

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 764
3231819

BETWEEN

SEOJEONG JOO
Applicant

AND

HOSPITALITY SERVICES
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Seungmin Kang, counsel for the Applicant
Takeshi Ito, counsel for the Respondent

Costs submissions
received: 1 and 15 December 2023

Determination: 19 December 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] In its determination of 29 November 2023, the Authority found that Seojeong Joo did not have a personal grievance as raised by her from the employment relationship she had with Hospitality Services Ltd (HSL). The Authority also found that any breach by HSL of the good faith obligations under s 4 of the Employment Relations Act 2000 (the ER Act), did not meet the standard required by s 4A of the Act for a penalty to be imposed on the employer.

[2] Regarding costs, the Authority noted that Ms Joo had been in receipt of legal aid and that the extent of any liability for an order for costs was provided for by the Legal Services Act 2011.

[3] In accordance with the timetable given by the Authority, an application has been made by HSL for an order for costs. Ms Joo has responded.

[4] The general principles for fixing costs in the Authority are well established from leading cases such as *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*¹. In this case there is no issue about the principles themselves or their application, if costs are to be ordered against Ms Joo.

[5] It is not disputed by the parties that but for the grant of legal aid to Ms Joo, the starting point for an order would have been the amount obtained by applying the Authority's daily rate to the investigation meeting time. The daily rate is currently \$4,500 for the first day and \$3,500 for each further day, giving in this case a total of \$8,000 for 2 days of hearing.

[6] From that beginning the Authority would normally have then considered whether any reduction or increase was required, to take account of any particular circumstances or features of the employment relationship problem. HSL seek \$8,000 without uplift.

[7] The issue in this case is whether in the circumstances an order can be made at all, in view of limitations in the Legal Services Act 2011. Under s 45(2) of that Act, the Authority is not able to award costs against a legally aided party, unless it is satisfied that there are exceptional circumstances.

[8] Section 45(3) sets out conduct the Authority may consider in determining whether there are exceptional circumstances. Relevant conduct by the legally aided person includes but is not limited to the following;

- a. any conduct that causes the other party to incur unnecessary cost
- b. any failure to comply with the procedural rules and orders of the court
- c. any misleading or deceitful conduct

¹[2005] ERNZ 808

d. any unreasonable pursuit of 1 or more issues on which the aided person fails

e. any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution

f. any other conduct that abuses the processes of the court.

[9] The courts have held that the threshold for a finding of exceptional circumstances is that the conduct must be ‘sufficiently egregious’ or ‘quite out of the ordinary’².

[10] For HSL it is submitted that none of Ms Joo’s claims was upheld or determined in her favour, and she rejected a without prejudice save as to costs offer. That offer was a payment of \$17,000 compensation expressly under s 123(1)(c)(i) of the ER Act (although the Authority had not determined Ms Joo had a grievance to be settled under that provision). Ms Joo was given less than two days to accept the offer.

[11] In considering the without prejudice settlement offer under s 45 of the Legal Service Act, it can be inferred that HSL contends the rejection of the offer by Ms Joo falls within s 45(3)(a) or (d) or (e), or a combination of those.

[12] For Ms Joo it is submitted the circumstances do not meet the high threshold of exceptional circumstances and therefore no order for costs can be made.

[13] The Authority agrees. The rejection of a good or reasonable without prejudice save as to costs offer, may be unwise, show lack of judgement, or even be unreasonable, but something more is required before the character of the conduct becomes ‘egregious’. It must by definition be conduct that is outstandingly bad, or shocking.

[14] The rejection of a fair and reasonable settlement offer is relatively commonplace in employment law and is not something ‘quite out of the ordinary’. With hindsight, Ms Joo would have been financially much better off to have accepted the offer.

² *Laverty v Para Franchising Ltd* [2005] NZCA 436; [2006 1 NZLR 650 (CA)]; *Checkmate Precision Cutting Tools Ltd v Tomo* [2013] NZEmpC 107 at [10]; *Blue Water Hotel Ltd v VBS* [2019] ERNZ 40 at [10] to [11].

[15] Being a without prejudice offer, it was not made with any acknowledgment of liability to provide Ms Joo some vindication of her grievance. Although the Authority did not uphold her claims, it could see she had a very strong and personal sense of justice in pursuing them. Vindication is likely to have been an important motivation for her in bringing the claims.

[16] Rejection of HSL's offer, although it was a fair and reasonable offer, did not attain the threshold of egregious or extraordinary conduct.

Conclusion

[17] For the above reasons, the Authority concludes that in the absence of exceptional circumstances it is unable to make any order for costs against Ms Joo. The limitation of s 45(2) of the Legal Services Act applies.

Alastair Dumbleton
Member of the Employment Relations Authority