

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 243
5398797**

BETWEEN REBECCA JANE FINLAY
Applicant

A N D BLACKWOODS BAKERIES
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Keshila Fayen, Advocate for Applicant
Paul Whiteford, Advocate for Respondent

Submissions received: 12 April 2013 from Applicant
15 May 2013 from Respondent

Date of Determination: 11 June 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive decision

[1] The Authority issued its substantive determination on 19 March 2013 as [2013] ERA Auckland 92. That determination found for Ms Finlay and reserved costs.

The claim for costs

[2] Ms Finlay seeks costs of \$3,587.50 inclusive of GST together with reimbursement of the Authority's filing fee which the Authority omitted to order reimbursement of, in the substantive determination.

[3] Legal costs sought of \$3,587.50 include GST, which is usually not included in a costs award made by the Authority and the time spent in mediation, again which is usually not part of a costs award made by the Authority.

[4] The GST component of the tax invoice rendered, for which payment is sought is \$538.12 and the time spent in mediation amounts to \$525. Those two sums amount

to \$1,063.12. Deducting the aggregate of those two amounts from the total fee charged to Ms Finlay brings the allowable amount for consideration down to \$2,524.38.

[5] The submissions for Ms Finlay argue that she is entitled to full reimbursement because of the difficulties she had in engaging with the employer. In effect the submission is that if the employer had been more willing to engage with Ms Finlay during the employment, some or all of Ms Finlay's costs would have been avoided.

[6] Certainly, it is the position that the law allows the Authority to consider the behaviour of parties in employment relationship problems when it comes to the fixing of costs and if the Authority is persuaded that a party has contributed to the costs of the other by their behaviour, then that may sound in the costs fixing environment.

[7] In particular, Ms Finlay makes the point that her decision to seek representation at all was a function of her difficulty in getting answers from Blackwoods Bakeries. Further, but in the same general connection, a refusal by Blackwoods Bakeries to provide wage and time records when requested not only added to the cost but also placed another obstacle in the path of resolution because provision of that information might have led appropriately to a discussion of the nature of the employment (whether casual or permanent part time) which had a material effect on the outcome of the employment relationship problem.

The response

[8] Mr Whiteford for Blackwoods Bakeries advises in his submission that Blackwoods Bakeries is no longer able to pay its current creditors and it is suggested that part of the reason for the firms trading difficulties is the present proceeding.

[9] Further, Blackwoods Bakeries maintain that there are no costs incurred by Ms Finlay as her advocate worked on *a commission basis as everyone already knows*. First, it is for the Authority to decide if the costs incurred by a party seeking costs, are reasonable. Second, whatever the basis on which Ms Finlay retained her advocate, the fact is that Ms Finlay is responsible for the costs she has been charged and the law allows her to seek a contribution to those costs from the unsuccessful party. Complaints about that fact cannot be fairly directed either at Ms Finlay or the Employment Relations Authority; the law allows Ms Finlay to make the claim that she does and the Employment Relations Authority is required to administer the law.

[10] Blackwoods Bakeries also allege that the Authority has mistakenly awarded wages when it should not have. The position is there are two different classes of wages for the Authority to consider. The first related to the period when Ms Finlay was not receiving work as usual, because Blackwoods Bakeries were undertaking their investigation into money going missing. The Authority declined to award lost wages for that period because it reached the conclusion that Blackwoods Bakeries were entitled to not call Ms Finlay in during their investigation. However, Ms Finlay is entitled to wages that she lost after her employment was unjustifiably terminated. Again, that is the law.

Determination.

[11] The law on the fixing of costs in the Authority is well settled. The fundamental premise is that costs usually follow the event; that is the unsuccessful party is required to contribute to the costs of the successful party. Further, if the behaviour of the unsuccessful party contributes to the costs incurred by the successful party then that is able to be taken into account by the Authority. Thirdly, and finally, the Authority usually adopts a daily tariff approach the effect of which is that each days hearing is said to be worth \$3,500 in costs.

[12] This particular matter was dealt with in around half a day. On that basis a contribution to Ms Finlay's costs of \$1,750 would be the starting point. The Authority accepts that Blackwoods Bakeries mistaken view about their employment relationship with Ms Finlay contributed to increasing those costs and accordingly, the Authority fixes costs at a total of \$2,000 which reflects the elapsed time of the hearing and a small allowance for the additional costs Ms Finlay suffered as a consequence of the unwillingness of Blackwoods Bakeries to engage with her at the end of the employment relationship. Had there been some genuine engagement between the parties, a great deal of cost may have been avoided for all parties.

[13] Given Blackwoods Bakeries intimation that the firm is suffering financial difficulties, the Authority directs that Blackwoods Bakeries is to have time to pay the costs amount. Blackwoods Bakeries is also to pay the filing fee of \$71.56 to reimburse Ms Finlay for that cost.

James Crichton
Member of the Employment Relations Authority