

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 10  
5630167

BETWEEN                      FLORIAN PELABON  
Applicant

AND                              ZUMO RETAIL NELSON  
LIMITED  
Respondent

Member of Authority:        Michele Ryan

Representatives:              Bede Laracy, Advocate for the Applicant  
George Allen Chambers, for the Respondent

Submissions received:        13 October 2017 on behalf of the Applicant  
27 October 2017 and 19 December 2017 on behalf of the  
Respondent

Determination:                2 February 2018

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 6 October 2017 I found the applicant, Mr Florian Pelabon, had been unjustifiably dismissed by the respondent, ZUMO Retail Nelson Ltd.<sup>1</sup> Mr Pelabon now seeks to have the respondent contribute \$3,250 towards his costs.

***Principles***

[2]     The power to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act which states:

**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.

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<sup>1</sup>     *Pelabon v Zumo Retail Nelson Ltd* [2017] NZERA Wellington 101

- (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

[3] The principles guiding the exercise of the Authority's discretion as to costs are set out in the Employment Court decision of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup> and are well known. It is not necessary to restate these in full. Material to this determination the following principles are relevant:

- the Authority's discretion to award costs, including whether costs would be awarded and what amount, should be exercised in a principled manner and not arbitrarily;
- costs generally follow the event;
- an award of costs should not to be used as a punishment or as an expression of disapproval of a party's conduct, although conduct which increased costs unnecessarily can be taken into account in terms of an award;

[4] More recently, the Court has endorsed the Authority's practice of using a tariff based approach as its starting point when assessing costs.<sup>3</sup> The Authority's tariff is currently set a \$4,500 for a 1 day investigation meeting. That sum may then be increased or reduced depending on the particular circumstances of each case.

### ***Determination***

[5] Submissions for Mr Pelabon note the investigation meeting occupied half a day. He asks for the tariff to be uplifted. Mr Pelabon refers to the respondent's initial resistance to attend mediation, its failure to provide wage and time records, and the director's failure to attend the investigation meeting in a timely fashion, as factors that unreasonably and unnecessarily increased his costs.

[6] The director of the respondent provided two relatively brief emails in reply to the costs application. These challenged the findings made in the substantive determination however neither document addressed the issue of costs.

[7] One of the aims of the Employment Relations Act 2000 is to have parties seek to resolve differences prior to the intervention of the Authority (or the Court). Attendance at mediation is an important mechanism which assists parties to that end.

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<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

However mediation is not a mandatory requirement under the Act and I am unwilling to find the respondent's refusal to consent to mediation at first instance gives cause to uplift the tariff.<sup>4</sup> Nor do I accept that the alleged failure to send wage and time records to Mr Pelabon's representative provides justification for an increased award. As was noted in the substantive determination Mr Pelabon's advocate was advised that the payroll information was available to Mr Pelabon electronically. No evidence was furnished to establish he could not access that material.<sup>5</sup>

[8] I accept however that the director's late attendance at the Authority's investigation moderately increased the length of the meeting. Had Mr Chamber's attended at the time agreed when arrangements for the investigation were made (and confirmed in the Notice of an Investigation Meeting),<sup>6</sup> the investigation would have concluded earlier. That factor has been taken into account in my assessment as to the duration of the investigation.

[9] I am not persuaded this case warrants an uplift to the current tariff rate. But Mr Pelabon is entitled to a contribution to his costs. The daily tariff, pro-rated, to reflect a half day investigation meeting is an appropriate award.

### **Order**

[10] Pursuant to Section 15 of Schedule 2 of the Employment Relations Act I order ZUMO Retail Nelson Ltd is required the sum of \$2,250 in contribution towards Mr Pelabon's costs.

Michele Ryan  
Member of the Employment Relations Authority

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<sup>4</sup> In any event the parties attended mediation following a direction by the Authority.

<sup>5</sup> para. [38]

<sup>6</sup> sent on 17 November 2016 – over 4 months' before the Investigation Meeting