

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 57
5420025

BETWEEN	CHANELLE BRYAN Applicant
A N D	ULTIMATE LIMITED (IN LIQUIDATION) First Respondent
A N D	ULTIMATE TEMPS LIMITED Second Respondent
A N D	STEPHEN JOHN RYAN Third Respondent
A N D	JOANNA WILSON Fourth Respondent

Member of Authority: Rachel Larmer

Representatives: Michael Smyth, Counsel for Applicant
First Respondent struck-out as a party before substantive
proceedings investigated
Stephen Ryan as Director of Second Respondent and
Third Respondent in person
No submissions by Fourth Respondent

Submissions Received: 28 January 2014 from Applicant
10 February 2014 from Second and Third Respondents
No submissions from Fourth Respondent

Date of Determination: 18 February 2014

COSTS DETERMINATION OF THE AUTHORITY

- A. Stephen Ryan is ordered to pay Ms Bryan \$4,750 towards her legal costs and \$153 towards her disbursements.**

B. Joanna Wilson is ordered to pay Ms Bryan \$5,500 towards her legal costs and \$153 towards her disbursements.

Employment relationship problem

[1] The first respondent was struck out as a party to these proceedings before the substantive investigation meeting occurred. It is in liquidation and the liquidator did not consent to proceedings continuing against the company.

[2] In a determination dated 19 December 2013¹, the Authority held that Ms Bryan was entitled to a contribution towards her actual costs. The parties were encouraged to resolve costs by agreement but that has not occurred. Ms Bryan now seeks an award of costs in her favour.

[3] Ms Bryan incurred costs of \$21,997.95 (GST inclusive) and total disbursements of \$306.01. She seeks an award of \$14,000 being two thirds of the costs she incurred.

[4] Mr Ryan, on behalf of himself as third respondent and as director of the second respondent, submitted costs should be reserved pending the outcome of a challenge (an appeal to the Employment Court) to the Authority's substantive determination. I do not accept that the challenge Mr Ryan has filed should prevent the Authority from resolving costs. This is the only outstanding issue remaining before the Authority and it is in the interests of justice for the parties to have closure in respect of the Authority proceedings.

[5] Mr Ryan submits that costs should lie where they fall. He says costs should recognise that Ms Bryan was only partially successful in her claims against him. Mr Ryan further submits that if costs are to be awarded then they should be calculated based on half of the notional daily tariff.

[6] This matter involved a one day investigation meeting. However this was a matter in which the Authority's investigation extended past the investigation meeting. All parties filed additional evidence and multiple submissions were received to address the new evidence as it arose.

¹ [2013] NZERA Auckland 584

[7] I therefore assess costs on the basis that this is a two day matter to reflect the additional time and costs resulting from the additional evidence and various matters that arose after the investigation meeting.

[8] Costs principles in the Authority are so well established I do not need to set them out here.² I adopt the Authority's usual notional daily tariff approach to costs. The current notional daily tariff is \$3,500 which means that the notional starting point for assessing costs in this matter is \$7,000 (2 days x \$3,500 per day). That notional starting tariff must then be adjusted on a principled basis to reflect the particular circumstances of this case.

Issues

[9] The following issues are to be determined:

- (a) What if any costs and/or disbursements should be imposed on Ultimate Temps?
- (b) What if any costs and/or disbursements should be imposed on Mr Ryan?
- (c) What if any costs and/or disbursements should be imposed on Ms Wilson?

What if any costs and/or disbursements should be imposed on Ultimate Temps?

[10] Ms Bryan's claim that she was employed by Ultimate Temps did not succeed so her penalties claim against Ultimate Temps for its alleged breaches of her employment agreement was also unsuccessful. I therefore find that it is not appropriate for Ultimate Temps to contribute towards Ms Bryan's costs. Accordingly, no costs or disbursements are imposed on Ultimate Temps.

What if any costs and/or disbursements should be imposed on Mr Ryan?

[11] Ms Bryan did succeed in respect of some of her claims against Mr Ryan so it is appropriate for him to contribute towards her actual costs. Because this matter

² See for example *PBO Ltd (formerly Rush Security Ltd v. Da Cruz* [2005] 1 ERNZ 808 and cases following

involved two days of investigation the notional starting point for assessing costs is \$7,000.

[12] However the notional starting tariff must be divided between two parties, Mr Ryan and Ms Wilson. I consider the claims against both parties required equal investigation time so on that basis the starting tariff should be split equally. That means that the notional starting tariff for assessing costs against Mr Ryan is \$3,500.

[13] I consider that Ms Bryan's lack of success in the following claims she made against Mr Ryan should result in the notional starting tariff (in so far as it applies to Mr Ryan) being decreased.

[14] Ms Bryan's following claims against Mr Ryan were unsuccessful;

- (a) That Mr Ryan had employed Ms Bryan either in partnership with Ms Wilson or by himself;
- (b) That Mr Ryan incited, instigated, aided or abetted Ms Wilson's breaches of her employment agreement with Ms Bryan in so far as the breaches related to Ms Wilson's failure to provide a written employment agreement and to her breaches of her statutory good faith obligations as Ms Bryan's employer. I note that Mr Ryan was held to have incited, instigated, aided or abetted all of Ms Wilson's other breaches of Ms Bryan's employment agreement;
- (c) Mr Ryan without sufficient excuse obstructed or delayed the Authority's investigation by failing to attend mediation as schedule.

[15] I consider that the notional starting tariff should be reduced by \$750 to reflect Ms Bryan's lack of success with the above claims against Mr Ryan. That takes the notional starting tariff for Mr Ryan's costs to \$2,750.

[16] I turn now to factors which should increase the costs awarded. I accept Mr Smyth's submissions that the manner in which Mr Ryan conducted his case unreasonably and unnecessarily increased Ms Bryan's costs. It is therefore appropriate for that to be reflected by increasing the notional starting tariff (in so far as it applies to Mr Ryan) by \$2,000.

[17] I order Mr Ryan to pay Ms Bryan \$4,750 towards her legal costs (being \$7,000 notional starting tariff less \$3,500 being half share of costs less \$750 to reflect Mr Ryan's partial success plus \$2,000 to reflect the unnecessary additional costs Ms Bryan was put to as a result of the manner in which Mr Ryan conducted this matter).

[18] I am satisfied that Ms Bryan incurred total disbursements of \$306.01 consisting of a filing fee of \$71.56, photocopying bundles for the Authority of \$95.01, courier fees of \$15.24 and research costs/document delivery from the NZLS of \$124.20. I consider it appropriate for Mr Ryan to pay a half share of these disbursements. Accordingly Mr Ryan is ordered to pay Ms Bryan \$153 towards her actual disbursements.

What if any costs and/or disbursements should be imposed on Ms Wilson?

[19] The notional starting point for assessing costs against Ms Wilson is \$3,500. I am not aware of any factors which should reduce the notional starting tariff.

[20] I accept Mr Smyth's submissions that the manner in which Ms Wilson conducted her case unnecessarily increased Ms Bryan's costs. I find that the notional starting tariff needs to be increased by \$2,000 to reflect that. I also consider it appropriate for Ms Wilson to pay a half share of the actual disbursements incurred by Ms Bryan.

[21] Ms Wilson is ordered to pay Ms Bryan \$5,500 towards her actual costs together with \$153 towards Ms Bryan's disbursements.

Rachel Larmer
Member of the Employment Relations Authority