

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 371
5620398

BETWEEN THERESA VAN DER MERWE
Applicant

A N D ROLLERFLEX LIMITED
First Respondent

MICHAL CIGANEK
Second Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person
Paul Watson for Respondents

Submissions Received: 27 July and 4 September 2017 from Respondent
13 August and 1 September 2017 from Applicant

Date of Determination: 30 November 2017

**COSTS DETERMINATION OF THE
AUTHORITY**

A. Costs will lie where they fall.

The substantive determination

[1] In a determination of the Authority dated 11 July 2017¹ the Authority determined that:

- (a) Rollerflex Limited owed Theresa van der Merwe \$200.00 as reimbursement for cell phone top ups used for company business and \$243.75 as unpaid wages;

¹ [2017] NZERA Auckland 200

(b) The Rollerflex commission system was not discretionary as claimed by Rollerflex but rather was Mrs van der Merwe's entitlement. The parties were ordered to attempt to resolve between them the issue of whether there was any outstanding commission. In the event that they were unable to, leave was granted to return to the Authority; and

(c) Mrs van der Merwe's claims for unjustified dismissal, disadvantage and differential treatment were unsuccessful.

[2] Mrs van der Merwe initially claimed that she was owed payment for statutory holidays. However, on 22 February 2017, after a case management conference, payment was made for those days and therefore that claim did not need to be investigated.

[3] After the determination was issued Mrs van der Merwe informed the Authority that the parties had been unable to resolve the question of whether there is any commission outstanding and she wished the Authority to determine that. That issue remains to be determined.

Rollerflex's costs application

[4] The parties were invited by the Authority to resolve the issue of costs between them, but they were unable to do so.

[5] Rollerflex applied for costs totalling \$8733.25. These consisted of the following:

- (i) An invoice from Rollerflex's previous representative for \$1350.00 plus GST, on receipt of the proceeding, for consideration of it, and drafting and filing the statement in reply;
- (ii) An invoice from the current representative which stated monthly retainer time used for assistance with "Employment Court hearing" of \$1223.75 including GST, dated 29 March 2017. Mrs van der Merwe is not identified on the invoice and there is no further detail included regarding the work undertaken; and

- (iii) An invoice from the same representative dated 3 April 2017 for various preparation items and attendance of “employment court investigation hearing 28/03/17”², totalling \$5957.00 including GST.

[6] There is no indication of what the retainer time was used for and the description in the 3 April 2017 appears to cover the preparation for and attendance at the Authority’s investigation meeting. The change of advisors, presumably at the Rollerflex’s choice, may have resulted in an overlap of costs between the two advisors.

[7] Other than the invoices and a totalling of the sums therein, there were no more detailed submissions supplied by Rollerflex.

[8] The amount sought by Rollerflex is over twice the notional daily tariff applicable at the time this case was filed, namely \$3,500. Rollerflex’s current representative had had no direct contact with the Authority prior to the investigation meeting but did attend that meeting, which took almost an entire day.

Mrs van der Merwe’s submissions

[9] Mrs van der Merwe asserts that she had to pursue her case to the Authority in order to get her entitlements recognised as Rollerflex had refused to pay them previously.

[10] She disputes that costs should be awarded at all when Rollerflex was represented at the investigation meeting by someone with a business background, rather than a legal one. Mrs van der Merwe accepts that the earlier representative appeared to be suitably qualified. I note that the Authority does allow representation by advocates who are not legally trained, and will award costs for such representation in appropriate circumstances.

[11] If costs are awarded, Mrs van der Merwe says that it should be done on the basis of the \$3,500 notional daily tariff applicable at the time the case was filed.

² This is the date of the Authority’s investigation meeting in this case

Costs determination

[12] Under clause 15 of Schedule 2 of the Employment Relations Act 2000, the Authority has a discretion to award costs. This discretion must be exercised in a principled way, including consideration of equity and good conscience³.

[13] In cases where both parties have had a measure of success it is not uncommon to allow costs to lie where they fall⁴.

[14] I turn to consider whether Mrs van der Merwe should have to make a contribution towards Rollerflex's costs.

[15] Mrs van der Merwe was unsuccessful on the personal grievance claims which she brought. However, she was found to be owed unpaid wages, and reimbursement of expenses. She also successfully established that she had a contractual entitlement to be paid commission, rather than commission merely being discretionary as Rollerflex claimed.

[16] The personal grievance claims made up perhaps the majority of the investigation meeting time. However, the issues on which Mrs van der Merwe had at least partial success also took up some time at the meeting.

[17] It is important that those who are owed unpaid wages or reimbursements are free to pursue their payment, even if the sum owing is not large. The amounts found to be owing here are certainly more than trifling. There was no evidence of any offer to pay by Rollerflex prior to the investigation meeting. I am satisfied that Mrs van der Merwe had to pursue them to an investigation meeting in order to achieve recompense.

[18] Taking into account all the circumstances of this case, I consider that costs should lie where they fall.

Nicola Craig
Member of the Employment Relations Authority

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

⁴ *Health Waikato Ltd v Elmsly* [2001] 4 ERNZ 172 at [39]