

**IN THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

[2013] NZERA Christchurch 88
5379611

BETWEEN MELISSA SPENCE
 Applicant

AND LAKE OHAU HOLDINGS
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Anna Oberndorfer, advocate for the applicant
 Tim Jackson, advocate for the respondent

Submissions received: From the applicant on 14 March 2013
 From the respondent on 2 April 2013

Determination: 15 May 2013

COSTS DETERMINATION OF THE AUTHORITY

- A. Lake Ohau Holdings Limited to pay Melissa Spence \$2,750 in costs.**
- B. Lake Ohau Holdings Limited to reimburse Melissa Spence \$71.56 for the filing fee.**

[1] On 14 February 2013 I issued a determination that Ms Spence had been unjustifiably disadvantaged and unjustifiably dismissed and awarded her \$7,500 in compensation. Ms Spence has applied for her full costs of representation being \$4,731.25 excluding GST.

[2] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act. Costs are at the discretion of the Authority.

[3] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party. Ms Spence was successful in her claims.

[4] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and were outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ a judgment of the Full Court of the Employment Court. The Court in the *Da Cruz* case also noted that in exercising its discretion the Authority frequently judges costs against a notional daily hearing rate. That notional rate is currently \$3,500 per day.

[5] Costs must be reasonable and costs awards are generally modest. Another principle set out in *Da Cruz* is that without prejudice offers can be taken into account in setting the amount of costs.

[6] Ms Oberndorfer submits that four without prejudice offers to settle the matter made to the respondent for modest and reasonable amounts should be taken into account as a factor to increase the costs above the daily rate of \$3,500. The final offer to settle was made in October 2012. Ms Spence has been awarded a greater amount in compensation than any of the offers to settle she made.

[7] Mr Jackson submits that any offers made to settle prior to mediation should not be considered to increase the costs. He also submits that the offer to settle made in October 2012 was made ‘without prejudice’ but not ‘without prejudice *save as to costs*’. He submits that the omission of the phrase ‘save as to costs’ means that the Authority is not able to take the offer into account in setting costs.

[8] I note that in *Da Cruz* the Employment Court said that “without prejudice offers can be taken into account” in exercising the discretion to award costs. I consider that the Court was using a kind of shorthand and meant “without prejudice save as to costs” offers could be taken into account. I do not consider that the Court intended to change well established practice to allow the Authority to consider all without prejudice offers; the starting point being that without prejudice offers cannot be seen by the decision maker.

¹ [2005] ERNZ 808

[9] The inclusion of the phrase “*save as to costs*” in the 13 October 2012 letter containing an offer to settle may have made a difference to the respondent’s consideration of whether to settle or not. In all the circumstances I do not take into account the existence of the without prejudice offer to settle as a factor that could increase the amount awarded under the daily tariff approach.

[10] Mr Jackson submits that Ms Spence is likely to have a contingency fee arrangement with Ms Oberndorfer and so should not be entitled to the claimed costs. On 13 May 2013 Ms Oberndorfer responded to a request from the Authority for information about the basis on which Ms Spence engaged Ms Oberndorfer’s services.

[11] I am satisfied that Ms Spence has incurred costs of \$4,631.25, which include costs incurred for mediation, that she is required to pay. It is not the Authority’s practice to award costs incurred up to and including mediation. The hourly rate charged is \$195.00 per hour plus GST, which is a reasonable hourly rate.

[12] Mr Jackson submits that the cost for:

...preparation for the hearing from filing the Statement of Problem onwards should not reasonably have been greater than \$2,500 given the magnitude of the matter.

[13] I agree that the matter was a relatively straightforward one with no complex legal issues. The investigation meeting took all morning and part of in the afternoon. The parties had to travel to Timaru for the meeting.

[14] Mr Jackson submits that the respondent is not able to afford to pay either the substantive award or any order for costs made against it. He provided a letter dated 21 March 2013 from Tony McCleary of Mitchell McCleary Chartered Accountants which show that in the 2011 tax year the respondent made a loss and that in the 2012 tax year it made a small profit. He submits that the profit was only possible because Mr and Mrs Schaar made no drawings for wages from the business. Mr McCleary wrote:

As at 31 March 2012 the Balance Sheet for the company showed it was technically insolvent as a result of the losses accumulated since the commencement of trading.

[15] However, if an award of costs on the usual basis would cause excessive or disproportionate hardship, costs may be reduced to reflect the unsuccessful party's circumstances.² In the *Gates* case Judge Couch explained that:

...a party is presumed to be able to pay any award of costs the Court might make and it is for that party to raise any issue of hardship. When it is raised, a claim that undue hardship would result is must be supported by acceptable and sufficient evidence.

[16] Mr Jackson also seeks a stay of execution of the Authority's order because the respondent has filed a de novo challenge in the Employment Court against the Authority's substantive decision. It is the Authority's usual practice to decide on costs for the proceedings that were before it despite any challenge to its decision to the Employment Court. The Court would be able to consider an application to stay the payment of the substantive award and the Authority costs. As a part of the Employment Court process it will also decide on the costs that must be paid for its own proceedings and those that were before the Authority.

[17] Having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, and the financial circumstances of the respondent, I consider that a contributory award of \$2,750 towards the Applicant's actual costs is reasonable and should be paid. The parties may negotiate and make an agreement for payment to be made by instalment over a period of time. However, at this stage it is not appropriate for the Authority to make any such order. In any event, it may be that the payment of costs will be stayed until after the Employment Court proceedings have been completed.

[18] Lake Ohau Holdings Limited must also reimburse Ms Spence for the fee of \$71.56 that she paid to make her application to the Authority.

Christine Hickey
Member of the Employment Relations Authority

² *Gates v. Air New Zealand Ltd* [2010] EMPC 26