

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 80  
5331992 and 5344671

BETWEEN JENNIFER ANN STEWART  
Applicant

AND ASHTAR NZ LTD  
First Respondent

SHARON SCHANAN also  
known as SHIRIN SCHANAN  
Second Respondent

RAFED SCHANAN SABHAN  
also known as RAFED  
SCHANAN  
Third Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 23 January 2012, from Applicant only

Determination: 1 March 2012

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1] Arising out of the investigation and determination of employment relationship problems between Ms Jennifer Stewart and her former employer Ashtar NZ Ltd and also a director and a manager of that company Mr Rafed Schanan and his wife Ms Sharon Schanan, an order for costs to be paid to Ms Stewart is sought against the Schanans.

[2] In its determination dated 10 January 2012, the Authority ordered Ashtar NZ Ltd to pay Ms Stewart \$3,097.00 as lost or unpaid earnings including holiday pay, \$8,000 compensation for hurt feelings and distress, and \$1,500 as a penalty for breach of the Employment Relations Act 2000 in relation to bargaining for an employment agreement. The company was also ordered to pay \$1,500 to the Crown for the same breach of the Act. Costs of \$17,000 including fees and disbursements were awarded to Ms Stewart against Ashtar NZ Ltd.

[3] In the same determination Rafed Schanan and Sharon Schanan were each ordered to pay Ms Stewart \$1,750 and the Crown \$750, as penalties for aiding, abetting, inciting or instigating the breach of the Act by Ashtar NZ Ltd against Ms Stewart. The penalties were awarded under s 135(2) of the Act. The question of costs against the Schanans in respect of the penalty claim that had been determined against them both personally was reserved.

[4] A timetable was given by the Authority for submissions to be filed and served. Ms Stewart sent in submissions within the time allowed but nothing was received from the Schanans by due date of 7 February 2012. Ms Foster, counsel for Ms Stewart advised the Authority that she had served a copy of the costs application on Mr Gelb, who had represented the Schanans, but that it appeared he no longer had instructions from them.

[5] The amount of \$8,625.00 is claimed as a reasonable contribution to Ms Stewart's costs. This is derived from total time of 34.5 hours at counsel's rate of \$250 per hour.

[6] Ms Foster has referred in her submissions to the leading case on costs in the Authority, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[7] In principle costs should follow the event and there is no reason why that should not be the result in this case. It must be kept in mind that the principal wrong doer or party in breach was Ms Stewart's employer, Ashtar NZ Ltd. The Schanans, a director and a manager of that company, were secondary parties only to the breach by the employer of an employment agreement which they had not been personally bound by.

[8] Costs have already been awarded against Ashtar NZ Ltd and the Authority should not try to increase that award by imposing an unreasonable level on the Schanans for their contribution to the situation. Although it appears unlikely that company will meet its obligation to pay the costs awarded against it, the Authority should not try to make the Schanans guarantors or indemnifiers of payment of that costs award which remains the responsibility of Ashtar NZ Ltd.

[9] I do not consider that costs at a level of around \$8,000 are reasonable in the circumstances. That is apparently total costs, whereas usually an award is to be a reasonable contribution to actual costs. The matters referred to as being the

responsibility of the Schanans for increasing costs are largely matters that Ashtar NZ Ltd is accountable for, such as asking for the claims to be put on hold. I bear in mind in respect of any conduct of the Schanans that may have increased Ms Stewart's legal costs and expenses, that in principle the purpose of costs is to compensate and not punish.

[10] I consider that factually the establishment of the Schanan's liability was a reasonably straightforward matter that did not require excessive investigation time. To answer the legal questions there were a number of cases able to be researched and that were presented with submissions to assist the Authority. While it might be unusual to award a penalty against an employer's directors or managers, there was precedent for it.

[11] Costs may be awarded in the exercise of a discretion by the Authority which, in the circumstances of this case, I consider should lead to orders requiring Mr Rafed Schanan and Ms Sharon Schanan each to pay \$1,350 to Ms Stewart, or \$2,700 in total. The orders are made accordingly, under clause 15 of Schedule 2 of the Employment Relations Act.

[12] The filing fee on the application is covered by the order made against Ashtar NZ Ltd to pay fees and disbursements.

A Dumbleton  
**Member of the Employment Relations Authority**