

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 296
5525475

BETWEEN

PAMELA JO SAROZ
Applicant

A N D

FLOWER FEVA LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Jeremy Browne, Counsel for the Applicant
Damien Luiten, Director of Respondent

Submissions Received: 10 September 2015 from the Applicant
No submissions from the Respondent

Date of Determination: 25 September 2015

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

Employment relations problem

[1] The Authority has issued two determinations in respect of this matter – a substantive determination dated 18 August 2015¹ and a remedies determination dated 04 September 2015.²

[2] The parties were encouraged to resolve costs by agreement but that has not occurred. Ms Saroz now seeks full indemnity costs of \$10,300 plus GST plus disbursements. Flower Feva Limited (Flower Feva) has not filed any costs submissions.

[3] Costs principles in the Authority are so well established that I do not need to set them out, see *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³

¹ [2015] NZERA Auckland 250

² [2015] NZERA Auckland 266

³ [2005] NZERA 808.

Should indemnity costs be awarded?

[4] I do not accept this is an appropriate case for indemnity costs. The Authority's usual notional daily tariff based approach to costs is able to do justice between the parties.

What is the starting point for assessing costs?

[5] The current notional daily tariff is \$3,500. This matter was scheduled for a two day investigation meeting but all of that time was not needed due to the extensive advance preparation done by Mr Browne.

[6] The pre investigation meeting work undertaken by Mr Browne enabled the two day investigation meeting to be significantly reduced to half a day. A second investigation meeting was also not required because Mr Browne submitted the necessary information to enable remedies to be determined on the papers.

[7] Ms Saroz has incurred considerable legal expense as a result of doing all of the necessary calculations that should have been done by her employer whilst she was employed.

[8] Due to the nature of the claims, the issues with the documentation produced (or not as the case may be) by each party and Flower Feva's dispute of almost all of Ms Saroz's evidence and calculations much of the Authority's actual investigation into this matter was undertaken prior to the substantive investigation. This occurred in order to ensure that actual meeting time was used efficiently. It would not be equitable for Ms Saroz to bear the cost of that.

[9] While it is unusual to recognise time incurred outside of the actual contact time involved in an investigation meeting, the additional investigation which resulted in significant reduction in meeting time (and costs incurred by Ms Saroz) was done at the direction of the Authority as part of the Authority's investigation process into Ms Saroz's claims.

[10] The purpose of this pre-meeting investigation was to ensure the actual investigation meeting time was used most efficiently. This is not a case of a party running up unnecessary, inefficient or unrequired legal fees.

[11] I therefore consider that the appropriate notional starting point for assessing costs in this particular matter is \$7,000. This more properly reflects the reality that this matter involved the equivalent of a two day investigation meeting, due to the actual investigation time conducted prior to and subsequent to the actual meeting contact time.

Are there any factors which would warrant reducing the notional starting tariff?

[12] I am not aware of any factors which warrant a reduction in the notional starting tariff for assessing costs and no such factors have been drawn to my attention. I therefore find that there are no factors which warrant reducing the notional starting tariff.

Are there any factors which warrant increasing the notional daily tariff?

[13] I accept Mr Browne's submissions that the manner in which Flower Feva elected to run its case unreasonably and unnecessarily increased Ms Saroz's costs.

[14] This was an appropriate case for Ms Saroz to engage counsel because there were numerous problems involved in getting clarity around her entitlements because of Flower Feva's lack of proper recordkeeping. This was exacerbated by the position that Mr Luiten took which was effectively to challenge almost all of Ms Saroz's figures and calculations.

[15] I also consider that Flower Feva's conduct unreasonably increased Ms Saroz's costs by introducing evidence which had to be considered but which was ultimately deemed irrelevant and/or which ultimately was not pursued at the investigation meeting.

[16] Ms Saroz is to be commended for the efficient and helpful way in which her case was presented to the Authority. It was a direct result of her advance preparation (and associated legal costs) which enabled the issues to be refined to the extent that a day or a day and a half of investigation time was no longer needed.

[17] Flower Feva's failure to keep accurate wage and time records or holiday and leave records meant Ms Saroz was put to considerable time and expense in trying to reconstruct these from disparate records. That should be reflected in costs as Ms Saroz should not be expected to bear the financial burden of pulling together information her

employer was required by law to have made available to her upon request. The information was requested from Flower Feva but not provided which effectively left the full burden of preparing information relevant to her wages and holidays on Ms Saroz.

[18] Flower Feva also challenged almost all of the information Ms Saroz produced in support of her claim. This resulted in Ms Saroz being put to the task of providing formal proof of almost every aspect of each of her claims.

[19] It was only at the investigation meeting, as a result of the extensive advance preparation that Mr Browne had done, that Flower Feva conceded it did not have sufficient evidence to contradict Ms Saroz's evidence. Up until then Flower Feva had maintained that its own information contradicted Ms Saroz's.

[20] Ms Saroz was also put to the additional unnecessary expense of calculating her remedies. Had Flower Feva complied with its legal obligations as an employer that information should have been readily available.

[21] Even after liability had been determined Flower Feva again put Ms Saroz to proof of her remedies so she had to apply to the Authority for orders regarding the amounts due to her in accordance with the findings in the substantive determination.

[22] While it is Flower Feva's right to put Ms Saroz to formal proof of almost every aspect of her claim she should not bear the costs consequences of that. It was clear at the investigation meeting that Flower Feva did not have a legitimate basis for challenging Ms Saroz's comprehensive workings.

[23] During the investigation meeting Mr Luiten (quite rightly) conceded to various matters which up until then he had refused to concede. When cross-examined by counsel as to why he had not agreed on those matters before, he had no reasonable explanation.

[24] This matter also involved Ms Saroz being put to the expensive of recovering her statutory entitlements under the Holidays Act 2003 which should have been paid to her whilst employed or at the latest upon termination.

[25] It would not be equitable for Ms Saroz to bear the financial consequences in terms of unnecessary legal expenses, which were directly caused by Flower Feva's serious and ongoing breaches of its legal obligations to her as its employee.

[26] I also find that Mr Browne's careful analysis of the available evidence and associated calculations (which had to continuously be updated as Flower Feva drip fed new information and documentation to Ms Saroz prior to the investigation meeting) substantially assisted the Authority.

[27] This is not a situation where unnecessary legal expense was incurred. Mr Browne's representation resulted in a far more efficient, focused and streamlined investigation meeting than would otherwise have been the case had Ms Saroz been without representation.

[28] Ms Saroz also offered to settle for much less than she ultimately recovered from the Authority prior to legal proceedings being issued. I consider Flower Feva unreasonably rejected that offer. If it had not done so, then Flower Feva would have ended up paying much less than it ultimately did and Ms Saroz would not have incurred any of her legal costs.

[29] I note that all of Ms Saroz's legal fees were incurred subsequent to her settlement offer being unreasonably rejected by Flower Feva. This is another factor which should increase the costs award past the notional starting tariff.

[30] Costs are discretionary. It is important to do justice between the parties. I consider that can be achieved by increasing the notional starting tariff by \$2,000.

Should any disbursements be awarded?

[31] Ms Saroz incurred \$71.56 for her filing fee so it is appropriate for her to be reimbursed for that. No other evidence was produced regarding any other disbursements so no other disbursements are awarded to Ms Saroz.

Orders

[32] Within 28 days of the date of this determination Flower Feva is ordered to pay Ms Saroz \$9,000 towards her actual legal costs together with \$71.56 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority