

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 230  
3002431

BETWEEN                      FRANCES HALL  
   Applicant

A N D                              TAUMARUNUI CHRISTIAN  
   EDUCATION TRUST  
   Respondent

Member of Authority:        T G Tetitaha

Representatives:              S McKenna/J Alchin-Boller, Counsel for Applicant  
   K Ngatai, Counsel for Respondent

Investigation Meeting:        On the papers

Submissions Received:        6 July 2017 from applicant only

Date of Determination:        2 August 2017

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]     The Authority in its substantive determination<sup>1</sup> held that Ms Hall was unjustifiably dismissed. The Taumarunui Christian Education Trust (Trust) was ordered to pay \$1,000 compensation.

[2]     Ms Hall now applies for costs. As she was legally aided, her actual costs are that part of the legal aid grant she is required to repay of \$1,300. She seeks to recover the entirety of

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<sup>1</sup>     *Frances Hall v Taumaranui Christian Education Trust* [2017] NZERA 179.

the costs she has been asked to repay towards legal aid grant. There is no issue these costs were properly and reasonably incurred.

### **Should a legally aided person be awarded indemnity costs?**

[3] Ms Hall is essentially seeking indemnity costs. The Court has rejected the submission that legally aided persons should receive indemnity costs:<sup>2</sup>

... the proposition that legally aided parties ought to receive awards of costs on an indemnity basis or close to it is inconsistent with the well-established principles guiding awards of indemnity costs in all courts. They will be truly exceptional, examples being where a party pursues a clearly hopeless claim or conducts the case in an appalling manner.

[4] Indemnity costs require “*exceptionally bad behaviour*” generally where a party has behaved either badly or very unreasonably.<sup>3</sup> This matter does not meet that required threshold.

[5] I note Ms Hall’s submission about the modest award and non-indemnity costs reducing this further. As noted by the Court, this is more properly a matter taken up with the Legal Services Commissioner in terms of the amount of her contribution towards repayment of the legal aid grant.<sup>4</sup>

### **Starting point for costs for legally aided persons**

[6] The Authority has adopted a notional daily tariff based approach to costs.<sup>5</sup> Matters lodged in the Authority from 1 August 2016 are subject to the increased daily tariff of \$4,500.<sup>6</sup> This matter involved a one day investigation meeting. The starting point for assessing costs would usually be \$4,500.

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<sup>2</sup> *Goodfellow v Building Connexion Ltd* [2010] NZEmpC 153.

<sup>3</sup> *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234.

<sup>4</sup> *Doran v Crest Commercial Cleaning Ltd* [2012] NZEmpC 200.

<sup>5</sup> *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16].

<sup>6</sup> Practice Note 2 Costs in the Employment Relations Authority para.4.

[7] The starting point here must be reduced to take account of Ms Hall being legally aided. Her actual costs she must repay to the Legal Services Agency are \$1,300. This must be reduced to reflect this case does not justify an award of indemnity costs.

[8] There is little law regarding a starting point for costs for legally aided persons where the amounts to be recovered are substantially less than the Authority's daily notional tariff.

[9] The Court of Appeal has addressed how and why 'scale costs' are set in the employment jurisdiction:<sup>7</sup>

First, an award of scale costs in New Zealand represents a *reasonable contribution* to the costs actually and reasonably incurred. Importantly, the assessment of what constitutes a reasonable contribution does not depend on the actual costs incurred by the successful party. This distinguishes scale costs from other types of costs awards. That scale costs will often not fully indemnify the successful party reflects the fact that litigation is generally an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the successful party's full costs. Setting scale costs at the level of approximately two-thirds of deemed actual and reasonable costs is also intended to encourage resolution of disputes efficiently and to disincentivise unnecessary or protracted litigation.

[citations omitted]

[10] I intend adopting this methodology in setting costs where the Authority's daily notional tariff exceeds what has been actually and reasonably incurred here. Accordingly costs shall be set at two thirds of the legal aid contribution of \$1,300 or \$866.67.

[11] Accordingly the Taumarunui Christian Education Trust is ordered to pay the Legal Services Commissioner the sum of \$866.67 as a contribution towards Ms Hall's legal fees.

**TG Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>7</sup> *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* (2016) 23 PRNZ 260 at [9].