

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 344
3067352

BETWEEN TYELA SINCLAIR
Applicant
AND MALIBU DINER LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Alex Kersjes, advocate for the applicant
Marie Bird for the respondent
Investigation Meeting: On the papers
Submissions and further information received: 24 June 2020 from the applicant
20 July 2020 from the respondent
Date of determination: 27 August 2020

COSTS DETERMINATION OF THE AUTHORITY

- A. Malibu Diner Limited is ordered to pay to Tyela Sinclair \$3,000.00 as a contribution to her costs, along with \$71.56 for the Authority's filing fee, within 21 days of the date of this determination.**

The Authority's first determination

[1] The Authority issued a determination on 2 June 2020 (the first determination) which found that Tyela Sinclair was unjustifiably dismissed by her employer Malibu Diner Limited (Malibu Diner or the company).¹ Ms Sinclair was awarded lost wages

¹ *Tyela Sinclair v Malibu Diner Limited* [2020] NZERA Auckland 216.

and compensation. The company was also found to have made an unauthorised deduction from Ms Sinclair's wages.

[2] The parties were encouraged to come to an agreement on costs but no agreement was reached. Ms Sinclair then applied for costs.

[3] Malibu Diner did not file any submissions or other information regarding costs within the 14 days allowed. When the Authority followed up, Malibu Diner's sole director and shareholder Marie Bird responded on 20 July 2020 that she did not know she could do that. This was despite the first determination setting out a timetable for costs, including the company's right to file submissions on costs, in the event that the parties did not agree.² The Authority referred Ms Bird to the relevant paragraphs of the first determination and informed her that although the deadline had passed, application could be made for leave to file submissions out of time. No application for leave nor any other communications were received from Ms Bird or Malibu Diner.

[4] Under s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all of the evidence or submissions received but states findings and expresses conclusions.

Ms Sinclair's claim for costs

[5] Submissions filed on Ms Sinclair's behalf identify that she has incurred costs of \$5,203.74 and disbursements of \$104.00. It is suggested that Malibu Diner had no reasonable expectation of success. An uplift is sought to the daily tariff to avoid any further disadvantage to Ms Sinclair, namely her having to bear some of the costs burden of pursuing her case.

[6] Ms Sinclair also seeks that costs incurred in preparing the costs submissions be taken into account in setting the total costs award.

Costs principles

[7] The Authority has the power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO*

² *Tyela Sinclair v Malibu Diner Limited*, above n 1 at [73].

Ltd (formerly Rush Security Ltd) v Da Cruz, the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.³

Costs analysis

[8] Ms Sinclair was successful in both her challenge to her dismissal and her claim that Malibu Diner did not make the final payment properly due to a deduction.

[9] To the extent it is suggested on Ms Sinclair's behalf that Malibu Diner should fully pay her actual costs, I do not agree. Indemnity costs are reserved for exceptional cases, with "exceptionally bad behaviour".⁴ Malibu Diner's case on the dismissal grievance could not be described as hopeless.

[10] The notional daily tariff is thus the starting point. The investigation meeting took a little over half a day. The applicable daily tariff is \$4,500. In the absence of a lunchbreak, I calculate that Ms Sinclair is entitled to \$3,000.

[11] There is no basis for an uplift from that figure.

[12] Costs are not usually allowed for preparation of a costs application and there are no grounds on which to award them in this case.

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

⁴ *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28].

[13] Disbursements are sought including the Authority's filing fee, transport for local travel and general office expenses. In the absence of proof of expenditure, no award should be made for disbursements, other than for the Authority's filing fee.

Conclusion

[14] Malibu Diner Limited is ordered to pay Tyela Sinclair \$3,000.00 as a contribution to her costs, along with \$71.56 for the Authority's filing fee, within 21 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority