

**Attention is drawn to the order  
prohibiting publication of certain  
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 106  
3020378 and 3017191

BETWEEN	Q Applicant
AND	BATTERSEA INVESTMENTS LIMITED Respondent
and	GARETH BALL Applicant
AND	BATTERSEA INVESTMENTS LIMITED Respondent

Member of Authority: Christine Hickey

Representatives: Michael McDonald, Advocate for the applicants  
Laurence McLean, Advocate for the respondent

Costs submissions received: From the applicants on 27 June 2018  
From the respondent on 10 July 2018

Determination: 30 July 2018

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**COST DETERMINATION OF THE AUTHORITY**

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[1] On 29 May 2018, I issued a determination finding Ms Q's claims proved, awarding remedies to her and imposing a penalty on the respondent.<sup>1</sup> I reserved costs. I have continued the order prohibiting publication of Ms Q's name and identifying information.

[2] On 29 May 2018, I also issued a determination finding Mr Ball's claims proved, awarding remedies to him and imposing a penalty on the respondent.<sup>2</sup> I reserved costs.

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<sup>1</sup> [2018] NZERA Christchurch 80

<sup>2</sup> [2018] NZERA Christchurch 78

[3] I now consider Ms Q and Mr Ball's claims for the respondent to pay a reasonable contribution to the costs of their representation. Both parties have made written submissions.

[4] Mr Ball and Ms Q both claim \$4,500 in costs from the respondent. They have each incurred costs of more than \$9,000 for their representation.

[5] The Authority's general power to award costs is set out in clause 15(1) of Schedule 2 to the Employment Relations Act and is discretionary.

[6] The Employment Court judgments in *PBO Ltd v Da Cruz*<sup>3</sup> and *Fagotti v Acme & Co Ltd*<sup>4</sup> set out the broad principles the Authority should apply in determining costs in the Authority.

[7] The Authority generally awards costs on a daily tariff basis with a tariff of \$4,500 for the first day of an investigation meeting and \$3,500 for subsequent days.

[8] I heard Ms Q's matter the day after I heard Mr Ball's matter. Ms Q and Mr Ball had the same representative. Mr McLean represented the respondent in both cases. The respondent's main witness and Mr McLean only had to travel to attend the investigation meetings in Christchurch once.

[9] The respondent's representative argues that the fact that I heard the two separate proceedings on consecutive days must have meant Mr Ball and Ms Q's cost of representation was less than it would have been if I had not heard the matters consecutively. The cost of two consecutive daily tariffs is  $\$4,500 + \$3,500 = \$8,000$ . The respondent argues that the starting point for my consideration of each of Ms Q and Mr Ball's costs must be half of that; \$4,000.

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

<sup>4</sup> [2015] NZEmpC 135

[10] I do not consider that hearing the related matters on consecutive days reduced the cost of Mr Ball and Ms Q's representation as much as it would have reduced the respondent's costs of representation. Each of their cases was quite different.

[11] I consider the starting point for my consideration of costs for each applicant is the full daily tariff of \$4,500.

[12] The respondent also submits that its ability to pay costs awards is very limited because of its poor financial position. Therefore, it suggests I exercise my discretion and award only \$2,000 each to Ms Q and to Mr Ball.

[13] The Authority can take into account a party's financial circumstances in exercising its discretion when making an order for costs and may do so if a party would genuinely be unable to pay the costs.

[14] In a recent Employment Court decision<sup>5</sup>, Judge Smith wrote:

[52] The ability of the liable party to pay has been taken into account in costs judgments previously. However, some caution is required as is illustrated by *Scarborough v Micron Security Products Ltd*.<sup>6</sup> In that case the plaintiff was unemployed and in a compromised financial situation. Judge Inglis said:

[36] I proceed on the basis set out in *Tomo v Checkmate Precision Cutting Tools Ltd*, namely that Miss Scarborough's financial position is relevant to determining a just award of costs but it is not decisive and must be weighed against other relevant factors, including the interests of the defendant, the broader public interest, and the aggravating way in which she has pursued her claim.

[53] The decision also included the following observation:

[38] There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in

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<sup>5</sup> *Nelson Marlborough District Health Board v Robyn Henderson* [2017] NZEmpC 81

<sup>6</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105

time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[15] My equity and good conscience jurisdiction requires me to consider both parties' interests, not just the respondent's current difficult financial situation, and the broader public interest.

[16] Despite the respondent's difficult financial position, Ms Q and Mr Ball are entitled to expect reasonable recompense of the costs that they incurred.

[17] I have taken into account both parties' interests, and that the respondent will have two costs awards to meet, as well as the remedies I awarded to its two former employees. I consider the amount of \$4,000 is a reasonable amount for it to pay to Mr Ball and to Ms Q for the cost of their representation.

[18] However, if the parties wish to do so they may come to some agreement as to payment by instalments.

### **Orders**

**Battersea Investments Limited must pay:**

- (i) Gareth Ball \$4,000 in costs; and**
- (ii) Ms Q \$4,000 in costs.**

Christine Hickey  
Member of the Employment Relations Authority