

IN THE EMPLOYMENT RELATIONS AUTHORITY

AUCKLAND

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

[2020] NZERA 537
3105492

BETWEEN

JO MORROW
Applicant

AND

NZRS NATIONAL LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul McBride, counsel for the Applicant
Shay Narayan, advocate for the Respondent

Investigation Meeting: On the papers

Submissions received: 20 November 2020 from the Applicant
4 December 2020 from the Respondent

Determination: 23 December 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2020] NZERA 455 it was determined that the Respondent, NZRS National Limited (NZRS) had breached the Record of Settlement it had agreed with the Applicant, Ms Jo Morrow.

[2] Costs were reserved in that matter in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] The matter was determined 'on the papers'.

[4] Mr McBride, on behalf of Ms Morrow, is seeking an uplift above the Authority's current daily tariff approach to costs.

[5] In support of this application Mr McBride highlights the fact that an agreed Statement of Facts was agreed to be lodged by the parties following a case management conference with the Authority in which it had been agreed for the matter to be dealt with 'on the papers'. An Agreed Statement of Facts signed by both parties was lodged with the authority on 15 July 2020.

[6] However the Respondent subsequently provided a further document also labelled Agreed Statement of Facts, but which was signed only by Ms Narayan, advocate for the Respondent.

[7] This resulted in further case management conference calls with, and correspondence by, the parties.

[8] As a consequence the Applicant is seeking a costs award of \$1,910.15 (including GST) on an indemnity basis in respect of the costs incurred arising from the 'Agreed Statement of Facts' issue, plus an uplift in costs in respect of the Respondent's conduct thereafter in the amount of \$9,256.35, a total contribution of \$9,256.35.

[9] Ms Narayan for NZRS submits that a starting point should be half day apportionment of the notional daily tariff on the basis that the investigation proceeded 'on the papers' which resulted in a costs saving for both parties.

[10] It is also submitted that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.¹

Principles

[11] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

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.

¹ *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*[2005] 1 ERNZ 808 at [44].

- (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 manner as it thinks reasonable.

[12] Costs are at the discretion of the Authority, as observed by the Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[13] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

Determination

[14] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Principles also include that costs are reasonable and that they normally follow the event.

[15] I see no reason for not applying these principles in this case. Ms Morrow was successful and costs normally follow the event.

[16] Whilst I concur that costs are not to be just as a punishment or expression of disapproval, conduct which unnecessarily increased costs can be taken into account in respect of costs. In this case I find that the confusion resulting from a signed Agreed Statement of Facts being filed which the Respondent subsequently resubmitted altered and not signed by the Applicant's counsel unnecessarily increased costs by incurring memorandum and discussion with the Authority.

[17] In addition a further determination has been necessary resulting from the failure of the parties to agree on the quantum of remedies and the Respondent depositing without notice a sum of monies into Ms Morrow's bank account representing its calculation of what was owed to her.

[18] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing.

² [1996] 2 ERNZ 622

³ Above n1

⁴ [2005] 1 ERNZ 808

[19] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point. I find that an uplift in costs is merited in this case for the above reasons.

[20] Accordingly NZRS is ordered to pay Ms Jo Morrow the sum of \$5,500.00 towards her legal costs.

Eleanor Robinson
Member of the Employment Relations Authority