

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 2
5384194**

BETWEEN NADINE STEELE
 Applicant

AND BARKERS PARK LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Alan Taylor, Advocate for Applicant
 Paul Diver, Advocate for Respondent

Submissions received: 5 December 2012 from Applicant
 16 November 2012 from Respondent

Determination: 3 January 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2012] NZERA Auckland 378 the Authority found that the Applicant, Ms Nadine Steele, had not been either unjustifiably dismissed or unjustifiably disadvantaged in her employment by the Respondent, Barkers Park Limited (Barkers Park).

[2] Barkers Park was wholly successful and is entitled to a contribution towards its actual costs. Costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] It is noted that the Applicant filed submissions outside the time frame indicated by the Authority in its determination, however the explanation and apology proffered by the Applicant has been considered and accepted by the Authority on this occasion.

[4] This matter involved in excess of half a day of an investigation meeting. Mr Diver, on behalf of Barkers Park, is seeking costs of \$8,062.07 (excl GST) as indemnity costs on the basis that the Applicant's case was wholly unmeritorious.

[5] Should the Authority decide not to award costs on an indemnity basis, Mr Diver submits that the Authority's tariff approach to costs be adjusted upwards to \$6,000.00.

Submissions for the Respondent

[6] Mr Diver in support of the level of costs claimed cites the manner in which the Applicant produced documentation, which he submits caused unnecessary costs for the Respondent. In particular Mr Diver highlights that:

- Mr Rob Kent, CEO of Barkers Park, had been required to spend in excess of 100 hours defending the claims of the Applicant;
- The Applicant submitted unnecessary lengthy, unclear and repetitive documentation to the Authority, which resulted in unnecessary cost to the Respondent;
- The Applicant raised many disadvantage claims, which were without merit and caused unnecessary cost to the Respondent to defend; and
- The Applicant withdrew a wage arrears claim and a claim for unjustified disadvantage in relation to a 90-day trial period that were without merit when an amended Statement of Problem was filed. This had the effect of having caused the Respondent unnecessary cost in order to respond and indicated that the Applicant knew her claims to be unmeritorious.

Submissions for the Applicant

[7] Mr Taylor submits that the main reason for the claims of the Applicant coming before the Authority was the total refusal of the Respondent to communicate constructively with the Applicant and her representatives or to agree to attend mediation with the Ministry of Business, Innovation and Employment Mediation service. Mr Taylor further submits that:

- It was the decision of the Respondent to obtain representation from Auckland and the Applicant should not be responsible for the additional costs associated with this cost.
- The Investigation Meeting took approximately half a day; and
- The position the Applicant subsequently obtained involved a significant reduction in her hours of work and weekly wage.

Principles

[8] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[9] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[10] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*².

[11] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[12] It is unusual for the Authority to allow preparation time per day of an investigation meeting. In this particular case, in consideration of the nature of the documentation submitted to the Authority by the Applicant, I am prepared to accept that there was a necessity for preparation in excess of what is usually required for a case falling within the jurisdiction of the Authority.

[13] Having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, and the conduct of the parties, I consider that a contributory award towards the Respondent’s actual costs is reasonable.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

Determination

[14] Adopting the notional daily tariff rate of the Authority as \$3,500.00, and the fact that the Investigation Meeting lasted more than half a day, I take the starting point for costs as \$2,625.00. From that point I take into consideration the following observation by the Employment Court:⁵

The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.

[15] I consider it appropriate to take the factors identified by the Respondent into consideration and award an additional \$1,375.00. I order Ms Steele to contribute \$4,000.00 towards Barkers Park's actual costs.

[16] In light of the submissions made by Mr Taylor as to Ms Steele's financial circumstances, an arrangement may need to be made for Ms Steele 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.

Eleanor Robinson
Member of the Employment Relations Authority

⁵ Ibid at para [46]