

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 352
3015771

BETWEEN ABBY HILLIER
 Applicant

A N D MEDEU INTERNATIONAL
 LIMITED trading as BLD CAFÉ
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Emma Moss, Advocate for the Applicant
 Abdrakhman Assilbekov, Director of Respondent

Investigation Meeting; On the papers

Submissions Received: 20 October 2017 and 8 November 2017 from Applicant
 31 October 2017 and 8 November 2017 from
 Respondent

Date of Determination: 13 November 2017

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A. The Respondent is to pay a contribution towards the Applicant’s costs in the sum of \$1,000 together with the filing fee of \$71.56 within fourteen days of the date of this determination.

The substantive determination

[1] By way of a determination dated 16 October 2017¹, the Authority found that the Applicant Ms Abby Hillier was unjustifiably dismissed by Medeu International Limited (“Medeu”).

¹ [2017] NZERA Auckland 323.

[2] Medeu was ordered to pay Ms Hillier the sum of \$5,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (“the Act”) for humiliation and loss of dignity and injury to feelings in respect of her unjustifiable dismissal together with \$5,320 gross in lost remuneration under s.138 of the Act, \$886.72 gross being two weeks’ notice owing under the terms of Ms Hillier’s employment agreement; and \$402.41 gross holiday pay.

[3] Costs were reserved and the parties were invited to exchange memoranda as to costs.

[4] Ms Moss on behalf of Ms Hillier submits that Medeu should pay Ms Hillier’s entire costs totalling \$4,550 together with the disbursement for the filing fee of \$71.56 on the basis that costs were reasonably incurred. Ms Moss referred to the rejection by Medeu of a *Calderbank* offer but there was no provision of the offer to the Authority nor any details of it.

[5] Mr Assilbekov opposes the application for costs. However, his submission relates to the findings made by the Authority in its determination of 16 October 2017 rather than addresses the issue of what amount of costs, if any, should be contributed by Medeu.

Costs determination

[6] The Authority’s power to award costs against a party 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 a manner as it thinks reasonable.

[7] The Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² when setting costs awards. These include:

- There is discretion as to whether costs would be awarded and in what amount;

² [2005] 1 ERNZ 808.

- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience are to be considered on a case by case basis;
- 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;
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that cost lie where they fall in certain circumstances.

[8] First, I accept that it is appropriate for Medeu to make a contribution towards Ms Hillier's costs on the basis that costs follow the event. Ms Hillier was wholly successful in her claims against Medeu.

[9] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day. The investigation meeting lasted half a day, so the starting point in this matter is \$2,250.

Should the daily rate be uplifted?

[10] Ms Moss seeks all legal costs incurred totalling \$4,550 plus the filing fee of \$71.56. Effectively by seeking \$4,550, Ms Moss is seeking an uplift in the daily rate of \$2,300. Ms Moss was asked to provide a time sheet and an invoice for costs. The invoice that was provided to the Authority was an invoice for \$2,000 plus GST of \$300. Attached was a time sheet detailing time spent on the matter including time spent at mediation.

[11] As mentioned, Ms Moss also refers to the rejection by Medeu of a *Calderbank* offer. There was no information concerning the *Calderbank* offer or any other details in respect of it provided to the Authority. Without this information, the Authority is not in a position to consider that as a factor in assessing costs.

[12] I consider the amount being sought on behalf of Ms Hillier to be too high. The matter before the Authority was not a complex matter and took just half a day. There was no real dispute about the facts that led to Ms Hillier's unjustified dismissal. With regard to the other claims brought by Ms Hillier concerning payment of the minimum wage and failures to deduct PAYE and Kiwisaver contributions Mr Assilbekov ensured these matters were satisfactorily resolved prior to the investigation meeting. This saved time.

[13] I am mindful that costs should be reasonable and awards modest and not to be used as a punishment or an expression of disapproval. In light of this, I am not prepared to uplift the Authority's daily rate. I consider an award of \$1,000 appropriate.

Order

[14] I order Medeu to make a contribution towards Ms Hillier's costs in the sum of \$1,000 together with the \$71.56 filing fee. These costs are to be paid to Ms Hillier no later than fourteen days from the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority