

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 214  
5464148

BETWEEN SHARON RUTH WALLACE  
Applicant  
A N D TITOKI SECURITIES TRUST  
Respondent

Member of Authority: T G Tetitaha  
Representatives: Applicant in person  
P Swarbrick, Counsel for the Respondent  
Investigation Meeting: On the papers  
Submissions: 24 April and 22 May 2015 from the Applicant  
13 April and 6 May 2015 from the Respondent  
Date of Determination: 21 July 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. Sharon Ruth Wallace is ordered to pay Titoki Securities Trust \$7,000 towards its actual legal costs.**

**Employment relationship problem**

[1] The Authority in its substantive determination dated 27 March 2015<sup>1</sup> dismissed the applicant's personal grievance. Costs were reserved.

[2] The respondent now applies for costs. The applicant seeks that costs lie where they fall.

**Issues**

[3] The following issues are to be determined:

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<sup>1</sup> *Sharon Ruth Wallis v. Titoki Securities Trust* [2015] NZERA Auckland 94

- a. What is the starting point for assessing costs?
- b. Are there any factors that warrant adjusting the notional daily tariff?

**What is the starting point for assessing costs?**

[4] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs<sup>2</sup>. The current notional daily tariff is \$3,500. This matter involved a two day investigation meeting. The starting point for assessing costs is therefore \$7,000.

**Are there any factors that warrant adjusting the notional daily tariff?**

*Factors which warrant an increase to the notional daily tariff*

[5] The respondent seeks an increase in the daily tariff totalling \$17,660.14. The respondent's actual costs were \$21,721.14. It points to two factors warranting an increase of costs namely lack of merit and the applicant's conduct of her case.

[6] There was no finding the applicants case totally lacked merit. Her lack of success should not necessarily infer her case was totally without merit.

[7] There was a lack of clarity around the applicant's alleged disadvantages and conduct leading to dismissal which was only resolved at hearing. The applicant represented herself. Lack of clarity about legal issues is not unexpected from self-represented litigants.

[8] The findings about jurisdiction were legal matters and outside of a self-represented litigants experience. The jurisdictional issue regarding s318 of the Accident Compensation Act 2001 was not raised by either party. It was an issue noted at the end of the hearing by me. I cannot attribute this issue to Ms Wallace alone.

[9] Given the presence of a self-represented litigant, many of these issues raised in costs may have been resolved if an experienced mediator had been available to the parties prior to hearing.

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<sup>2</sup> *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16]

[10] From the Authority's records, the applicant has been proactive in seeking mediation. The respondent refused to attend prior to the case management conference before another Authority Member. When the matter came before this Member a direction to mediation was not made. The matter was transferred to me after the hearing had been set down.

[11] The Authority has a duty to consider mediation and must direct mediation unless it considers the use of mediation will not contribute constructively to resolving the matter, will not in all the circumstances be in the public interest, will undermine the urgent or interim nature of the proceedings or will otherwise be impracticable or inappropriate in the circumstances<sup>3</sup>. This was a matter that should have been directed to mediation but unfortunately was not.

[12] The Court has held that a refusal to go to mediation is a factor that the Authority may take into account in terms of costs<sup>4</sup>:

*[The Authority] should encourage recourse to mediation by reflecting on costs any unreasonable refusal to accept mediation assistance. No one has to agree to settle in mediation, but there would be few cases in which a party could be justified in refusing even to explore this avenue. ... No party can afford to spurn an offer of mediation assistance in the way that occurred in this case. It is the duty of professional advisers to draw to their client's attention the advantages of mediation, and leave it to the client to decide whether to travel down the adversarial case of adjudication. Anyone who for no good reason refuses mediation assistance when it is offered must not expect that to go unnoticed when there is a question of costs. This is because he or she will have put the opposite party to expense that might have been avoided.*

[13] In my view, this case would have benefited from mediation in terms of clarifying the issues for hearing, obtaining realistic advice from an experienced mediator and promoting settlement. Given the respondent's success I would not reduce the daily tariff. However I refuse any uplift.

*Factors which warrant a reduction in the notional daily tariff*

[14] The applicant submits costs should lie where they fall because there is a discretion as to costs, she took legal advice confirming the merits of her case, she was self-represented and may not have handled matters as efficiently as she could have, the respondent refused to mediate, opposing an Employment Relations Authority-

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<sup>3</sup> Section 159(1)(b) of the Employment Relations Act 2000

<sup>4</sup> *Open Systems Ltd v. Pontiflex* [1995] 2 ERNZ 211, 217

directed mediation and driving the issue to a hearing and the associated costs and she is not in a financial position to meet an award of costs.

[15] Costs generally follow the event. The nature of the case does not infer that costs lie where they fall.<sup>5</sup> I cannot comment on the legal advice the applicant obtained as it is not before me. The issue of mediation and the hearing has been dealt with above. There is no evidence about the applicant's actual financial situation warranting reduction in costs.

### **Outcome**

[16] Sharon Ruth Wallace is ordered to pay Titoki Securities Trust \$7,000 towards its actual legal costs.

**TG Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>5</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [44]