

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 52
5633804

BETWEEN QWI
 Applicant

AND THE GREAT GATSBY LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Graeme Ogilvie, Advocate for Applicant
 Rosi Buttula and Michael Morris, on behalf of
 Respondent

Submissions Received: 9 June and 26 June 2017 from Applicant
 23 June 2017 from Respondent

Determination: 27 June 2017

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] On 19 May 2017 I issued a determination in which I concluded QWI had a personal grievance in that she had been unjustifiably dismissed but I refused to grant remedies on the grounds her conduct was such she forfeited any right to them.¹

[2] Costs were reserved and QWI now seeks a contribution toward that of establishing she had a grievance. She seeks \$4,500 plus reimbursement of the filing fee. The Great Gatsby Limited (Gatsby) is of the view costs should lie where they fall on the basis both parties had a measure of success and it too incurred costs by using professional representation prior to the investigation. Finally it is submitted any award effectively condones QWI's behaviour and that would be inappropriate.

¹ [2017] NZERA Wellington 38

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.² At the time this claim was filed the normal starting point was \$3,500 per day and from there adjustment might be made depending on the circumstances.

[4] In support of her claim for costs QWI cites various decisions in which the Authority has granted a contribution toward costs to an applicant who, as a result of their conduct, was deprived of any remedies despite establishing the existence of a grievance.³ *Kostic v Dodd* is perhaps the most pertinent of these as it was challenged and considered by the Employment Court. In its decision⁴ the Court said:

[103] ... The employer challenged that award on the grounds that, having made a finding that Mr Kostic contributed 100 percent to the situation giving rise to his personal grievance and awarded him no remedies, he should not have received a contribution to his costs.

[104] I agree with the Authority's reasoning that it is wrong in principle to deprive an employee who has been found to have been unjustifiably dismissed of an award of costs because there has also been a substantial finding of contribution. I repeat in the context of this case what I said recently in *Davis v Harbour Inn Fisheries Ltd* unreported, 15 May 2007, CC 9/07:

[11] ... *A declaration that an employer has acted unjustifiably will often play a significant part in resolving an employment relationship problem and be of considerable value to an employee independent of any remedies which may flow from it. That is because the employment relationship is usually more than a purely commercial arrangement. Emotions and feelings are frequently involved, including pride. A declaration that an employee has been unjustifiably dismissed, even when qualified by a finding of substantial contribution, can of itself assuage some of the feelings of humiliation, loss of dignity, and injury to the feelings of the employee arising out of a dismissal.*

[12] *By obtaining a declaration that he had been unjustifiably dismissed, Mr Davis therefore acquired something of actual or potential value. To an extent, it offset the Authority's subsequent conclusion that Mr Davis had contributed very substantially to his own dismissal. As Mr Brown aptly submitted, the outcome was that both parties were found to be at fault.*

[5] Given the Courts comments in *Xtreme Dining Limited v Dewar*⁵ I conclude that what occurred here, namely a refusal to grant remedies, is commensurate with the previous practice of finding 100% contribution.

² refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

³ *De Young v Pedersen Holdings Ltd* AA106A/02, *Moore v Alto Plastics Ltd* CA 22/05, *Kostic v Dodd & Anor* CA 12A/06 and *Dryland v Kung Brothers Ltd* AA265/09

⁴ *Kostic v Dodd and Milligan* [2007] NZEmpC 86

⁵ [2016] NZEmpC 136 at [216]

[6] The Court's conclusion in *Kostic* is clear. It is also consistent with the principles which apply to an award of costs. Costs follow the event with the key measure of success being the declaration a grievance exists. Furthermore costs are not to be used to punish and I have to conclude QWI's behaviour has already been addressed via the removal of remedies. Costs are to address the fact of litigation and how the parties conducted themselves when addressing the issues. There are two other points about which comment should be made.

[7] An investigation meeting was initially scheduled for 10 April 2017 but that was adjourned after about an hour. In its submission Gatsby argues an issue which led to adjournment was the absence of Ms Buttula's partner, Mr Morris, and the resulting need for an interpreter. While that was a factor it was not the most important. The adjournment was primarily attributable to the fact Gatsby failed to arrange for the attendance of two crucial witnesses it had previously advised it would rely on. Indeed it was those witnesses whose evidence undoubtedly led to the conclusion QWI acted improperly which, in turn, influenced the ultimate outcome. Attendance that day put QWI to unnecessary avoidable cost and the failure to produce crucial witnesses was wholly attributable to Gatsby's failures.

[8] Also addressed in the submissions is the fact the meeting of 10 April was preceded by Gatsby's late decision to do without its professional representative and use Mr Morris. This resulted in an initial adjournment application as Mr Morris had been called overseas at short notice. He had already left. It was only when that application was rejected on the grounds it was inappropriate to seek an adjournment at short notice on the basis of a desire to use a representative who was known to be unavailable that the interpretation issue arose. It appeared an afterthought. That said, and while QWI claims these interactions also unreasonably increased her costs, I conclude this issue largely de-minimis. QWI's response was short and could not have incurred a significant costs imposition.

[9] The meeting of 28 April took about half a day. Add to that the time taken on 10 April and I conclude the total to be about two thirds of a day. That, applying the tariff, would see an award in the order of \$2,345.

[10] While a greater sum is sought there is no additional argument as to why the tariff should be uplifted. Furthermore I do not know what the actual costs were other than a bald assertion they exceed the amount sought. I cannot, therefore, reach a

conclusion about their appropriateness. There is, however, an account from a lawyer QWI initially used but who was not retained for the investigation. It is for \$2,108.50 but not that useful as I do not know what portion to consider necessary for the investigation and it is debatable whether one of the itemised points is relevant. Also some of the cost would have been incurred had, for example, the matter settled at mediation and would not be recoverable.

[11] Opposing an award are the Gatsby's arguments. Two of those have already been addressed ([7] and [8] above). The third is the argument an award of costs could be interpreted as condoning bad behaviour and therefore send an inappropriate message. As was said by the Court in both *Kostic* and *Davis*, and as reflected in [6] above, that is not what the costs consideration is about. It is about the outcome and how the litigation was conducted. QWI was technically successful and her behaviour has already been addressed.

[12] In the circumstances, and having considered the submissions I conclude there is no reason to depart from the normal tariff. To that I add the filing fee which is a given. Accordingly I order the respondent, the Great Gatsby Limited, pay the applicant, QWI, the sum of \$2,416.56 (two thousand, four hundred and sixteen dollars and fifty six cents) as a contribution toward the costs QWI incurred in pursuing her personal grievance.

[13] Finally I reiterate there is a prohibition order pertaining to QWI's identity.⁶

M B Loftus
Member of the Employment Relations Authority

⁶ n 1 above at [39]