

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 387
5396334

BETWEEN SHIRLEY ANN MacDONALD
Applicant

A N D WHALE PUMPS LIMITED t/a
DENBY CATERERS
Respondent

Member of Authority: James Crichton

Representatives: Barry Nalder, Advocate for Applicant
Chris Rowe, Advocate for Respondent

Submissions Received: 21 August 2013 from Applicant
25 July 2013 from Respondent

Date of Determination: 28 August 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In its substantive determination issued as [2013] NZERA Auckland 252, the Authority rejected Ms MacDonald's various claims except to the extent that she had been underpaid holiday pay in the amount of \$292.81. The Authority determined all the other issues in favour of the respondent employer (Denby Caterers).

[2] The Authority rejected Ms MacDonald's claim that she was a permanent part time employee, rejected her claim to have been constructively dismissed, and rejected her significant wages claim.

[3] Costs were reserved.

The claim for costs

[4] As the substantially successful party, Denby Caterers seeks a contribution to its costs on a full indemnity basis.

[5] The Authority is told that those costs amount to \$10,000 inclusive of the costs relating to a counterclaim. Costs incurred without the counterclaim amounted to a little over \$6,000.

[6] The argument for an uplift from the notional daily rate approach commonly used by the Authority is the financial consequences on Denby Caterers of having to fund this litigation which, on the submission of Denby Caterers, was “*totally without merit*”. Denby Caterers says that it is “*unconscionable that the applicant can lodge a claim which has been found to be without any merit, and then say she is unable to pay costs because she is unemployed, while her former employer is left ‘carrying the can’*”.

The response

[7] Submissions for Ms MacDonald concentrate on her dissatisfaction with the Authority’s decision and her intention to challenge that decision in the Court if she is granted legal aid.

[8] However, the brief observations in respect to costs indicate that Ms MacDonald remains unemployed, is in receipt of an unemployment benefit and has neither savings nor assets.

[9] It is suggested that any costs order would be “*disproportionately punitive*” and it is suggested that costs should lie where they fall.

Discussion

[10] The law in relation to costs fixing is well settled and need not be recited again here. A good summary of the legal principles involved is contained in the Employment Court decision *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[11] That decision of the Full Bench of the Employment Court specifically approves the daily tariff approach frequently adopted by the Authority in a costs setting environment provided that the daily tariff is applied in accordance with

principle and not arbitrarily. Other common law principles such as costs typically following the event and the Authority having a discretion in respect of costs are also referred to in the judgment.

[12] The Authority has also found it helpful to apply the principles set out in an earlier decision of the Authority, *Graham v. Airways Corporation of New Zealand Ltd* (ERA Auckland, AA39/04, 28 January 2004). In that decision, the Chief of the Authority Member Dumbleton set out three propositions which the Authority must address in a cost setting environment:

- (a) What are the costs;
- (b) Are they reasonable;
- (c) What percentage of the costs should be met by the unsuccessful party?

[13] It is a truism that costs normally follow the event. Parties engaged in litigation, including in the Authority, must have an expectation that if they are unsuccessful they will likely be asked to make a contribution to the costs of the successful party. That part of the process must be seen as an attendant risk of undertaking legal proceedings and cannot simply be abrogated on the basis that the unsuccessful party is impecunious.

[14] The Authority is not persuaded that anything in the present case justifies a departure from the daily tariff approach. While this particular dispute was factually more complex than some, it was still dealt with in less than a day's hearing time.

[15] The current daily tariff applied by the Authority is \$3,500. The matter was dealt with in a little under a day's normal hearing time and on that basis the starting point ought to be \$3,000.

[16] While the Authority accepts without reservation the cost impost on the successful employer in defending Ms MacDonald's various claims, the fact remains that, like Ms MacDonald, Denby Caterers cannot expect to undertake litigation entirely without cost. It is a rare case indeed in the Authority where full indemnity costs are allowed unless there is a *Calderbank* offer in place or some other supervening cause for full indemnity costs to be allowed. Financial hardship is no

more an argument for a successful party than an unsuccessful one, although it is appropriate that submissions of that sort be taken into account for both parties.

[17] Both parties say that they have financial difficulties. In Denby Caterers' case it is attributed to the need to defend this litigation while in Ms MacDonald's case it appears to be more endemic. It is the case that she is unemployed but the Authority is also told that she has neither savings nor assets. The unemployment of course is, on the Authority's finding, her decision rather than a consequence of Denby Caterers' actions and the absence of savings or assets is not necessarily related to the employment position at all.

Determination

[18] In all the circumstances, the Authority is not persuaded that this is a case either where full indemnity costs ought to apply (as claimed for Denby Caterers), or where costs should lie where they fall (as is submitted for Ms MacDonald). In the Authority's judgment, Ms MacDonald should make a contribution to Denby Caterers' costs and having regard to her present financial predicament, the Authority is moved to reduce the amount she might otherwise be asked to contribute to take account of her financial position.

[19] Because the investigation meeting took less than a full day, the appropriate starting point is \$3,000 rather than \$3,500 for the full daily rate. The Authority discounts that figure by another \$1,000 to take account of Ms MacDonald's financial predicament and directs that she is to pay \$2,000 to Denby Caterers as a contribution to its costs. Ms MacDonald is to have time to pay that sum.

James Crichton
Member of the Employment Relations Authority