

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 17
3197319

BETWEEN	KIM MCLEOD Applicant
AND	SUN COURT HOTEL LIMITED Respondent

Member of Authority:	Natasha Szeto
Representatives:	Applicant in person Michael Grantham, counsel for the Respondent
Submissions and information received:	2 October 2023 from the Respondent, 17 October 2023 from the Applicant
Determination:	12 January 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 19 September 2023, the Authority issued a determination in this matter, finding that Ms McLeod's claims of unjustifiable dismissal and unjustifiable disadvantage were not made out.¹

[2] In that determination, the parties were encouraged to resolve any issue of costs between them, and the Authority referred to its usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve costs. Sun Court Hotel Limited (Sun Court) lodged a Memorandum seeking costs on 2 October 2023. Sun Court submits a costs award of \$5,500 should be made to it as the successful party. This is on the

¹ *Kim McLeod v Sun Court Hotel Limited* [2023] NZERA 540.

grounds that actual costs incurred were significantly greater than the notional daily tariff of \$4,500. Sun Court also says the investigation meeting continued past the scheduled end time, concluding at approximately 6:45pm and making the length of the meeting greater than normal.

[4] On 17 October 2023, Ms McLeod provided a printout from MyMSD confirming that she was (as at 17 October 2023) on Jobseeker Support payments and has – not insignificant - debts with the Ministry of Social Development. In a brief email to the Authority on 17 October 2023, Ms McLeod confirmed she is on a jobseeker’s benefit. She says she returned to work in November 2022, but has been off work since May 2023 due to ill health. She says her financial status means that she is left with a “zero balance” after paying rent and basic living costs.

[5] Following the Investigation Meeting, the Applicant is now self-represented. She was invited to respond to Sun Court’s submissions on costs, but did not do so. Other than the brief emails referred to above and the MyMSD record, Ms McLeod has not filed any further information or submissions. Consequently I now proceed to determine the costs application on the information before me.

Analysis

[6] Costs are at the discretion of the Authority.² The Authority has adopted a daily tariff approach as the starting point for considering costs which is now well known. The current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.³

[7] The parties can expect the Authority to adhere to the approach of applying the daily tariff, unless there is good reason to depart from it.

[8] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁴ as confirmed in *Fagotti v Acme and Co Limited*⁵. It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

³ Practice Direction of the Authority Te Ratonga Ahumana Taimahi at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

⁴ [2005] 1 ERNZ 808.

⁵ [2015] NZEmpC 135 at 114.

of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[9] As the successful party, Sun Court is entitled to a contribution to its costs actually and reasonably incurred. I accept Sun Court's actual and reasonable costs were significantly in excess of the daily tariff based on the information it has provided.

[10] I also acknowledge the Investigation Meeting ran longer than is usual to avoid the need to go into a second day. However, Investigation Meeting start times, break times and finish times are usually flexible. In this case, the "overrun" time was agreed between the parties and the Authority, and was not an excessive amount of time (being less than two hours assuming a finish time of 5:00 pm).

[11] I therefore adopt the daily tariff of \$4,500 as being the appropriate starting point for assessing costs.

[12] Costs awards must be realistic and must reflect the ability of the unsuccessful party to pay.⁶ Any order I make will need to recognise the reality that Ms McLeod is currently in a financially precarious position and is likely impecunious. A full award of costs at or above the daily tariff (as Sun Court seeks) would have an unduly punitive effect on her.

[13] However, a balance must be struck between reducing – including to nil - an otherwise appropriate costs award due to impecuniosity and the countervailing interests of the successful party. A total reduction of costs would not be appropriate – Ms McLeod must pay something towards Sun Court's costs, notwithstanding her financial position. There are broader public policy considerations in the successful party having a costs award in its favour.⁷

[14] I consider it reasonable to recognise and make allowance for Ms McLeod's current financial position, without denying Sun Court – as the successful party – the ability to seek to enforce an appropriate costs award.⁸

⁶ *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)* [2004] 2 ERNZ 274, and *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

⁷ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

⁸ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [21].

[15] Having regard to the factors referred to above, and allowances made for financial impecuniosity in other cases⁹ I consider it appropriate to moderate the award of costs by reduction of the daily tariff. I consider it fair and reasonable that Ms McLeod pay Sun Court \$2,250 (being half of the daily tariff for a one-day investigation meeting) towards its legal costs.

Orders

[16] For the reasons set out above, I order Kim McLeod to pay to Sun Court Hotel Limited within 28 days of the date of this determination:

- a. The sum of \$2,250 as a contribution to its legal costs.

Natasha Szeto
Member of the Employment Relations Authority

⁹ See for example: *Stanley Martin Good v Pukekohe High School Board of Trustees* [2022] NZERA 79, *Stacey Kereama v Harbar Limited* [2022] NZERA 460, *Michael Oxley v Compass Group New Zealand Limited* [2023] NZERA 64, and *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 (in which \$3,000 costs was ordered despite the Court accepting Mr Tomo was unemployed, had no assets, had debts owing and did not have the means to meet an award of costs against him, at [11]).