

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 52A/09
5117459

BETWEEN KELLY DUNCAN
 Applicant

AND RESTAURANT BRANDS
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: John Harland, Advocate for Applicant
 Robyn Commins, Advocate for Respondent

Submissions received: 20 May 2009 from Respondent
 10 June 2009 from Applicant

Determination: 5 August 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 23 April 2009 I found in favour of the respondent and dismissed the applicant's claims in their entirety. I reserved the issue of costs and timetabled for an exchange of submissions, which I have now received from both Ms Commins and Mr Harland.

Respondent's submissions

[2] Ms Commins refers in her submissions to the principles in the judgment of the Full Court of the Employment Court *PBO Ltd (formerly Rush Security) v. Da Cruz* [2005] 1 ERNZ 808.

[3] Ms Commins submits that the following factors should be considered by the Authority in determining costs in this matter:

- The respondent offered other solutions to the applicant which were not considered; and the offer of work at another store after the applicant resigned was not taken up.
- The applicant did not intend to resolve matters and had no intention of staying with the respondent company.
- The expense of a claim to the Authority could have been avoided if the suggestions had been taken up by the applicant.

[4] The respondent's actual costs were \$14,837.58 inclusive of GST.

Applicant's submissions

[5] Mr Harland on behalf of the applicant submits that costs should not be awarded against the applicant at all or if the Authority was minded to do so, they should be at the lower end of the scale. Mr Harland submits that the applicant's conduct was reasonable in circumstances where she attempted to resolve the matter through mediation and then the Authority process because she genuinely believed she had a personal grievance.

[6] The applicant does not accept that she unnecessarily or deliberately increased costs incurred by the respondent.

[7] Mr Harland submits that the applicant does not have the means to pay as she is a student with a significant student loan and credit card and overdraft debts. The applicant does not own assets and Mr Harland submits, has recently been advised that her current employer has sold its business and even if she was to be re-employed, there would be a lengthy period without income pending re-commencement of work.

[8] In the event that there is an award of costs, Mr Harland submits that the case was not complex and the facts relatively simple. Further, he submits that if there is to be an award of costs the Authority should advise as to an appropriate payment regime.

Determination

[9] I accept that the principles in *PBO* are applicable. This was an important case to both parties and it was not legally or factual complex. It was able to be investigated within about half a day.

[10] It is clear that the respondent has incurred considerable costs in defending the claim against it and that it did, in good faith, attempt to resolve the matter, short of a legal process being entered into.

[11] I do need however to consider the applicant's financial circumstances and her ability to meet an award of costs in the exercise of my discretion as to costs. There is always a risk in any litigation that a party may be unsuccessful and therefore required to meet some of the costs of the other party. It is recognised in the Authority that costs awarded are usually modest and therefore unlikely to compensate the successful party for their full or close to full costs.

[12] The applicant is in a difficult financial position but I do not find that it would be appropriate to deprive the respondent of any contribution towards its costs.

[13] I conclude that given the nature of this case, which was uncomplicated and took less than a full day to investigate, a starting tariff of \$2,000 is appropriate.

[14] It is very clear to me, however, that the applicant would struggle to meet an award of that amount. Even if, as would seem to be inevitable, the respondent was to be paid over time, the applicant could probably only afford a very modest weekly or monthly sum. It could take some years to satisfy such an award.

[15] Given the applicant's financial circumstances, I have decided in this case in exercising my discretion as to costs, to make an award for a modest sum of \$1,500.

[16] I have been asked to give some direction as to a suitable repayment regime. I propose to deal with that matter on the basis that Mr Harland suggest a repayment regime to Ms Commins. If there are any difficulties in that regard then I reserve leave for Mr Harland to return to the Authority for directions. The Authority would need to have some indication as to what the applicant considers would be an amount that she could reasonably afford to pay towards costs and the respondent's view.

[17] I order Kelly Duncan to pay Restaurant Brands Limited the sum of \$1,500 being costs.

Helen Doyle
Member of the Employment Relations Authority