

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 100
5454183

BETWEEN DUYEN THI BICH NGUYEN
Applicant

A N D HUE KIM THI TA
First Respondent

LITTLE SAIGON NAILS AND
BEAUTICIANS LTD
Second Respondent

Member of Authority: David Appleton

Representatives: John Horan, Advocate for the Applicant
Peter Rea, Advocate for the Respondents

Investigation Meeting: Determined by consideration of the papers

Submissions Received: 7 and 9 June 2016 from the Respondents
23 June 2016 from the Applicant

Date of Determination: 29 June 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] Following the withdrawal by the applicant of her claims against the respondents on 2 June 2016, the respondents seek substantial costs against her. Initially, they claimed \$80,000¹, but this was revised to \$53,096.87.

[2] These costs have been broken down by Mr Rea as follows:

- a. Costs of Aliza Eveleigh in the sum of \$1,765.37;
- b. Costs of Mortlock McCormack, in the sum of \$13,959.30;
- c. Costs of Mr Rea, in the sum of \$3,372.20;

¹ By way of an email from Mr Rea to the Authority dated 3 June 2016.

- d. The cost of having USB recordings transcribed, in the sum of \$4,000;
- e. Stress and damage to reputation, in the sum of \$10,000; and
- f. Breaches of trust and financial loss due to the failed sale of the nail shop business in the sum of \$20,000.

[3] I can deal with some of these costs claimed immediately, as they clearly fall outside of the scope of the Authority's power in respect of awarding a contribution towards legal costs. Before doing so, I set out the key principles governing the award of costs in the Authority.

The key principles governing the award of costs

[4] The Authority's power to award costs is set out in paragraph 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.

[5] When determining how legal costs and expenses should be dealt with, the Authority must take into account the principles set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. These principles include the following:

- 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.
- 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.

The respondent's application for costs

[6] As a starting point, I accept that the respondents may be entitled to an award of costs on the basis that the applicant withdrew her claims principally because her representative was not able to continue representing her, for health reasons. Mr Horan has referred to other matters in his submissions, which I will address below.

[7] The fact that the applicant chooses to withdraw her claims because of her advocate's indisposition begs the question why she could not have engaged new representation. Whatever her reasons, the withdrawal of the claims was not in any way caused by the respondent.

[8] As it is not appropriate to adopt the daily tariff as the starting point in assessing the appropriate amount of costs to be potentially awarded, as no investigation meeting took place, I address each claimed head of costs.

Disallowed claims

[9] Stress and damage to reputation do not give rise to recoverable costs in the Authority. A costs award is intended to reimburse a party who has incurred actual

financial costs and disbursements in defending a claim against them or in successfully bringing a claim. I therefore disallow this head of claim.

[10] Breaches of trust and financial loss due to the failed sale of the nail shop business also do not give rise to recoverable costs in the Authority, for the same reason. In any event, whatever happened between the parties in respect to negotiations for the applicant to buy the respondent business is not judicable in the Authority, as the existence of the employment relationship between the parties was not a necessary component of the applicant trying to buy the respondent's business².

[11] Ms Eveleigh's invoice is dated 14 February 2014. This predates the date of the applicant's lodging of the statement of problem against the respondent. The invoice narrative also refers to *Reviewing claims by Tran*, who is not the applicant. I therefore disallow this head of claimed costs.

[12] The transcription of the USB recordings (in Vietnamese, which were transcribed and then translated to English) are said by Mr Rea to have cost the respondent \$4,000. However, an invoice from a translating company in Vietnam was produced to the Authority, written in Vietnamese, which shows that 3,154,000 Vietnamese dong was charged on 21 May 2015.

[13] On this date, the Vietnamese dong was worth 0.000062 New Zealand dollars. This means that the invoice equated to \$195.55. This is considerably less than the \$4,000 claimed. The basis of the \$4,000 claimed seems to be that that figure was an estimate given to the respondent for getting the recordings transcribed and translated in New Zealand. As I say above, only costs actually incurred may be recovered. Whether the correct sum of \$195.55 should be awarded will be examined below.

What remaining costs are recoverable?

[14] On the face of it, \$17,526.50 of costs are potentially recoverable.

Mortlock McCormack's costs

[15] These costs were billed to the second respondent in five tranches, on 28 November 2014, 18 December 2014, 30 January 2015, 27 February 2015 and 30 April 2015.

² See *JP Morgan Chase Bank NA v Robert Lewis* [2015] NZCA 255, paras [95] to [98].

[16] On 16 February 2015 an amended statement of problem was lodged with the Authority, after parts of the original claim had been settled. The Authority has not been sent a copy of the settlement agreement, but Mr Horan has stated to the Authority in his written submissions that his costs were covered by the settlement. In that case, I infer that both parties' costs to the date of settlement were settled by that agreement³. For that reason, I disallow any costs which predate the lodging of the amended statement of problem on 16 February 2015. This means that only the last two of Mortlock McCormack's costs are potentially recoverable. They amount to \$5,451.

Mr Rea's costs

[17] No breakdown has been provided of Mr Rea's costs. He has been involved with the respondents since the original claims were presented, prior to the partial settlement, and it is possible that he advised them in matters other than the claims in the Authority. I do not accept that all of the \$3,372.20 costs are necessarily recoverable therefore. However, he was clearly involved in representing the respondents in the Authority since the amended statement of problem was lodged and so a proportion of the costs will be potentially recoverable. As costs are a matter of discretion, I accept \$2,000 of Mr Rea's costs as potentially recoverable.

How much of the potentially recoverable costs should be awarded?

[18] It is not necessarily just for all of the costs incurred by the respondents since the lodging of the amended statement of problem to be awarded to them.

[19] Mr Horan says in his submissions that no costs should be borne by the applicant as the respondents chose to have representatives, they chose to have the audio recordings translated, and the applicant had no part to play *in any decision the respondent had to make in the protection of her good name*. Mr Horan also refers to the settlement as an indication of the respondents' fault. I can deal with these submissions in short order.

[20] First, the respondents were entitled to engage representation to defend themselves against the applicant's claims. Second, it is a well-known principle that a

³ On the basis that, if Mr Horan's cost were to paid by agreement, the respondent was to cover its own costs.

party is at risk of bearing a proportion of the other party's costs in engaging in the Authority's proceedings. Mr Horan is well aware of this, as he claimed costs on behalf of his client in his amended statement of problem. Third, the respondents are entitled to obtain their own transcription and translation as they doubted the accuracy of those provided by the applicant.

[21] Finally, I disallow any costs which predate the settlement, so Mr Horan's point about it is irrelevant.

[22] I do not believe that the applicant should be responsible for all of the respondents' potentially recoverable costs, as the withdrawal was not due to the applicant's claims being obviously unsustainable.

[23] However, it is just for some of the respondents' costs to be covered. In so deciding, I also take into account the fact that the Authority had to adjourn its planned investigation meeting twice because of the applicant's failure to serve and lodge briefs of evidence, in breach of the Authority's directions. This will inevitably have caused extra costs to have been incurred by the respondent.

[24] Standing back, I believe that it would be just for the following costs to be recovered by the respondents:

- a. Half of the allowed Mortlock McCormack costs;
- b. All of the allowed costs of Mr Rea; and
- c. The transcription costs.

[25] This amounts to \$4,921⁴.

Order

[26] I order the applicant to pay to the respondents the sum of \$4,921. Mr Rea is to advise Mr Horan within seven days of the date of this determination how the sum is to

⁴ \$2,725.50 + \$2,000 + \$195.55

be proportioned between the two respondents. The applicant is to make the payment within seven days of receiving that information from Mr Rea, in the proportions so advised.

David Appleton
Member of the Employment Relations Authority