

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 360  
5597767

BETWEEN PALMCO GARDEN LIMITED  
Applicant

A N D JOHN WELCH and  
MONIKA WELCH  
Respondents

Member of Authority: T G Tetitaha

Representatives: K Taurau, Counsel for Applicant  
S Bliss, Advocate for Respondents

Submissions Received: 28 September 2016 from Applicant  
11 October 2016 from Respondent

Date of Determination: 2 November 2016

---

**COSTS DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

---

- A. Monika Welch is ordered to pay Palmco Garden Limited \$1,750 towards its actual legal costs. Payment is to be made by instalments at the rate of \$20 per week starting within 28 days of the date of this determination.**

**Employment relationship problem**

[1] The Authority in its substantive determination dated 16 September 2016<sup>1</sup> dismissed both applications for penalty against John and Monika Welch. Costs were reserved.

[2] The parties have been unable to agree costs. Palmco Gardens Limited (PGL) now applies for costs. Its actual costs were \$7,868.56.

---

<sup>1</sup> *Palmco Garden Limited v John Welch and Monika Welch* [2016] NZERA Auckland 315.

### **What is the starting point for assessing costs?**

[3] Costs in the Authority usually start from its notional daily tariff. The current notional daily tariff is \$3,500 per hearing day.

[4] This matter involved a one day investigation meeting including delivery of the oral determination. The starting point for assessing costs is therefore is \$3,500.

### **Are there any factors that warrant adjusting the notional daily tariff?**

[5] PGL submits the factors that warrant an increase in the daily tariff are:

- (a) Ms Welch's prehearing conduct including continued denials of breaching the Settlement Agreement and the offer of a "mediated meeting" without advising how mediation could resolve this matter;
- (b) This conduct required PGL to file proceedings to prevent further derogatory statements being made;
- (c) Further costs were incurred because PGL was required to address a preliminary jurisdictional matter; and
- (d) Her conduct during hearing including admissions she had said her husband had been made redundant and "laid off for no reason"; her acceptance at hearing that her comments might have shocked Ms Walker inferring something was wrong with PGL.

[6] PGL has also indicated willingness to accept payment of any costs award in instalments. It seeks an order for its actual costs incurred in the sum of \$7,868.56.

### **Determination**

[7] There is no basis to award the full legal costs incurred by PGL or indemnity costs. An award of indemnity costs requires "exceptionally bad behaviour"<sup>2</sup>. This matter does not meet the very high threshold required before indemnity costs may be imposed.

[8] PGL was only partially successful. The application against John Welch was dismissed in its entirety. Any cost award shall be reduced to account for this.

---

<sup>2</sup> *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234.

[9] 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 in inflating or reducing an award.<sup>3</sup>

[10] Monika Welch's application to dismiss the action against her was properly founded. The statement of problem did not particularise an actionable cause against Monika Welch. PGL was directed to refile its proceeding.<sup>4</sup> It was also dealt with on the papers at less cost to the parties than a hearing. There is no basis for an increased award of costs for that determination.

[11] Monika Welch may have been misconceived in her views, but that does not mean that she had no defence to PGL's application. Some of the factual allegations were unfounded. The alleged damages were also unfounded.

[12] Overall, it is appropriate to reduce the starting point for assessing costs by 50%.

[13] Monika Welch is ordered to pay Palmco Garden Limited \$1,750 towards its actual legal costs. Payment is to be made by instalments at the rate of \$20 per week starting within 28 days of the date of this determination.

**TG Tetitaha**  
**Member of the Employment Relations Authority**

---

<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [44].

<sup>4</sup> *Palmco Garden Limited v Welch & Anor* [2016] NZERA Auckland 52.