

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 134  
3039114

BETWEEN                    CUCHALIN (CULAIN) JONTY  
   KIMBERLEY-CHANDRE  
   (WALSH)  
   Applicant

AND                            FERRYMEAD AGADIR  
   LIMITED  
   Respondent

Member of Authority:     Helen Doyle

Representatives:           Applicant in Person  
   Robert Thompson, advocate for the Respondent

Submissions Received:    Submissions and financial information from applicant to  
   10 March 2020  
   Submissions from respondent 10 February 2010

Date of Determination:    30 March 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A        Cuchalin Walsh is ordered to pay to Ferrymead Agadir Limited costs in the sum of \$1,575. He is to make arrangements to pay this sum by instalments. If agreement cannot be reached then either party may return to the Authority for appropriate orders.**

**Substantive determination**

[1] The Authority did not find for the applicant in its determination dated 13 January 2020.

[2] The issue of costs was reserved and a timetable set for an exchange of submissions.

[3] The respondent seeks an award of the daily tariff for a one day hearing in the sum of \$4,500.

[4] The applicant has provided information that his financial situation is such that there should either be no award or that an award of costs should be minimal.

**Analysis**

[5] Clause 15 of Schedule 2 to the Employment Relations Act 2000 (the Act) gives the Authority the power to award costs.

[6] The leading case on costs in the Authority is the judgment of the full Court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.<sup>1</sup>

[7] There is a discretion as to whether costs are to be awarded and, if so, in what amount. That discretion is to be exercised in accordance with principle and not arbitrarily.

[8] Equity and good conscience is to be considered on a case by case basis and costs are not to be used as a punishment or an expression of disapproval with the unsuccessful parties conduct. Conduct however which unnecessarily increases costs can be taken into account in increasing or decreasing an award.

[9] Costs in the Authority are usually judged against a daily rate which is now recognised as \$4,500 for the first day.

[10] The Authority asked for further information from the applicant and this was provided to the Authority and Mr Thompson.

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<sup>1</sup> *PBO Limited v De Cruz* [2005] ERNZ 808 at [44].

[11] The Employment Court has held the ability of the unsuccessful party to pay without undue hardship is a relevant consideration for the Authority in exercising its discretion as to costs.<sup>2</sup> An award of costs should not be oppressive.

[12] The financial position of the unsuccessful party is not the only consideration for the Authority. It is only one factor that needs to be considered in the exercise of the discretion alongside other relevant factors including those that relate to the respondent. The Chief Judge of the Employment Court in a judgment about costs in the Authority, *Elisara v Alianz New Zealand Limited*<sup>3</sup>, emphasised the principle that costs in the Authority will be modest.<sup>4</sup>

[13] The Chief Judge stated in *Elisara*<sup>5</sup> that there should not be an assumption the notional daily tariff is universally “modest” and should be applied in that way. An example was given of a worker on the minimum wage and one who has failed to obtain alternative employment to illustrate that \$4,500 in those circumstances would not be a modest cost award.

[14] The respondent was put to considerable cost in defending the wide ranging case against it pursued by the applicant. This included as Mr Thompson submits obtaining a transcript of a lengthy disciplinary meeting.

[15] There was nothing in the applicant or respondent’s conduct before or during the Authority investigation meeting that could be said to have increased costs for either party. Directions of the Authority were complied with by both parties. The investigation meeting was originally scheduled for three days but was able to be concluded in one day largely due to the constructive approach by both parties.

[16] The appropriate starting point is the daily tariff of \$4,500.

[17] I have then considered in the exercise of my discretion the applicant’s financial circumstances. He is currently on a Student Allowance which he says enables him to pay rent, minimum food costs and fuel.<sup>6</sup> He has also provided bank records that support amongst other matters outgoings for car insurance and other payments. His bank account is in an overdraft situation although not overdrawn to the maximum amount. He has also provided

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<sup>2</sup> *Metallic Sweeping (1998) Ltd v Ford* (2010) 8 NZEMPC 129 8 at [52]

<sup>3</sup> *Elisara v Alianz New Zealand Limited* [202] NZEmpC at [29]

<sup>4</sup> *PBO v Da Cruz* above n 1

<sup>5</sup> *Elisara* above n 3 at [30]

<sup>6</sup> He submits that it “just” enables these payments.

information from the finance company about what he owes with respect to his vehicle. There is nothing to support assets other than the encumbered vehicle.

[18] Currently Mr Walsh is without employment. It is unclear when he would be in a situation to obtain employment particularly in the current circumstances.

[19] In all the circumstances having regard to the applicant's financial circumstances, I am minded to adjust the daily tariff downward. I have reflected on whether that should be to the point to extinguish any costs at all. To extinguish any liability at all for costs however would fail to recognise the costs incurred by the respondent in defending a wide-ranging claim. An award of costs will inevitably need to be paid by instalment.

[20] I intend in the exercise of my discretion to make an order for payment of costs of \$1,575. That is a 65% reduction from the notional daily tariff of \$4,500. Mr Walsh is to confirm a sum that he can pay by regular instalment to Mr Thompson within 10 days of the date of this determination. If agreement cannot be reached about that then Mr Walsh and Mr Thompson can return to the Authority for an order.

### **Order**

[21] I order Cuchalin (Culain) Jonty Kimberley-Chandre (Walsh) to pay to Ferrymead Agadir Limited the sum of \$1,575 being costs.

Helen Doyle  
Member of the Employment Relations Authority