settle proceedings by a compromise. That is to be encouraged in the public interest. However, if no *Calderbank* offer is made I cannot take it into account when considering costs.

[27] Mrs Gillan's submission that Birchleigh failing to settle the matter once Mr Churchman became involved "clearly has a massive impact on the costs application" is simply not correct. Mrs Gillan brought the proceedings and may well have preferred to reach a settlement without going through an investigation meeting culminating in a written determination with

resultant costs for her, but that has no bearing on the issue of costs before me now.

Birchleigh's forcing Mrs Gillan through a "trial"

[28] Mrs Gillan's criticism of Birchleigh "without conscience, forc[ing] Kaye to undergo a full trial (and bear the cost, both financial and psychological thereof) in full knowledge of her extremely fragile mental state" is misguided. The Authority's processes are available for applicants who choose to bring proceedings. Mrs Gillan had a right to bring her personal grievance claim against Birchleigh. Given that Birchleigh did not consider it had unjustifiably dismissed Mrs Gillan it was entitled to defend her claims against it. In addition, Birchleigh did not consider that Mrs Gillan was being bullied while she worked for Birchleigh, or that bullying had anything to do with her dismissal. Neither party was "forced" to do anything. As it happens, Birchleigh lost the proceedings and Mrs Gillan was successful which gives rise to this

application seeking her costs from Birchleigh. However, Birchleigh was partly correct

9 Birchleigh submitted that a brief portion of an email exchange that Mr Halse had provided to the Authority was a without prejudice communication that I could not see in considering costs. Two other Authority members reviewed the document and decided that it was not a protected without prejudice communication because no offers or counter-offers were contained in it.

in that the Authority did not find that Mrs Gillan's case was a bullying case, as Mr

Halse and Mr Hyslop submitted it was.

[29] I need to comment on Mrs Gillan's "extremely fragile mental state". As the Member investigating Mrs Gillan's claims, I did my best to consider Mrs Gillan's fragile mental state at all times, and that has been acknowledged by Mr Halse on Mrs Gillan's behalf.

[30] Mr Halse and Mrs Gillan insisted to me, more than once, that being heard by the Authority and hearing from Birchleigh's witnesses would be good for her mental health.

[31] Mrs Gillan's view was not initially supported by her mental healthcare team. However, at the investigation meeting, the health professionals I heard from gave evidence that they had recently discharged Mrs Gillan from the team's care. They also gave evidence that they supported Mrs Gillan's decision to bring the proceedings despite their views of its possible effect on her being very different from her own views.

[32] I made sure that Mrs Gillan would be supported by the presence of a mental health professional as well as her husband at all times during the investigation meeting.

[33] Co-representation at the investigation meeting was not necessary to support Mrs Gillan. Indeed, at times the representatives were at odds over points they wished to make and how to conduct Mrs Gillan's case. In addition, I have already referred to steps taken to ensure, as best I could in the circumstances, that support for Mrs Gillan and her health was prioritised. The proceedings were not legally or factually complex and it is not within the considerations of equity and good conscience to require Birchleigh to pay more for Mrs Gillan's costs because she chose to engage two paid advocates concurrently.

[34] I also consider that travel costs10 are not a factor that should increase the daily tariff. There are many qualified and competent lawyers and advocates in and around Dunedin with experience in conducting Authority cases. Had Mrs Gillan engaged one of them she would not have incurred any travel costs.

Costs prior to and including mediation

[35] Mr Hyslop's invoice includes time spent preparing for and attending mediation. I agree with Birchleigh's submission that costs related to mediation are not generally recoverable in the Authority. There is no reason to depart from that rule in this case.

Relevance of how long the proceedings took

[36] Birchleigh did not contribute to the length of time for the proceedings to be resolved from the time the Statement of Problem was lodged on 19 December 2016 until I issued my determination on 8 October 2018. I set out in the substantive determination11 the progress of the claim. The first case management conference was on 2 February 2017 and in the Notice of Direction I wrote:

[45] After a case management conference on 2 February 2017, I decided to determine, on the papers, the jurisdictional claim of whether the applicant raised her personal grievance of unjustified dismissal within 90-days. If I found she had not, I was also going to consider Mrs Gillan's application whether the Authority [should] grant leave to raise her grievance out of time.

[46] I set a timetable for submissions and evidence. However, no submissions arrived. In the meantime, I understand that the respondent consented to Mrs Gillan raising her claim of unjustified dismissal out of time, because it conceded it was only out of time by a few days.

[47] I referred the matter to mediation, which I understand took place in April

2017. The matter did not settle at mediation.

[48] After mediation, Mr Hyslop requested a case management conference to set a timetable for an investigation meeting. However, he then requested that I delay holding the case management conference because he had requested an opinion on Mrs Gillan's case from a barrister specialising in employment law.

[49] I instructed the Authority officer to respond that the Authority would wait to hear further from Mr Hyslop before holding a case management conference.

10 For example, Mr Halse's invoice includes travel costs of approximately $2,869.13 (not including GST) between Hamilton, where Mr Halse lives, and Dunedin, where Mrs Gillan lives, for client meetings and for the two trips to Dunedin for the investigation meeting.

11 Note 1, paragraph [39] onwards.

[50] On 6 November 2017, Mr Halse contacted the Authority officer informing him that he was Mrs Gillan's new representative. Initially, I understood that he had replaced Mr Hyslop, but it emerged that Mr Hyslop and Mr Halse were jointly acting for Mrs Gillan.

[51] On 30 November 2017, I held another case management conference. At the conference, Ms Brazil informed me that Birchleigh had consented to Mrs Gillan's personal grievance of unjustified dismissal being raised out of time.

[52] In the Notice of Direction I issued on the same day I noted: After some discussion about a claim of unjustified

disadvantage for alleged bullying, Mr Halse confirmed that

the applicant will proceed with the personal grievance claim and breaches of contract claims. Mr Halse confirmed that [Mrs Gillan] does not want to proceed with [an] application for leave to raise a personal grievance of unjustified disadvantage outside of the statutory timeframe based on exceptional circumstances.

I understand that [Mrs Gillan] wishes to raise evidence of alleged bullying as part of the historical context for her

claim of unjustified dismissal.

...

[37] The 9-month period of delay between 2 February 2017 and 6 November 2017 was not attributable to Birchleigh, or to the Authority.

[38] I had to hold a greater number of case management conference calls than is usual in personal grievance proceedings.

[39] The investigation meeting took place on 22 and 23 March and 23 April 2018. I received submissions and further documents on 8, 9, 21 and 22 May and on 15 and

28 June and 1 October 2018.

[40] During the proceedings Mr Halse made much of the fact that he is a leading expert in workplace bullying. I accept that to be the case. However, neither he nor Mr Hyslop are experts in personal grievance law and procedure. Reviewing their invoices I find that even taking into account Mrs Gillan's poor mental health they took longer to prepare her case than would be reasonable for even fairly inexperienced counsel or other advocates who appear reasonably often in the Authority, as Mr Halse does.

[41] The length of time it took to investigate the claim and finalise the substantive determination was not due to any Birchleigh default. There are no grounds to increase the daily tariff in relation to the length of time it took to finalise the proceedings.

Were all the costs reasonably incurred?

[42] Mr Halse and Mr Hyslop seek to recover a significant number of hours they put into producing written submissions. Those submissions addressed a number of matters other than those that I had clearly directed were the areas for investigation. For example, they made submissions on bullying as if it was a separate cause of action in and of itself. It was not.

[43] The amount of extra time they took to prepare for and present a fairly straightforward case is not entirely due to Mrs Gillan's mental health meaning it was difficult to take instructions and draft her witness statement/s. In addition, her advocates wrote two separate and unnecessarily complex submissions, when one would have sufficed.

[44] In reaching the view that more hours were charged for than should have been reasonably necessary, I have no concern about the hourly rate/s charged. However, I do have concerns about the number of hours charged for.

[45] None of the above factors should result in any uplift in the daily tariff.

Level of costs compared to what Mrs Gillan could reasonably have been expected to be awarded by way of remedies

[46] I have awarded Mrs Gillan total remedies of $23,243.82. She has incurred costs of $35,878.97, of which at best she could expect to recover $9,750. Despite her success, she will be out of pocket after paying her advocates' bills. It may be that she values her moral victory highly. However, the Employment Court and the Authority

have long had concerns about representatives'12 costs exceeding remedies awarded.

That is reflected in the principle arising out of the *Da Cruz* case that awards of costs

12 Whether counsel or advocates.

must be "modest". For example, in the case of *Pathways Health Limited v*

*Moxon13*Judge Couch wrote:

[44] I noted earlier the observation of the full Court in *Da Cruz* that employment relationship problems should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. This is one of those unfortunate cases where costs of representation have got out of all proportion to what was at stake and to the parties' means. The defendant has only modest income ...

Ultimately, decisions about representation are made by the parties but there is also a strong obligation on counsel and advocates to ensure that disputes are

resolved much more economically than this case was.

[47] Mrs Gillan's case was never a case in which such a high total of representation costs should have been incurred. Mr Halse and Mr Hyslop were aware that Mr Gillan has only modest income. Her advocates needed to recognise and to make clear to Mrs Gillan that costs awards in the Authority are modest. I acknowledge that Mr Halse and Mr Hyslop may have done that and Mrs Gillan may have decided to proceed anyway, being aware that the cost to her of representation might outweigh any remedies awarded.

[48] I do not consider that there are any grounds for any uplift in the daily tariff based on the amounts of he advocates' invoices.

Should there be any downward adjustment to the award of costs based on the daily tariff?

[49] Birchleigh submits that the daily tariff is too high and that a lesser amount would be correct. Birchleigh submits that the matter could not proceed on the second day due to factors largely outside its control, meaning that half of a third day was needed. It also submits that the way Mrs Gillan's advocates ran the case led to unnecessarily increased costs for it. Therefore, it submits that the award of costs

should not be for more than two days of tariff.

13 [2013] NZEmpC 18.

Did the conduct of Mrs Gillan's case unnecessarily increase costs for Birchleigh?

[50] The Authority cannot use the costs regime to punish either party for inappropriate behaviour. However, a factor it can take into account is whether one party's conduct of the case was unreasonable thus causing unnecessary cost to the other party.

[51] Unfortunately, despite my stipulation that Mrs Gillan was supported at all times by a professional it became clear on the second day that Mrs Gillan's supporting mental health worker was not able to stay with her the whole day. Approaching lunchtime it was apparent Mrs Gillan was very unhappy. I adjourned early for lunch.

[52] Mrs Gillan's family, friends and advocates were very worried about Mrs Gillan, and thought that she had gone missing. However, she had been in the foyer of the hotel that the Authority used for the investigation meeting. I saw her there when I returned from lunch. She was very distressed. The fear that Mrs Gillan might attempt to harm herself again was very real and caused all parties, including Ms Shepherd, who was yet to give evidence for Birchleigh, to become upset.

[53] Once Mrs Gillan was located, and after discussion with both parties I agreed to the representatives' request not to continue further at that point but to allow them to negotiate in the hope of reaching a settlement. After some time it became obvious that would not be possible and I made the decision to adjourn the hearing for another day, partly because Ms Shepherd remained distressed. Both parties agreed that was the best course of action at the time.

[54] Later, Mr Halse submitted that the need to go into a third day to finish the investigation meeting was Birchleigh's fault somehow because Ms Shepherd was not ready to proceed that afternoon. He suggested that Ms Shepherd was part of the cause of Mrs Gillan's ill health in the first place and her upset at Mrs Gillan's obvious distress was due to some fault of her own. I reject that analysis of the situation.

Ms Shepherd cannot be criticised for feeling empathy for Mrs Gillan or for the effect on her of Mrs Gillan's extremely distressed state.14

[55] I agree with Birchleigh's submission that the case should have taken no more than the two days I had set down for it. The reason it took longer was not entirely due to Mrs Gillan's fragile health and the temporary unavailability of her mental health support worker on the second day.

[56] More than once during the investigation meeting I had to enquire of Mr Halse and/or Mr Hyslop about the relevance of their lines of questioning. I was often told that the case was one about bullying and that was the relevance of the evidence they were seeking.

[57] I made it very clear during case management conferences and written directions that the only relevance of any bullying allegations was as background to Mrs Gillan's claim of unjustified dismissal and was not an issue for investigation leading to a determination of Mrs Gillan's case. Despite that Mr Halse and Mr Hyslop consistently disagreed with me.

[58] A significant amount of time was taken by Mr Halse and Mr Hyslop's continued insistence in presenting the case on the basis that it was a bullying case. The determination makes it clear that any alleged bullying by Ms A was not relevant to the proceedings.15

[59] In addition, Mr Halse and Mr Hyslop frequently introduced or attempted to introduce new evidence from the morning of the first day of the investigation meeting onwards. Most of that evidence was of tangential relevance at best. For example, they introduced evidence from a former employee in relation to staff food use at Birchleigh. However, that witness did not work at Birchleigh until some months after

Mrs Gillan had been dismissed. That "evidence" and other evidence of alleged

14 I was made aware of some factors personal to Ms Shepherd that increased her upset at Mrs Gillan's distress. These factors are not to be published.

15 That is because it was not a constructive dismissal case and there was no claim of personal grievance

by way of unjustified disadvantage on the grounds of bullying. Mrs Gillan elected not to proceed with an application for leave to raise such a grievance out of time.

bullying after Mrs Gillan's dismissal were not and never could have been relevant evidence to assist my enquiry into whether Birchleigh acted as a fair and reasonable employer in all the circumstances *at the time*.

[60] Some of the evidence the advocates sought to rely on was inadmissible for reasons in addition to its lack of relevance. One example is that a third party's16 privacy would have been breached if I read the letters proffered let alone relied on them in public proceedings.

[61] However, each proffering of new evidence took my time and the time of Birchleigh and its representative to consider and discuss. At times, I gave Mrs Gillan's team the benefit of the doubt and accepted some new evidence. However, I did not gain any real assistance in determining the case from the newly presented evidence.

[62] The cause of the investigation not finishing within the two days set down for it was partly due to Mrs Gillan's ill health, partly due to her own and her family and representatives' under-estimation of the toll the proceedings would take on her, and partly due to the way her representatives ran her case.

[63] Because of the way Mrs Gillan's case was run, I consider that Birchleigh incurred far greater legal costs of its own than it should have in a reasonably straightforward personal grievance case.

Order on costs

[64] Having had regard to the principles set out in *Da Cruz* and *Fagotti* and the comment made by Judge Couch in *Pathways*, the time taken for the investigation meeting, and the conduct of the parties, I consider that a reasonable contributory award for Birchleigh to make towards Mrs Gillan's costs is $8,000.00, representing the two days the matter should have taken, even allowing for the frequent breaks that I

had planned for those two days.

16 These were letters written between a witness and a third party who was not a witness and was not aware her letters were proffered as evidence.

[65] **Birchleigh Management Limited must pay Mrs Gillan $8,000 towards the costs of her representation by 4 pm, Friday, 21 December 2018.**

Christine Hickey

Member of the Employment Relations Authority