IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 152
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	BETWEEN	TINEILL HAMILTON-REDMOND First Applicant
	AND	JESSICA CLIFFORD Second Applicant
	AND	CASINO BAR LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Michael McDonald, Advocate for Applicants Erin Anderson, Counsel for Respondent
Investigation Meeting:	Determined on the papers
Submissions Received:	15 October 2018 from Applicants 1 October 2018 from Respondent
Date of Determination:	16 October 2018

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination on a preliminary matter dated 3 September 2018[1], the Authority found that the two applicants were not employees of the respondent, and so could not pursue personal grievances before the Authority. I reserved costs and invited the parties to agree how costs were to be dealt with between them. They have been unable to agree.

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[2] Ms Anderson seeks contributions on behalf of the respondent towards its costs in the respective sums of $4,500 from Ms Hamilton-Redmond and of $7,000 from Ms Clifford. This is on the basis that:

a. If the applications had been heard separately, they would have taken a day each;

b. The two parties are not related and should not be financially responsible for each other;

c. The respondent was put to the cost of responding to two substantive claims with two sets of evidence from the applicants;

d. Ms Clifford went to the media hours after a case management conference in which counsel for the respondent had been asked to confirm instructions regarding non publication orders, but before counsel could obtain those instructions. This resulted in significant publicity, including negative publicity, about the respondent, and necessitated the respondent seeking non-publication orders.

e. Ms Clifford should have to pay a greater contribution towards the respondent's costs as her conduct caused damage to the respondent, and an uplift in the daily tariff would be a deterrent.

[3] Ms McDonald, for the applicants, resists this approach, saying that:

a. The daily tariff should be applicable to the hearing, not the applicants severally, as the issues were identical;

b. The applicant's evidence was given together;

c. The outcome has had a benefit to the respondent generally, which now has certainty for the 250 dancers it has working for it. It therefore has a substantial element of being a test case;

d. The applicants are not in a position to pay any costs. Ms Clifford is studying to be a teacher, and Ms Hamilton-Redmond is a solo parent on a benefit. They have no assets, and are applying for legal aid to pay for representation in their challenge to the Employment Court;

e. Ms Clifford contacted the media before the telephone conference, not afterwards, there is no evidence that confidential information was disclosed to the public and the prohibition from publication orders were not made permanent.

Discussion

[4] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

> ***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.*

[5] The Authority is bound by the principles set out in *Da Cruz* when setting costs awards. These include:

a. There is discretion as to whether costs would be awarded and in what amount.

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

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

d. Equity and good conscience are to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as 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.

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

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] First, I accept that costs should follow the event, and that the daily tariff is an appropriate starting point. I agree with Mr McDonald that it would not be appropriate to treat the two applicants separately. Their statements of claim were very similar, as were their briefs of evidence. The statements in reply were nearly identical, and only one set of briefs of evidence were lodged from the respondent's witnesses. I took evidence from the applicants together, inviting each to answer each question in turn, in order to save time and costs. Therefore, I am satisfied that the starting point should be a daily tariff of $4,500 for the meeting, not per applicant.

[7] As far as Ms Clifford's conduct is concerned, I do not know when she contacted the media. I doubt that she was trying to pre-empt an anticipated prohibition from publication order, but I cannot be sure. However, it was not an action that the Authority wishes to encourage and, in many cases, such actions can backfire on a party, as the media cannot be controlled. Despite that, costs are not to be used as a punishment, and uplifting the daily tariff as a deterrent would undoubtedly fall into the category of a punishment.

[8] If the respondent had detailed how much extra costs had been incurred by it as a result of Ms Clifford contacting the media, I would have been sympathetic to recognising that in an uplifted costs award. However, the respondent has not provided any indication at all of its costs, other than to say they are significantly more than the daily tariff. Therefore, I cannot guess the additional costs it was put to.

[9] Turning to disbursements, it is not clear that the respondent seeks these, although they are referred to in a letter annexed to Ms Anderson's submissions. For the avoidance of doubt, I shall address disbursements briefly. It appears that the respondent incurred a total of $1,600 in flights and accommodation for counsel and

the 'industry practice' witness, Ms LeProu. However, there is no breakdown of how these costs are made up. This is a problem, for two main reasons:

a. the Authority will not generally award the costs of travel for out-of-town counsel except under exceptional circumstances; and

b. allowable disbursements must be reasonable, and I am unable to ascertain what Ms LeProu's costs were, and so cannot assess them.

[10] In light of these problems, I am unable to make any award for disbursements.

[11] Turning to the applicants' ability to pay, I note that Mr McDonald has given no financial details, but has said they have no assets to liquidate. I am prepared to accept that neither applicant has any financial reserves available to them. In *Gates v Air New Zealand Ltd* [2] His Honour Judge Couch stated[3]:

> A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiff to pay. The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate.

[12] The Authority is entitled to take account of the ability of the two applicants to pay any award. I believe that anything other than a very modest amount is unlikely to be within the ability of either applicant.

[13] Was this a test case, so that no costs should be awarded, as suggested by Mr McDonald? I believe that it cannot be so characterised. Whilst it may be tempting to read the Authority's determination as applying to all lap dancers or strippers in New Zealand, or even to all lap dancers or strippers working for the respondent, it was an analysis of the particular work situation of the two applicants. I cannot say that a

[2] [2010] NZEmpC 26
[3] At [21]

different dancer working for the respondent in Wellington, say, has the same working arrangements and, so, is also not an employee. Therefore, I do not agree that this was a test case, and that costs should lie where they fall.

Disposition

[14] I conclude that, taking into account the respective financial situations of each applicant as I infer them, it would be appropriate to make the following orders:

a. Within 28 days of the date of this determination, Ms Clifford is to make a contribution towards the costs of the respondent in the sum of $500; and

b. Within 28 days of the date of this determination, Ms Hamilton-Redmond is to make a contribution towards the costs of the respondent in the sum of $500.

David Appleton
Member of the Employment Relations Authority