

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 280
5379368

BETWEEN JENNIFER KILPATRICK
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: J Kilpatrick in person
D France, counsel for respondent

Memoranda received: 10 June 2013 from applicant
28 June 2013 from respondent

Determination: 4 July 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 31 May 2013 I found Ms Kilpatrick's dismissal was justified. I also found she did not suffer disadvantage in her employment as a result of unjustified action of her employer's.

[2] Costs were reserved, and the parties have filed memoranda on the matter.

[3] Counsel for the respondent sought an award of costs in the sum of \$9,500. He relied on the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*¹ and the notional daily rate in the Authority of \$3,500. He pointed out, correctly, that the investigation meeting lasted for two days. A third scheduled day could have been used for the presentation of submissions, but written submissions were permitted instead. He suggested that be reflected in the addition of a further half day to the meeting time.

¹ [2005] 1 ERNZ 808

[4] Overall, counsel sought a contribution to Air New Zealand's costs in the sum of \$9,500. This was based on a slight increase in the notional daily rate to reflect the extra work required to address the voluminous material Ms Kilpatrick filed. Much of it included material relevant to another matter before the Authority, and was not required for the meeting in question.

[5] Ms Kilpatrick said in-house counsel could have been instructed, and that she has no resources to meet an order for costs. She said she remains unemployed and has no income.

[6] Air New Zealand was the successful party and is entitled to a contribution to its costs. In the light of my approach to this matter and another matter between the same parties², I do not apply an increase to the notional daily rate. At the same time I had required the parties to be ready to present submissions at the investigation meeting, and allow a notional half day for that purpose. I find 2.5 days' hearing time is an appropriate measure for costs purposes.

[7] I do not accept that anything in Air New Zealand's decision to instruct counsel – who appears regularly for it – should sound in costs. Secondly Ms Kilpatrick provided no evidence beyond assertion as to her means, and I am unaware in particular of whether she has any assets. I do, however, note that the Authority accepted statements regarding her means at face value in *Kilpatrick v FARSA*.³ The member also warned that embarking on litigation involves risk, including one of a requirement to contribute to the other party's costs if the litigation is unsuccessful.

[8] For these reasons Ms Kilpatrick is ordered to contribute to Air New Zealand's costs in the sum of \$8,750. Leave is reserved to request a consideration of orders for payment by instalment.

R A Monaghan

Member of the Employment Relations Authority

² [2013] NZERA Auckland 279

³ [2013] NZERA Auckland 236