

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 110  
5317315

BETWEEN                      CATHERINE MARY SIMONS  
   Applicant  
  
A N D                            HALSWELL    TAVERN    &  
   RETAIL LIQUOR LIMITED  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:            Applicant in person  
   Fiona McMillan, Counsel for Respondent  
  
Submissions received:      10 June 2011 from Applicant  
   24 March 2011 from Respondent  
  
Date of Determination:    29 July 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive decision**

[1]     In the substantive decision of the Authority in this matter which issued on 21 February 2011, the respondent employer (Halswell Tavern) was completely successful in resisting the applicant's (Ms Simons) claimed personal grievance. Costs were reserved.

**The claim for costs**

[2]     Halswell Tavern seek an award of costs in the sum of \$3,000 against actually incurred legal costs in the sum of \$10,356.50, inclusive of GST, or some \$9,000 with the GST component removed. In addition, the Authority is told that Halswell Tavern incurred a further \$10,000 in costs in earlier attendances relating to the disciplinary process, the investigation into the alleged sexual harassment claim made by Ms Simons and in attendances at mediation in an endeavour to resolve matters prior to the Authority's investigation meeting.

[3] The claimed amount of \$3,000 represents Halswell Tavern's conclusion that if the Authority were to adopt its customary daily tariff based approach to cost fixing, that amount is well within the range predicated by decisions of the Employment Court, such as the leading costs decision *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 and *South Trans Ltd v. Strait Freight Ltd* (8 April 2008, CC3/08).

[4] Ms Simons argues that the costs sought by Halswell Tavern are unreasonable. She argues that "*of the 17 results where costs were awarded to the employer where the investigation meeting lasted less than one day 76% were less than \$2,999 with 52% being less than \$1,999*". Ms Simons also maintains that Halswell Tavern chose to use a lawyer when it was not necessary and that they had their lawyer do a significant amount of work in relation to the case which would, in the normal course, be attended to by the employer itself. Lastly, the Authority is urged to take account of Ms Simons' financial circumstances. She indicates that she has been unable to find work since being dismissed by Halswell Tavern and her ability to support her dependent children is unlikely to be much enhanced by having to meet a costs award in favour of Halswell Tavern.

### **Determination**

[5] I think this is a matter where the appropriate decision of the Authority is that costs should lie where they fall.

[6] Ms Simons makes a number of pertinent observations in her submissions. First, it is true that costs awards in the Authority are modest. Second, Ms Simons is right to make the point that Halswell Tavern chose to incur legal costs and equally, her observations concerning the extent to which Halswell Tavern made use of legal services is especially pertinent. Looking at the total quantum of costs incurred by Halswell Tavern in this matter, it is fair to observe (as Ms Simons does) that much of the total legal costs incurred were for tasks that would, in the normal course, be undertaken by an employer of its own motion. It is, of course, entirely proper for an employer to choose to use legal services, but for present purposes, the question is whether any significant percentage of the legal costs properly incurred in the proceeding itself ought to be met by Ms Simons.

[7] I am persuaded that Ms Simons' financial circumstances are such that it would be unfair and unjust to have her meet any of the costs incurred by Halswell Tavern in

successfully defending itself against her claim. In making that decision, I am mindful of Ms Simons' obligation to care and provide for her young children without the benefit of additional income from a replacement job since her dismissal by Halswell Tavern. I consider it would be unjust to effectively penalise Ms Simons' young family by requiring her to make a contribution to the costs incurred by Halswell Tavern which, given Ms Simons' financial circumstances, would in any event be only at a very modest level and would likely need to be paid on a time payment basis if required.

[8] I accept that Halswell Tavern can reasonably point to the difficulty in dealing with Ms Simons during the investigation into her sexual harassment complaint and the disciplinary proceeding and can rely on those difficulties as a basis for increasing the legal costs.

[9] But in the end, I am persuaded that Ms Simons' financial circumstances are such that she is simply not in a position to make a contribution to Halswell Tavern's costs and that they are in a better position to bear those costs than she is to contribute to them.

[10] As a consequence, there is no cost award made in the present case.

**James Crichton**  
**Member of the Employment Relations Authority**