

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 174
3105772

BETWEEN REBECCA YOUNG
Applicant
AND BOURSON LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Paul Mathews, advocate for the applicant
De Kai (Larry) Liu for the respondent
Investigation Meeting: On the papers
Submissions received: 10 April 2021 from the applicant
Nothing received from the respondent
Date of determination: 29 April 2021

COSTS DETERMINATION OF THE AUTHORITY

A. Bourson Limited is to pay Rebecca Young \$7,500 as a contribution to her costs, along with \$71.56 for the filing fee, within 21 days of the date of this determination.

[1] The Authority issued a determination finding that Rebecca Young had been disadvantaged by unjustified actions of Bourson Limited (Bourson or the company) regarding suspension, breaks and a disciplinary process resulting in a warning.¹ Bourson was ordered to pay Ms Young compensation totalling \$10,000 for those grievances. Ms Young's constructive dismissal claim was not established.

¹ *Rebecca Young v Bourson Limited* [2021] NZERA 113.

[2] Ms Young has applied for costs, filing submissions. No submissions or other information was received on behalf of Bourson.

Ms Young's claim

[3] Ms Young seeks payment of the daily tariff of \$4,500 plus uplifts.

[4] The uplifts to a total of \$3,000 are sought for the following reasons:

- (a) Mr Liu on behalf of Bourson did not provide witness statements until the morning of the investigation meeting, after repeated directions from the Authority to do so. This made the preparation of submissions in advance impossible and created difficulties with preparation for the meeting;
- (b) Bourson failed to arrange for witnesses to attend the meeting as directed. This cause delays in the meeting, meaning it went well past 5pm and lead to an adjournment to hear oral submissions;
- (c) Mr Liu failed to attend the teleconference for oral submissions. This wasted further time and caused additional costs. Brief written submissions had been prepared for this meeting;
- (d) Mr Liu's non-attendance meant that full written submissions were required to provide Mr Liu an opportunity to respond;
- (e) There was a Calderbank offer which was rejected; and
- (f) An attempt to resolve costs was ignored, meaning costs submissions were needed.

Costs discussion and conclusion

[5] The Authority has the power to order costs under clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles governing the Authority's discretion are described by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.² These include that costs will usually follow the event as well as that the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Also, costs are not to be used as a punishment

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Limited* [2105 NZEmpC 135].

or as an expression of disapproval for an unsuccessful party's conduct. But conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[6] Costs usually follow the event, meaning that the unsuccessful party will be required to make a contribution towards the successful party's costs.

[7] Ms Young was not entirely successful in her claims. She established unjustified action grievances but not constructive dismissal.

[8] Ms Young's constructive dismissal was based on Bourson's unjustified actions and her sense of her work environment being different after she raised her grievance. The constructive dismissal claim did not add significantly to the investigation meeting time so I do not consider reduction should be made for it.

[9] The starting point for the Authority's assessment of the amount of costs is usually the daily tariff. This sets \$4,500 as the tariff for the first day of an investigation meeting and \$3,500 for each subsequent day. The investigation meeting in this case went for a full day. The in-person investigation meeting lasted a day, albeit slightly longer than the usual day. The attempted investigation meeting for submissions by phone was relatively brief as Mr Liu could not be contacted.

[10] I accept the submission that Bourson's conduct increased the investigation meeting time and costs. Witness statements were filed in a number and in names which did not entirely match those who were indicated as witnesses at the case management conference, without explanation. Significantly, no witness statement was provided in accordance with the timetable for the main respondent witness, Mr Liu. A specific direction that Mr Liu's witness statement was provided, was not complied with until after 11pm on the night before the investigation meeting.

[11] The investigation meeting started slightly late after Bourson's representative did not arrive on time. Mr Liu had not brought witnesses despite a Minute indicating that witnesses were to attend at the start of the investigation meeting. Some witnesses were able to be contacted by phone but others were not. As a result some witness statements were set aside. The meeting ran until after 5pm.

[12] Mr Liu could not be contacted by phone or email at the time agreed by the parties for the submissions to be heard by telephone.

[13] A Calderbank offer, marked as being without prejudice save as to costs was made on 7 February 2019. This sought a payment to Ms Young of \$5,000 under s 123(1)(c)(i) of the Act along with a contribution to her costs of \$2,500 plus GST. The offer was left open for slightly more than five days, although this included a weekend.

[14] The offer was made well before the investigation meeting and was for half of the amount of compensation ordered by the Authority. Bourson could have reduced costs considerably by accepting that offer and it was unreasonable of the company not to do so. An uplift is appropriate on that basis.

[15] There are grounds for a considerable uplift. I accept the claim of a \$3,000 uplift.

[16] Bourson Limited is ordered to pay Rebecca Young the sum of \$7,500 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