

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2016] NZERA Auckland 104  
5556692**

BETWEEN                      JOSEPHINE BARLOW  
   Applicant

AND                              WAIKATO SHEDS LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson

Representatives:             Applicant in person  
   Susan-Jane Davies, Counsel for Respondent

Submissions received:       2016 from Applicant  
   16 & 30 March 2016 from Respondent

Determination:                5 April 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] By determination [2016] NZERA Auckland 18 the Authority determined that the Applicant, Ms Josephine Barlow, had not been unjustifiably dismissed by the Respondent, the Respondent, Waikato Sheds Limited (WSL).

[2] In that determination 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 Ms Davies, on behalf of WSL, has filed submissions in respect of costs.

[3] This matter involved one and a half days of an Investigation Meeting.. Ms Davies, is seeking a contributory award of \$6,595.00 towards the actual costs. This amount consists of a claims:

- (i) \$5,250.00 calculated as 1.5 x the Authority normal daily tariff rate of \$3,500.00;

- (ii) \$1,345.00 in respect of the actual and reasonable costs incurred in relation to claims against Mr Brian Insoll, the director of the Respondent who was initially named by the Applicant as a second Respondent;
- (iii) \$360.00 in respect of the costs associated with this application

[4] In support of the second element of the costs submission, Ms Davies notes that the claims against Mr Insoll personally was withdrawn by the Applicant, but only following his application for removal had been filed. At that time the Respondent noted that it would be making an application for costs in respect of that matter at the time costs fell to be assessed.

[5] Ms Barlow submits that she is currently financially unable to make any contribution towards costs.

## Costs

### *Principles*

[6] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) 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.*

[7] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*<sup>1</sup>.

[8] 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*<sup>2</sup>.

[9] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria*

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<sup>1</sup> [1996] 2 ERNZ 622

<sup>2</sup> [2005] 1 ERNZ 808

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

*University of Wellington v Alton-Lee*<sup>4</sup> at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

## **Determination**

[10] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. The tariff is currently set at \$3,500.00 per day. For a 1.5 day investigation meeting, this would equate to a costs award of \$5,250.00.

[11] The normal rule is that costs follow the event and WSL is entitled to a contribution to its costs.

[12] Ms Barlow has submitted information in support of her claim to the effect that she is currently unemployed, has no income, and is significantly in debt. Consequently she is unable to meet an award of costs. She has provided information in support of that submission, specifically her current income and regular out-goings.

[13] As stated in the Employment Court case *Bishop v Bennet*<sup>5</sup> at [30]: “Assessment of the ability to pay requires consideration of the total financial position of the party concerned including both assets and liabilities and income and necessary expenditure.”

[14] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However I note the observation of Judge Inglis in *Tomo v Chekmate Precision Cutting Tools Ltd*<sup>6</sup> at [22] that:

*... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.*

[15] Having weighed all these considerations, I find that whilst WSL as the successful party is entitled to some award, this is a case in which it is appropriate for the Authority to use its discretion by lowering the tariff.

[16] Ms Barlow is ordered to pay WSL the sum of \$2,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

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<sup>4</sup> [2001] ERNZ 305

<sup>5</sup> [2012] NZEmpC 5

<sup>6</sup> [2015] NZEmpC 2

[17] It may be that WSL is willing for Ms Barlow to make payment by instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**