IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 12
5443177

	BETWEEN	RACHEL SUSAN BOTHWELL Applicant
	AND	MANAWATU DANCE ACADEMY LIMITED First Respondent
		JACQUELINE CAROL PHILLIPS AND MICHELLE ANN SMITH Second Respondents

Member of Authority:	P R Stapp
Submissions received by:	4 February 2015
Determination:	10 February 2015

COSTS DETERMINATION OF THE AUTHORITY

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[1] The Authority reserved costs in [2014] NZERA Wellington 54.

[2] Jacqueline Phillips and Michelle Smith have applied for full indemnity costs for being cited as parties and being struck out by the Authority in an employment relationship problem that has put them to unnecessary costs by the applicant, Rachel Bothwell. Ms Phillips and Ms Smith are represented by the same representative and the Manawatu Dance Academy Limited is represented separately by different counsel.

[3] Ms Phillips and Ms Smith are claiming $4,576.25 costs. Ms Bothwell seeks that costs lie where they fall or alternatively a modest amount. There is no claim from the Manawatu Dance Academy Limited

[4] Ms Phillips and Ms Smith were successful in requesting the Authority to strike them out as parties. Essentially their inclusion in the employment relationship problem by the applicant was misconceived as the employment relationship had nothing to do at that stage with enforcement. The main issue related to the employer and there appeared to be no dispute about the Manawatu Dance Academy Limited being the employer. Ms Smith and Ms Phillips have been put to unnecessary cost.

[5] Costs are determined on principles that are well set out[1] and do not need repeating here, suffice to say that costs should be kept at a low level in accordance with delivering speedy, informal and practical justice to the parties. The use of the tariff takes into account a party's choice of representative and the amount of costs the parties agree to pay. There is no excuse for parties not knowing the tariff that applies and that there will be the possibility that they will have to meet some of their costs.

[6] Indeed Judge Inglis has recently stated in a significant judgment on costs that

> *"[t]he assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs in this (Employment) Court".*[2]

[7] Also, Judge Inglis stated that

> *"awards in the Authority will be modest, that costs are frequently assessed against a notional daily rate, and that conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award".*[3]

[8] In Judge Inglis's judgment she returned to the same matter again and stated that

> *[15] Parties are entitled to adopt a belts and braces approach to litigation, and may retain the services of legal counsel of their own choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particularly apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily*

[1] PBO Ltd (formerly Rush Security Ltd) v DA Cruz [2005] 1 ERNZ 808
[2] Booth v Big Kahuna Holdings Limited [2015] NZEmpC 4 paragraph [6]
[3] Booth v Big Kahuna Holdings Limited [2015] NZEmpC 4 paragraph [7]

> *accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues, particularly (although not exclusively) for employees…*[4]

[9] Judge Inglis went on to make some comments about *"Calderbank"* letters, and although it is not directly relevant in this matter, it is worthy to note that she commented that there is some doubt that the approach that applies in the Court should have equal application in the Authority. In particular she noted that the steely approach referred to by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* [5] was directed at the Employment Court and that it was not apparent that the comment was intended to have broader application, meaning in the Authority.

[10] The themes from Her Honour's comments are that costs in the Authority should be modest and are assessed differently to the Employment Court. As such the daily rate is applied where costs in the Authority need to be modest for preparation and attendances at the Authority and to enable access to justice particularly for employees. The daily rate is applied and can be up-lifted or lowered, depending on different factors.

[11] First it is only in exceptional circumstances that full indemnity costs are awarded. This is not one of those occasions, I hold, as the matter was not exceptional. This was only an interlocutory matter and not too complex. Ms Phillips and Ms Smith are directors of the First Respondent, and they chose to have a different representative than the Manawatu Dance Academy Limited. There are occasions that directors are included in an employment relationship problem for the applicant to protect their right to pursue any remedies personally against the directors, but that was not an identified cause of action brought by the applicant in the correct manner. The lack of any cause of action against Ms Phillips and Ms Smith was the main problem with the way the statement of problem against them had been filed by the applicant. Although it was alleged that the Manawatu Dance Academy Limited was no longer trading any liability remained with the company since it was the employer. As a

[4] Booth v Big Kahuna Holdings Limited [2015] NZEmpC 4
[5] Bluestar Print Group (NZ) Ltd v Mitchell [2010] NZCA 385, [2010] ERNZ 446 at [20].

consequence both Ms Phillips and Ms Smith were struck out, leaving only the Manawatu Dance Academy Limited as the respondent. Indeed there was never likely to have been an outcome in regard to Ms Phillips and Ms Smith personally. One option for them was to reserve their position and to allow the Authority to conduct a full investigation and to deal with any enforcement matters later. However, they were entitled to apply to be struck out because there was no actual claim against either of them and they were entitled to a peace of mind.

[12] Second, for the above reasons I am not applying *Binnie* [6] used by the Court in determining costs. I accept that costs follow the event and must be based on the current daily rate of $3,500. The issue is whether or not this should be up-lifted or lowered to the point that costs lie where they fall.

[13] One factor I have been asked to consider by the respondents is that their efforts to settle should be taken into account. I have not been provided with any details and do not understand what happened here to make any savings and/or avoid any costs. Ms Phillips and Ms Smith requested the determination of the strike out application first. It needed to be done as an interlocutory matter before a full substantive hearing, because the applicant opposed the application. This approach has resulted in costs for the respondents and the applicant. Both parties consented to the application being dealt with on the papers. The matter involved written submission from the parties and replies.

[14] Next it was submitted that the whole matter has caused Ms Smith significant emotional strain and a financial toll. The applicant says the matter has had an emotional impact on her too. There are no details to these assertions. These are not factors taken into account for costs. If the matter had to proceed against the First Respondent then I presume Ms Smith would have needed to be involved anyway as she was a director. In any event the entire employment relationship problem has been withdrawn. The respondents claim that the matter is unfair. Other than the submission that this was so, there is no basis for me to conclude the same, and it cannot be a factor for costs.

[6] Binnie v Pacific Heath Ltd (2003) 7 NZELC 98, 730(CA)

[15] I agree that there was an early notice given to the applicant that could have involved Ms Phillips and Ms Smith being withdrawn from the statement of problem to avoid costs. There has been a cost associated with Ms Smith and Ms Phillips engaging the same counsel, but different from the first respondent, to deal with the interlocutory matter that they were both successful on. Therefore costs follow the event as there have been costs incurred. I have to add that I see no reason to let costs lie where they fall because the costs were incurred after ample notice was given to withdraw the second respondents before dealing with the matter on the papers. Also, there was little likelihood of the applicant being successful in opposing the strike out application with the way the statement of problem set out the claims. Without a proper cause of action against the second respondents the applicant's submission on opposing the strike out application was always going to be difficult to succeed, and the applicant's approach to the matter has been substantially the cause for the costs.

[16] The applicant claims that she will have difficulty paying any costs and that she and her partner are impecunious. I have been provided with broad comments about their current income circumstances that support that there may be some immediate difficulties in them being able to pay with their cash flow. However, there are no financial details provided of their assets and liabilities to include in the assessment. I hold it is reasonable to consider that the applicant may be able to pay some time in the future and it is still open to the parties to reach an arrangement.

[17] The applicant needs to understand that an assessment of costs is not to punish her, but to compensate the parties put to the cost.

[18] I have assessed an award in the order of $700 by reducing the daily rate because the matter was determined on the papers. This sum is for the preparation of one email for the notice of the strike out application separately to the statement in reply, and written submissions on the strike out application, and by proportioning the daily rate. There have been no invoices and no details supporting the sums claimed for "documents", "file management" and "disbursements" in the respondents' costs submission. In any event they are all inclusive of the rate. I have also factored in that the respondents did have a choice on dealing with the matter by proceeding on the entire matter that may have saved them the costs because they would have been

involved anyway as witnesses. Instead they have seen off the applicant's employment relationship problem and avoided more costs in the matter.

[19] I order Rachel Susan Bothwell to pay Jacqueline Carol Phillips and Michelle Ann Smith jointly and severally the sum of $700 costs.

P R Stapp
Member of the Authority