

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 525
5455310

BETWEEN ELLA NEWMAN
 Applicant

AND TAXI LEASE LIMITED T/A
 THE PLANT PLACE
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Scott, Counsel for the Applicant
 Andrea Twaddle, Counsel for the Respondent

Submissions received: 2 December 2014 from the Respondent
 None received from the Applicant

Determination: 18 December 2014

COSTS DETERMINATION OF THE AUTHORITY

The applicant, Ms Ella Newman is ordered to contribute \$5,000 towards the respondent's, The Plant Place's, costs.

Employment Relationship Problem

[1] In a determination dated 19 November 2014¹, the Authority declined the applicant, Ms Ella Newman's application for a non publication order. In a determination dated 24 November 2014², the Authority found that Ms Newman had not been sexually harassed in her employment by Mr Bruce Sanson, the owner of the respondent, Taxi Lease Limited t/a The Plant Place (The Plant Place). The Authority also found that Ms Newman had not been constructively dismissed by The Plant Place.

[2] In the substantive determination costs were reserved in respect of both the above matters. The parties were invited to file memoranda as to costs within a

¹ [2014] NZERA Auckland 473

² [2014] NZERA Auckland 481

specified time frame. Submissions in respect of costs have been filed by The Plant Place but not by Ms Newman.

[3] Ms Twaddle, for The Plant Place seeks full reimbursement of its costs which total \$13,016.85 in respect of both matters. Ms Twaddle submits that the way in which Ms Newman's case was handled put The Plant Place to additional cost. Ms Twaddle claims the application for a non publication order by Ms Newman was unfounded and was made after the conclusion of the investigation meeting. Ms Twaddle is also critical of the statement of problem and witness statements filed by Ms Newman which she says were vague and required The Plant Place to respond by summoning witnesses in order to respond to what were broad allegations.

[4] For these reasons Ms Twaddle seeks full reimbursement of costs incurred by The Plant Place to defend Ms Newman's unsuccessful application for a non-publication order and unsuccessful personal grievance claims.

[5] The principles applicable to awards of costs in the Authority are well established. The general principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ ("*Da Cruz*") is that costs follow the event, and I see no reason to depart from that in this case. The Plant Place was entirely successful in its defence of Ms Newman's claims and should be awarded costs.

[6] It is also a principle in *Da Cruz* that costs are to be assessed on a case by case basis and are to be modest. A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. The investigation meeting lasted one full day. For a full day investigation meeting the notional daily rate amounts to an award of \$3,500.00. In addition, costs were incurred in respect of the last minute application by Ms Newman for a non publication order which required an urgent response by The Plant Place. The application was unsuccessful.

[7] In setting the level of costs, it is also a principle in *Da Cruz* that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account when inflating or reducing an award.

³ [2005] 1 ERNZ 808

Application for non publication order

[8] I accept the submissions made by Ms Twaddle that Ms Newman's last minute application for a non publication order increased The Plant Place's costs. The application lacked proper foundation and required an urgent response from The Plant Place. According to the schedule of time and attendances filed in the Authority on behalf of The Plant Place, the costs associated with defending the application amounted to \$1055.00 plus GST. Counsel's hourly rate is \$280 plus GST and so almost 4 hours was spent on this matter. These costs seem reasonable in my view especially given the urgency and importance of the issue.

[9] Ms Newman produced no evidence regarding her costs or her financial circumstances to assist the Authority. Ms Newman did not file any submissions in response to The Plant Place's memorandum as to costs.

[10] In the circumstances, I order a contribution by Ms Newman of \$1,000 to The Plant Place in respect of the application for non publication order.

Substantive claims

[11] Ms Newman's witness statements were vague and required The Plant Place to call witnesses to respond to the broad allegations made by her. This conduct meant in my view The Plant Place was put to additional and unnecessary cost.

[12] Weighing all the considerations referred to in *Da Cruz* in the discretionary exercise of awarding costs, I consider that the notional daily rate should be adjusted to take in to account further costs incurred by The Plant Place in defending Ms Newman's unsuccessful substantive claims. The notional daily rate is to be increased from \$3500 to \$4000.

[13] Accordingly, Ms Newman is ordered to pay The Plant Place a total of \$5,000 as a contribution to its costs in respect of the application for non publication order and in respect of the substantive claims of sexual harassment and unjustified constructive dismissal.

[14] An arrangement may need to be made for Ms Newman to pay the costs by way of instalments over several months. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are sought and cannot be agreed.

Anna Fitzgibbon
Member of the Employment Relations Authority