

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 471
3116072

BETWEEN AWESOME ART LIMITED
Applicant

AND IAIN MILNE
Respondent

Member of Authority: Michael Loftus

Representatives: Kathy Jarrett, for the Applicant
Phillip Drummond, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 7 September 2020 and 20 October 2020 from the
Respondent
4 November 2020 from the Applicant

Determination: 16 November 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] On 15 October 2020 I issued a determination in which I declined an application from Awesome Art Limited (Awesome Art) that I remove to the Employment Court the determination of costs in an earlier matter, *Milne v Awesome Art Limited*.¹ Costs on the removal application were reserved and it is that this determination addresses.

Background

[2] On 8 June 2020 I issued a determination addressing a personal grievance claim Iain Milne brought against Awesome Art. Costs were reserved and Mr Milne, as the

¹ *Awesome Art Limited v Milne* [2020] NZERA 427 and *Milne v Awesome Art Limited* [2020] NZERA 222

successful party, sought a contribution toward those he had incurred on 14 August 2020.

[3] Awesome Art's response was to lodge an application on 18 August 2020 asking the determination of costs be removed to the Employment Court.

[4] It was pointed out the application might face some difficulties given, amidst other problems, it made no mention of the statutory grounds for removal (s 178 of the Employment Relations Act 2000) but instead concentrated on what Awesome Art considered wrong with the substantive determination which it was then seeking to challenge, though that needs the Court's approval to do so out of time.

[5] Notwithstanding that, Awesome Art chose to continue with the removal application and Mr Milne's Statement in Reply was lodged on 7 September 2020. As well as addressing the removal application, which was said to be untenable, it also raised the issue of costs. Awesome Art was put on notice that Mr Milne intended seeking reimbursement of actual costs given what was considered to be the removal application's forlorn chance of success. At that time Mr Milne had incurred costs of \$1,511 (including GST and disbursements) which was evidenced by a copy of the invoice he had been sent.

[6] With the agreement of the parties the removal application was determined on the papers. It was unsuccessful and costs were reserved.²

[7] Mr Drummond provided further input on 20 October 2020. In it he advises time spent on the application totalled approximately 5 hours and, applying the Authority's tariff approach,³ he estimated \$2,250 should be payable.

[8] Awesome Art then had a further seven days to respond but did not do so in a conventional sense. Instead it chose to simply pay Mr Drummond the \$1,511 mentioned in the Statement in Reply. The words used when advising the Authority of this were *Awesome Art have paid Mr Drummond directly for the invoice presented ...*

[9] Mr Drummond's response was yes, payment has been received but the invoice was not addressed to Awesome Art. The claim as outlined on 20 October 2020

² *Awesome Art Limited v Milne* [2020] NZERA 427 at [17] to [19] inclusive

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

remained and the monies received would be considered part payment on any award subsequently made.

[10] Awesome Art replied on 4 November 2020 suggesting the payment already made was fair and questioning the reasonableness of the amount subsequently claimed.

[11] In the interim, and following rejection of the removal application, Awesome Art provided final submissions in respect to costs for the substantive matter on 28 October 2020.⁴ Contained therein were invoices Ms Jarrett had furnished for her services as a professional representative. Suffice it to say these were a surprise as is recorded in the resulting costs determination but they are accepted at face value.⁵

Discussion

[12] The original claim for costs was expressed as being one for reimbursement in full (indemnity costs). While the amended submission makes mention of the tariff, its content strongly suggests the claim remains one for indemnity costs (or something very close there-to). That is because an application of Mr Drummond's hourly rate multiplied by total attendances plus the disbursements earlier advised result in a total close to, perhaps a little more than, the amount claimed.

[13] Before continuing I record the tariff is the usual way the Authority determines costs with that being a starting point from which adjustment can then be made. I do not consider five hours an inordinate period of time for addressing this claim and conclude the amount claimed by Mr Drummond is, despite Awesome Art's contrary view, reasonable. The only potential problem is that irrespective of how it is now argued, it effectively remains a claim for indemnity costs when a contribution is considered both appropriate and the norm.

[14] The principles regarding indemnity costs are outlined in *Bradbury v Westpac Banking Corporation*.⁶ Referred to therein as possible grounds for awarding indemnity costs is the *making [of] allegations which ought never to have been made*, characterised as the "hopeless case".⁷

⁴ *Milne v Awesome Art Limited* [2020] NZERA 222

⁵ *Milne v Awesome Art Limited* [2020] NZERA 465 at [18]

⁶ *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA)

⁷ N 6 above at [29]

[15] Mr Drummond has argued that this is such a case and with that I agree. Its chance of success was, at best, very remote and I struggle to accept a professional representative, as I am now aware Ms Jarrett held herself out to be, could have considered it viable. This must be especially so given the difficulties were pointed out early in the process and when it was still understood Ms Jarrett was a functionary of Awesome Art and acting in that capacity. Also pointed out was the fact, that by continuing, the parties would be put to additional cost.

[16] To that I add the observation that any remote prospect the claim might have had was totally destroyed by the way it was argued. There was no reference to the statutory grounds for removal or argument as to why they might apply despite the need for this also being advised almost immediately after the application was lodged.

[17] In other words this claim is one I conclude should never have been taken, especially in the way it was. It was hopeless and for that reason I conclude an award of indemnity costs is justified.

Conclusion

[18] Whichever way I consider this I conclude Mr Milne should receive costs as claimed. The amount sought is, applying the tariff, reasonable and he should not be disadvantaged because Counsel charged reasonably. On the other hand I consider this is a situation in which an award of indemnity costs is justified. Either way the outcome is the same.

[19] As a result I order the respondent, Awesome Art Limited, pay the applicant, Iain Milne, the sum of \$2,250.00 (two thousand, two hundred and fifty dollars) toward the costs he incurred in defending the application to remove.

[20] Payment is to be made within 28 days of this determination.

Michael Loftus
Member of the Employment Relations Authority