

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 464
3125294

BETWEEN SHARRON MATTHEWS
Applicant

AND NEWBERRYS FUNERAL
HOME LIMITED
Respondent

Member of Authority: Sarah Kennedy

Representatives: David Flaws, advocate for the Applicant

Submissions Received: 2 August 2022 from the Applicant
No submission from the Respondent

Date of Determination: 15 September 2022

COSTS DETERMINATION OF THE AUTHORITY

Costs

[1] On 26 July 2022, the Authority issued a determination finding that:

(a) Sharron Matthews was not paid correctly, constructively dismissed from her employment and unlawfully discriminated against during her employment with Newberrys Funeral Home Limited (NFHL).

(b) NFHL were directed to pay Ms Matthews wage arrears, lost wages and compensation under the Employment Relations Act 2000.¹

¹ *Sharron Matthews v Newberrys Funeral Home Limited* [2022] NZERA 394.

[2] The parties were asked to explore resolving costs by agreement but failed to do so. No submissions were made on behalf of NFHL.

Submission for Ms Matthews

[3] Ms Matthews' view is that there were repeated instances of non-compliance by NFHL with the Authority's directions and timetable and some key documents were not provided until investigation meeting. This created addition expense and delays for Ms Matthews.

[4] I note there were health issues impacting on the NFHL's representative for some of that time, but that does not explain the total length of the delays in providing all the relevant information requested on more than one occasion by both the applicant and the Authority for the purposes of the Authority's investigation.

Costs principles

[5] The Authority's discretion to award costs is well established and arises from clause 15 of schedule 2 of the Employment Relations Act 2000. The discretion is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that a successful party should receive a contribution to costs reasonably incurred in reaching that result; costs are discretionary and should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional "daily rate" or "tariff" as a starting point to assess costs.

[6] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may account for a liable party's means to pay costs, the preparation required in particularly complex matters and where the conduct of parties has unnecessarily increased costs.³

[7] The Authority's current tariff for a one-day investigation meeting is \$4,500.00 and \$3,500.00 for each additional day. This means an appropriate starting point for assessing a reasonable contribution to the costs incurred by a party in preparing for and taking part in a three-day investigation meeting is \$11,500.00.

² Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

³ Above n2.

Assessment

[8] The investigation meeting took place over three days. After weighing the relevant principles referred to above, having been successful, Ms Matthews is entitled to a contribution towards her costs.

[9] Having been wholly successful in her constructive dismissal claim and partially successful in her unlawful discrimination claim, I consider an uplift to reflect the additional expense incurred by Ms Matthews by non-compliance by NFHL with the Authority's directions and requests for information is appropriate.

[10] I consider that costs based on three day's hearing time of \$11,500.00 plus an uplift of \$2,000.00 is appropriate.

Order

[11] Newberrys Funeral Home Limited is ordered to pay Sharron Matthews the sum of \$13,500.00 as a contribution towards her costs, together with the filing fee of \$71.56 within 28 days of this determination.

Sarah Kennedy
Member of the Employment Relations Authority