

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 3  
3000221

BETWEEN ROCHELE REID  
Applicant

A N D LEISHA ANDREWS t/a  
ALTERATIONS & DESIGNER  
GARMENTS  
Respondent

Member of Authority: Nicola Craig

Representatives: Hamish Burdon, Advocate for Applicant  
Rose Alchin, Counsel for Respondent

Submissions: 21 November 2017 from Applicant  
4 December 2017 from Respondent

Date of Determination: 5 January 2018

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**COSTS DETERMINATION OF  
THE AUTHORITY**

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- A. Leisha Andrews, trading as Alterations & Designer Garments, is ordered to pay within 28 days of the date of this determination, \$3,000.00 to Rochele Reid as a contribution towards her costs, along with \$71.56 for the filing fee.**

**The substantive determination**

[1] The Authority, in a determination dated 25 October 2017<sup>1</sup> determined, in summary, that:

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<sup>1</sup> [2017] NZERA Auckland 335

- (a) Rochele Reid was subject to three unjustified actions by Leisha Andrews, to Ms Reid's disadvantage, regarding suspension, not allowing a return to work unless there was acceptance of unpaid suspension and resuming a disciplinary process;
- (b) For those grievances Ms Andrews was ordered to pay Ms Reid compensation of \$5,400;
- (c) Ms Reid was also subject to an unjustified action to her disadvantage regarding a reduction in hours of work, and was awarded \$816.64 as lost wages and \$1,800 as compensation; and
- (d) Ms Reid was owed sums of money for wages, leave and Kiwisaver entitlements, totalling \$494.59 gross.

[2] Ms Reid's other personal grievance claims were not successful, including her constructive dismissal claim.

#### **Costs application and submissions**

[3] The parties were invited by the Authority to resolve the costs issue between them but no resolution was reached.

[4] The Applicant's costs submissions were filed shortly before receiving a response on behalf of the Respondent to the Applicant's proposal to settle costs. The Respondent then filed costs submissions. The Applicant's representative subsequently filed further submissions, which the Respondent's representative objected to as the further submissions were not sought by the Authority. I have disregarded the Applicant's further submissions.

[5] In the meantime, Ms Andrews has filed in the Employment Court challenging parts of the Authority's determination. However, as neither party has suggested that that should have any impact on the costs issue, I am proceeding to determine costs.

[6] Ms Reid has applied for costs. She seeks costs of \$8,000 as well as reimbursement for the filing fee and any hearing fee. Her claim is based on \$4,500 for the first day, and \$3,500 for the second day. These are the Authority's notional daily tariff rates, although submissions seek the full second day amount despite the early finish, which was at 3.15pm. Reliance is placed on the requirements for

additional evidence and submissions after the hearing to justify the full second day claimed.

[7] An account was provided showing that Ms Reid's costs incurred as of 5 April 2017, the day before the investigation meeting, were \$8063.29 exclusive of GST. This did not include mediation costs. Costs for attendance at the investigation meeting were noted as being an additional \$4,800, when calculated at a rate of \$300 per hour.

[8] For Ms Andrews the \$300 rate, for at least that part of the work, was criticised as not being reasonable for an advocate, when compared with an average lawyer's charge out rate of \$292.70.<sup>2</sup>

[9] Ms Andrews' position is that costs should lie where they fall, because of both parties having partial success in this case. A number of Ms Reid's claims were noted to be unsuccessful. Additional time was said to be needed to deal with the extensive claims. Ms Andrews is emphasised to be a very small business owner who has been put to large costs by the Applicant's approach to this process.

[10] Ms Andrews also relied on her own substantial expenditure on legal fees in this proceeding. She seeks an award herself of the daily tariff for one day's hearing which she says was unnecessarily incurred by what is described as the Applicant's scattergun approach, with many petty and unmeritorious claims. I take this as a submission that if both parties were awarded costs against the other for one day's hearing, costs would effectively lie where they fall.

### **Determination on costs**

[11] The Authority's power to award costs comes from clause 15 of Schedule 2 of the Act. The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> and include:

- The discretion regarding costs is to be exercised in accordance with principle and not arbitrarily.

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<sup>2</sup> New Zealand Law Society survey, June 2016, referred to in *MacDonald v TKR Properties Ltd* [2017] NZERA Auckland 240 at [13]

<sup>3</sup> [2005] 1 ERNZ 808

- The statutory jurisdiction to award costs is consistent with the equity and good faith jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case-by-case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

[12] In *Coomer v JA McCallum & Son Ltd* Judge Smith considered a situation where the parties had had mixed success and stated that a “nuanced assessment of competing considerations” was required.<sup>4</sup> Reference was also made to the Court of Appeal’s statement that “...success on more limited terms is still success”.<sup>5</sup> Mr Coomer could not have achieved his success, limited as it was, without lodging his claim in the Authority.<sup>6</sup>

[13] The present case also involves the parties having mixed success. Ms Reid was successful in about half of her claims, as those claims were characterised by the Authority. Ms Andrews successfully defended the remainder. This is an important consideration in assessing the appropriate costs outcome.

[14] For the sake of completeness, I note that a Calderbank offer was made on Ms Andrews’ behalf but that was in July 2016 when the two were still in an employment relationship. I do not consider that it necessitates an adjustment to what I would otherwise order.

[15] The applicable notional daily tariff for the Authority in place at the time that this case was filed was \$4,500 for the first day of hearing and \$3,500 for subsequent

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<sup>4</sup> *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 156 at [37]

<sup>5</sup> From the Court of Appeal in *Weaver v Auckland Council*[2017] NZCA 330

<sup>6</sup> *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 156 at [43]

days. I am not inclined to consider the second day as a full day as there was a planned later start than usual due to a representative's unavoidable commitment elsewhere and an early finish.

[16] The account submitted on Ms Reid's behalf showing \$8063 excluding GST includes a considerable amount of cost incurred whilst the Applicant was still employed by the Respondent, as well as the filing fee and photocopying disbursements and \$750 for transcribing of recordings.

[17] In terms of the Applicant's conduct of the proceedings I note that some claims were withdrawn either prior to or at the start of the investigation meeting. To some extent, this was the Applicant's responsibility but I do accept that she had to go to some lengths to obtain timesheets and pay records.

[18] The multiple claims did increase the hearing time not insignificantly and add to the preparation time required on behalf of the Respondent. One or two of the claims appeared to have had, at most, a theoretical interest to the Applicant. However, Ms Reid had success in about half of her claims and bringing this proceeding was the only way for her to achieve that success.

[19] In all of the circumstances, I order Ms Andrews to pay to Ms Reid the following within 28 days of the date of this determination:

- (a) \$3,000 as a contribution towards her costs; and
- (b) \$71.56 being the filing fee.

**Nicola Craig**  
**Member of the Employment Relations Authority**