

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 62  
3019132

BETWEEN                      KERYN KING  
   Applicant  
  
A N D                              CAFÉ ALLWOOD LIMITED (IN  
   LIQUIDATION)  
   Respondent

Member of Authority:        David Appleton  
  
Representatives:              Chrissy Gordon advocate for the Applicant  
   Brenton Hunt, Liquidator for the Respondent  
  
Investigation Meeting:        Determined on the papers  
  
Submissions Received:        19 April 2018 from Applicant  
   None from the liquidator  
  
Date of Determination:        8 May 2018

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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[1] By way of a determination of the Authority dated 16 March 2018<sup>1</sup>, the Authority found that Ms King had been unjustifiably constructively dismissed and subjected to an unjustified disadvantage by her employer, the respondent. Costs were reserved, and the parties invited to agree how costs were to be dealt with. However, the parties have not been able to agree and, on 4 April 2018, the respondent went into liquidation.

[2] Upon learning of the liquidation, the Authority wrote to the liquidator to say that, notwithstanding the fact that the company has been placed into liquidation, that fact does not prevent the Authority from determining costs, as costs are a consequence of proceedings, and follow the event of the determination already issued prior to the

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<sup>1</sup> [2018] NZERA Christchurch 33

company being placed into liquidation. In other words, s 248 of the Companies Act 1993 is not engaged to prevent a determination on costs. I rely on *Orakei Group (2007) Limited (formerly PRP Auckland Limited) v Hilton Doherty (No 2)*<sup>2</sup> in reaching this conclusion.

[3] I invited the liquidator to make submissions on costs, extending time to allow him to do so, but none have been received within the time limit set by the Authority. Accordingly, this determination disposes of costs.

[4] Ms Gordon seeks a contribution towards Ms King's costs in the sum of \$8,000 plus disbursements of \$224.89 (being the lodgement fee of \$71.56 and a hearing fee of \$153.33 for one half of the second day). The figure of \$8,000 is based upon the Authority's daily tariff of \$4,500 for the first day and \$3,500 for the second day.

### **Discussion and determination**

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

#### ***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[6] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*<sup>3</sup> when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

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<sup>2</sup> 28 October 2008, WRC 5/08

<sup>3</sup> [2005] 1 ERNZ 808

- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[7] Whilst Ms King did not recover any remedies for the disadvantage, and the counterclaim against her succeeded to a small degree, she was materially successful. Therefore, the usual principle of costs following the event means that she should have a contribution towards her costs. I also agree that the daily tariff approach is appropriate.

[8] However, the Authority's investigation lasted one and a half days, the second day ending at 1.15 pm. Whilst written submissions were also later provided, I do not accept that their preparation by the applicant's advocates would have taken up another half a day had they been delivered orally. I therefore decline to extend the second day to a full day for costs purposes.

[9] In addition, Ms Gordon has not given any indication of what costs her client has incurred. Part of the assessment of a party's costs involves deciding whether they are reasonable. I cannot do that when no information has been provided. The award

of costs depends upon costs actually being incurred, and does not just follow a win automatically.

[10] However, I am prepared to accept that Ms Gordon's advocacy practice is a commercial practice which will charge commercial advocacy rates. It is more likely than not that Ms King's costs are at least \$6,250, which is the total of \$4,500 (the daily tariff for the first day) and \$1,750, which is half the daily tariff for the second day.

[11] I see no reason to either uplift, or reduce that sum, and fix costs at \$6,250.

[12] Turning to disbursements, I agree that Ms King is entitled to receive a refund from the respondent of the lodgement fee of \$71.56, together with the hearing fee for one half of the second day at \$153.33.

[13] The applicant is entitled to receive from the respondent the following sums in relation to her costs pursuant to clause 15 of Schedule 2 of the Act:

- a. The sum of \$6,250;
- b. The sum of \$71.56;
- c. The sum of \$153.33.

David Appleton  
Member of the Employment Relations Authority