

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 328  
3024031

BETWEEN                      Maree Cooper  
   Applicant  
  
AND                                Phoenix Publishing Limited  
   Respondent

Member of Authority:        Jenni-Maree Trotman  
  
Representatives:              G Ogilvie, Advocate for the Applicant  
   L McLean, Advocate for the Respondent  
  
Investigation Meeting:        27 September 2018 in Tauranga  
  
Submissions Received:        9 October 2018 from Applicant  
   23 October 2018 from Respondent  
  
Determination:                24 October 2018

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

- A. The Respondent is ordered to pay to the Applicant a total of \$4,631.56 made up of:**
- i) The sum of \$4,500 towards the Applicant's legal costs;**
  - ii) The sum of \$71.56 for the filing fee the Applicant paid to lodge his Statement of Problem.**
  - iii) The sum of \$60 for photocopying and stationery costs incurred in preparing the common bundle of documents.**
- B. Payment of the sum of \$4,631.56 is to be paid within 14 days of the date of this determination.**

## **Employment Relationship Problem**

[1] On 27 September 2018 I issued an oral determination in which I found that Maree Cooper had been unjustifiably dismissed from her employment with Phoenix Publishing Limited. I further found that wage arrears and expenses were owing to Mrs Cooper. Phoenix Publishing was ordered to pay to Mrs Cooper the sum of \$1,884.61 gross for monies lost as a result of her personal grievance, \$4,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), and \$9,306.58 for unpaid wages, holiday pay and expenses. In addition, it was ordered to pay a penalty of \$10,000 under s 134 of the Act for breaching the employment agreement.

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions.

[3] The parties have been unable to resolve costs. On 9 October 2018, Mrs Cooper's representative filed submissions applying for costs. On 23 October 2018 Phoenix Published filed its cost submission in reply.

[4] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **Application for costs**

[5] Mrs Cooper claims costs in the sum of \$6,391.12 plus disbursements of \$139.40. The legal cost component is made up of:

- a) A sum of \$2,941.12 representing the legal costs invoiced to Mrs Cooper by her former representative for the period 26 November 2017 to 28 February 2018;
- b) A sum of \$3,450 representing the legal costs invoiced to Mrs Cooper by her current representative.

[6] Phoenix Publishing opposes the Authority ordering costs beyond the daily tariff.

### **Authority's Approach to Costs**

[7] The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority considers reasonable.<sup>1</sup> The principles applying to costs are well settled and do not require repeating.<sup>2</sup>

[8] Recently in *Booth v Big Kahuna Holdings Limited*<sup>3</sup> Judge Inglis wrote:

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

[9] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting. For each subsequent day of an investigation meeting the Authority's normal daily tariff is \$3,500.00<sup>4</sup>. The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

### **Should the daily tariff be adjusted?**

[10] The investigation meeting took place over 0.75 of a day. Using the normal daily tariff the starting point for costs is \$3,375.

#### *Upward Adjustment?*

[11] I am satisfied that an upward adjustment to the daily tariff is warranted.

[12] Phoenix Publishing failed, without excuse or leave, to file witness statements and relevant documentation prior to the investigation meeting in accordance with the

---

<sup>1</sup> Employment Relations Act 2000, Schedule 2 clause 14.

<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

<sup>3</sup> [2015] NZEmpC.

<sup>4</sup> Practice Note 2, Costs in the Employment Relations Authority.

directions made by the Authority. This resulted in the investigation meeting being lengthened and additional time being expended by Mrs Cooper's representative in preparing for the investigation.

[13] Additional legal expenses were also incurred by Mrs Cooper in attempting to organise mediation between the parties. The additional time required was due to Phoenix' actions in cancelling and/or avoiding attending mediation. The time spent was outside the normal range taken into account by the Authority in setting its daily tariff.

[14] Lastly, Mrs Cooper was put to the expenses of preparing costs submissions when the parties were unable to reach agreement on costs.

[15] In these circumstances I adjust the daily tariff to \$4,500 representing one day in the Authority.

#### *Downwards Adjustment?*

[16] I am satisfied that the daily tariff should not be adjusted downwards. Having reviewed the invoices provided by Mrs Cooper I am satisfied that she has reasonably incurred costs equalling at least the daily tariff for one day.

#### *Expenses*

[17] In my minute of 19 July 2018 I directed Mrs Cooper to prepare a Common Bundle of Documents. Two copies of this bundle were to be filed with the Authority. Mrs Cooper claims the photocopying and stationery costs associated with preparation of these bundles in the sum of \$60. I find this cost is reasonable and is payable by Phoenix Publishing.

[18] The Authority has also charged Mrs Cooper a filing fee of \$71.56. This cost must also be paid by Phoenix Publishing to Mrs Cooper.

#### **Determination**

[19] Phoenix Publishing is ordered to pay to Mrs Cooper the sum of \$4,500 towards her legal costs. In addition, it is ordered to pay her the sum of \$71.56 being the Authority's filing fee and the sum of \$60 for photocopying and stationery costs

associated with the preparation of the common bundle of documents. These sums must be paid within 14 days of the date of this determination.

Jenni-Maree Trotman

Member of the Employment Relations Authority