**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

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

[2020] NZERA 311
3081213

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| | BETWEEN | BANK OF NEW ZEALAND<br>Applicant |
| | AND | CHRISTOPHER SMITH<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Samuel Moore, counsel for the Applicant<br>Rebecca Rendle, counsel for the Respondent |
| Submissions received: | From the Respondent on 23 April 2020 and from the Applicant on 13 May 2020 |
| Determination: | 10 August 2020 |

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## COSTS DETERMINATION OF THE AUTHORITY

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### A. Costs are to lie where they fall.

[1] Christopher Smith sought an order for a contribution to costs of representation he had incurred in responding to an application to the Authority made, and later withdrawn, by his former employer, Bank of New Zealand (BNZ).

[2] In November 2019 Mr Smith was serving a period of garden leave from his position as a general manager. His employment with BNZ was due to end on the grounds of redundancy on 12 December. On 12 November BNZ applied to the Authority for compliance orders requiring Mr Smith to provide passwords for BNZ electronic devices used in the course of his employment. BNZ sought urgency for consideration of its application and the parties were directed to mediation. They attended mediation on 22 November. On 25 November the parties reached agreement, recorded in writing, over the issue of provision of passwords. On the same day Mr

Smith, through counsel, had lodged a statement in reply to BNZ's application. On 26 November the Authority was advised that the urgent issue regarding passwords had been resolved. BNZ asked that "the usual requirements for timetabling" apply to other matters raised in its statement of problem, which concerned whether Mr Smith had breached the terms of his employment agreement in how he responded to BNZ's instructions to him regarding the passwords.

[3] The Authority member who had dealt with the urgent matter had a message sent to the parties saying any substantive issues remaining in BNZ's application would be dealt with by another Authority member but asked the parties to advise whether any costs matters needed to be dealt with in relation to the urgent orders. The Authority file records no subsequent contact from the parties' representatives until early March 2020 when BNZ counsel contacted an Authority Officer to inquire when an investigation meeting date would be set. In subsequent communication from the parties Mr Smith proposed any costs issue on the urgent matter be determined once the substantive matter was concluded. On 3 April 2020 BNZ lodged a notice withdrawing its 12 November 2019 application.

[4] In its withdrawal notice BNZ proposed costs lie where they fell. Mr Smith opposed that view and a timetable was set for the parties to lodge memoranda on costs.

[5] The memorandum lodged on Mr Smith's behalf proposed costs should be awarded to him, assessed in one of the following three ways: firstly, on an indemnity basis or, secondly, $12,033 said to have been calculated by applying a 2B categorisation of the District Court costs scale to steps in the Authority proceedings or, thirdly, on terms the Authority deemed fit in the circumstances.

[6] He sought those costs for three steps in the proceedings he said had to be taken to defend himself from "frivolous" claims by BNZ which had put him to unnecessary expense: lodging and serving a statement in reply, preparing for and attending mediation held under a direction from the Authority, and lodging a costs memorandum.

[7] BNZ, in its reply memorandum on costs, said it had a strong prima facie case rather than a frivolous one in seeking compliance orders about passwords to its devices. The parties had attended urgent mediation and, following post-mediation discussions, soon after reached a satisfactory resolution. The outcome meant BNZ ultimately did not need to pursue the proceedings any further.

[8] On 22 May 2020 Mr Smith also sent the Authority a separate four-page typewritten letter of his own, not through counsel, commenting on BNZ's reply memorandum. While I accept BNZ's position that the costs issue should be determined on the basis of the timetabled memoranda only, I nevertheless read and considered what Mr Smith wrote. One point from his letter is noted, in particular, later in this determination.

**How costs in the Authority are assessed**

[9] The Authority's exercise of its discretion to award costs is carried out by applying a well-established but non-exhaustive list of "basic tenets" applied to the particular circumstances of the case.[1] Those tenets include exercising the discretion in a principled and not arbitrary way, considering equity and good conscience on a case by case basis, inflating or reducing an award to take account of party conduct that unnecessarily increased costs, considering whether any of the parties' costs were unnecessary or unreasonable and the general rule that costs follow the event. Each case must be considered on its own merits. Undue rigidity in the Authority's practice of applying its daily tariff as a starting point can be avoided by principled adjustments upwards or downwards to take account of particular characteristics of a case, including a liable party's means to pay costs, preparation required in particularly complex matters and conduct of the parties.

[10] There was no good reason in assessing costs in this case to depart from those tenets and, if needed, by applying the daily tariff as a useful starting point. Mr Smith's submissions on costs and what was apparent from review of the pleadings, all documents lodged and party correspondence established no grounds on which costs could reasonably be awarded on an indemnity basis. Similarly, there was no reason to adopt the District Court's costs scale rather than the Authority's own long-standing methodology for exercising the discretion granted to it under the Employment Relations Act 2000.

[1] *PBO Limited v Da Cruz* [2005] ERNZ 808 at [44]-[46].

[11] Rather, what was required was an assessment of how any relevant tenets applied to the particular circumstances of Mr Smith having incurred costs in lodging a statement in reply in a matter ultimately withdrawn by BNZ.

*What is the 'event' or outcome in this case?*

[12] A first point concerned how to characterise the 'event' or outcome in this matter. Mr Smith's memorandum suggested BNZ had "effectively conceded defeat" in withdrawing its application.

[13] Some criticism could fairly be made of why BNZ's withdrawal took some months but the reality was that the substance of its application had been resolved by late November 2019, barely a fortnight after BNZ lodged its statement of problem seeking compliance orders. The resolution reached by the parties meant no orders were needed and this proceeding went no further in any real way.

[14] While Mr Smith's position was that he had made practical and sensible proposals to resolve the issue before BNZ lodged its application on 12 November 2019, the merits of his objections to providing the information BNZ had requested of him (as recounted again in his costs memorandum) were not strong from the outset. This was apparent from some preliminary concerns expressed by the Authority member who dealt with the urgency application. She set out those concerns in a written message sent to the parties before a case management conference she held on 19 November 2019.

[15] Mr Smith, in his letter to the Authority on 22 May, complained that the Member's concerns were expressed without hearing from him. He said they were made "without … providing a right of reply from myself or my legal counsel".

[16] However the member's concerns were clearly expressed conditionally, they used the word "if", and she noted they were "subject to what the parties have to say" at the case management conference. The member also took the relatively unusual step of asking Mr Smith, rather than just his counsel, to attend the case management conference (held by telephone) so she could "speak to him directly regarding his position on the facts BNZ have put forward". She clearly wanted to hear from him. Mr Smith did not attend the conference call.

[17] The mediation directed by the Authority was held on 22 November, three days after that conference call. And three days after then, by 25 November, the parties had reached a written agreement.

[18] Although it contained a confidentiality clause, a copy of that agreement was attached to Mr Smith's costs memorandum. I have accepted BNZ's submission that the contents of the agreement differed from earlier proposals for resolution made by Mr Smith and had allowed BNZ to fully control its search of its devices, with only very narrow exceptions. As a substantive outcome, the result was at least neutral and clearly not what Mr Smith's costs memorandum described as a concession of 'defeat' by BNZ for which costs should follow.

[19] Earlier on the day that the parties had reached agreement Mr Smith's counsel had lodged Mr Smith's statement in reply and an affidavit in the Authority. While lodging the statement was a necessary step if the proceedings were to continue, it is not one for which he should be awarded costs given the conclusion reached on the 'event' or 'outcome' of the matter. While the administrative step of formally withdrawing the application was delayed, there were no further steps or attendances directly related to this particular matter that reasonably incurred further costs for Mr Smith that would warrant an award of costs to him.

*No costs for attending mediation by direction*

[20] Similarly, no award for costs Mr Smith incurred in preparing for or attending mediation by direction was appropriate in this matter.

[21] While each case is considered on its merits and with regard to its particular circumstances, the Authority's practice note on costs explains the general position:[2]

> Costs associated with preparation for and attendance at mediation, whether by agreement of the parties or at the direction of the Authority, are not typically included in costs awards of the Authority (unless some particular or unusual circumstance of the case makes it appropriate to do so).

[22] Here there were none of the circumstances that sometimes warrant such an award, such as instances where parties misbehave by repeatedly failing to attend directed mediations or frustrate attempts to arrange mediation. Rather, in this case,

[2] Practice Note 2: Costs in the Employment Relations Authority at clause 11, see www.era.govt.nz/steps-in-the-authority-process.

mediation happened promptly and consistently with its statutory objective of being the primary problem-solving mechanism. The result minimised rather than increased the overall costs for the parties for resolving this matter.

*No costs on costs*

[23] Even if a costs award were to be made in this case, costs would not be awarded for preparing and lodging a costs memorandum.

**Outcome**

[24] The parties had promptly and effectively resolved the substance of this matter within two weeks of BNZ lodging its application. In light of the outcome and the particular circumstances of the case, there were no grounds to award Mr Smith costs for lodging a statement in reply, attending mediation or for seeking costs. Costs are to lie where they fall.

Robin Arthur
Member of the Employment Relations Authority