

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 131  
5636931

BETWEEN                      KAY TRIGGS  
   Applicant  
  
AND                                JB PRESENTATIONS  
   LIMITED  
   Respondent

Member of Authority:        Christine Hickey  
  
Representatives:              David Beck, counsel for the Applicant  
   Jeff Goldstein, counsel for the Respondent  
  
Submissions on costs:        From the Respondent 12 May 2017 and 16 June 2017  
   From the Applicant on 2 June 2017  
  
Determination:                27 July 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Within 28 days of this determination, Kay Triggs must pay JB Presentations Limited \$3,750.00 towards its legal costs.**

[1]     On 27 April 2017, I issued a determination finding that Kay Triggs had not been an employee when she worked for JB Presentations Limited (JB). Therefore, the Authority did not have jurisdiction to consider her claims of unjustified dismissal and unjustified disadvantage. JB's was successful in its assertion that Ms Triggs had not been its employee.

[2]     I reserved costs and set a timetable for submissions. I received submissions from JB's seeking \$4,500 contribution towards its actual costs of \$13,065 plus GST. Mr Beck's submissions in response state that Ms Triggs is in a financially compromised position and would struggle to meet any significant award against her. Therefore, Mr Beck submitted that either each party should bear its own costs or that I should lower the daily tariff from its nominal rate of \$4,500.

[3] Mr Goldstein's submissions in response suggest that Ms Triggs' financial position is not as dire as suggested in Mr Beck's submissions and an award of costs, at the daily tariff level, would not cause her undue hardship. He claims costs of \$4,500, although the investigation meeting did not take a full day, because he claims Ms Triggs should pay \$500.00 for the preparation of JB's costs submissions.

### **The law**

[4] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[5] The principles the Authority applies are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.<sup>1</sup> In *Fagotti v Acme & Co Limited*,<sup>2</sup> the Employment Court recently affirmed these principles. The Authority must exercise the discretion to award costs in accordance with principle and not arbitrarily, and consistently with its equity and good conscience jurisdiction.

[6] Generally "costs follow the event", which means that a successful party should ordinarily be able to expect a reasonable contribution to its legal costs from the unsuccessful party. The starting point for my consideration of costs is the daily tariff amount \$4,500 for a full day. The investigation meeting took only five hours out a possible six hours. Therefore, the appropriate starting point is \$3,750.

### **Determination**

[7] There are no reasons to increase the daily tariff amount. I do not agree that this is a suitable case to award costs for the preparation of costs submissions.

[8] Mr Beck raised Ms Triggs' ability to pay as a reason to reduce the costs she might otherwise be ordered to pay. I have not had an affidavit of her financial position showing her assets and liabilities. I accept that Ms Triggs' health makes a reliable constant income from work difficult for her. However, Ms Triggs was aware of that when she decided to embark on these proceedings and in doing so took on the risk that she may not be successful.

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<sup>1</sup> [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

<sup>2</sup> [2015] NZEmpC 135

[9] In a recent Employment Court decision<sup>3</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>4</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 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.

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

[11] I accept that Ms Triggs had limited income as at the date of Mr Beck's submissions. However, it appears that Ms Triggs does have some assets that she could call on to assist her to pay a contribution to JB's costs.

[12] JB's is entitled to expect some recompense of the costs that it incurred in defending Ms Triggs' claim, and it is in the general public interest that unsuccessful parties should make some financial contribution to the successful party's costs.

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<sup>3</sup> *Nelson Marlborough District Health Board v Robyn Henderson* [2017] NZEmpC 81.

<sup>4</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105.

[13] Having considered all the relevant principles and both parties' submissions I consider the amount of \$3,750, is a fair and reasonable amount for Ms Triggs to pay, even if it may take some time for her to arrange to make that payment.

Christine Hickey  
Member of the Employment Relations Authority