

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 173
3178679

BETWEEN	KALEM BROWN Applicant
AND	MALBEC ORCHARDS LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Kirsten Westwood, advocate for the Applicant Doug Abraham, advocate for the Respondent
Submissions received:	29 March 2023 from Applicant 28 March 2023 from Respondent
Determination:	12 April 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] On 15 March 2023, I issued a determination in this matter, finding that the applicant's claim of unjustified dismissal was not made out and that no remedies would be awarded due to the applicant's own extreme misconduct, which was causative of the situation that lead to the grievance, making it unjust to award him any remedies.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them. The determination made reference to the Authority's usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve costs between themselves. The applicant has applied for costs, on the basis that costs should follow the event and the applicant was successful, thus he should be entitled to costs of \$3,000 plus the reimbursement of the \$71.56 filing fee.

[4] The respondent is also seeking an award of costs. The respondent does not specify the amount of costs it seeks, but does submit that the award in its favour should be in excess of the current daily tariff of \$4,500.

Principles

[5] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act).

[6] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹ as confirmed in *Fagotti v Acme and Co Limited*². The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful parties conduct.

Analysis

[7] When determining whether a party is entitled to receive a contribution to costs, it is often said that costs follow the event. In this matter, the applicant raised a claim of unjustified dismissal. He sought remedies of lost wages, compensation for hurt and humiliation, and costs, resulting from this claim.

[8] In the substantive determination, I found that the applicant's claim of unjustified dismissal was not made out (and no remedies were therefore available). The applicant was not successful in his pleaded claim.

[9] I also found that the applicant had a claim of unjustified disadvantage, in accordance with section 122 of the Act, which states that there may be a finding that a personal grievance is of a type other than alleged. However, no remedies were awarded in respect of this, as I found that the applicant's own behaviour was completely causative of the situation, and that it would be unjust and inequitable to award any remedies to him based on a situation which was caused by his own misconduct.

¹ [2005] 1 ERNZ 808.

² [2015] NZEmpC 135 at 114.

[10] The applicant now submits that this outcome amounts to him being successful in his claim, such that he is entitled to an award of costs.

[11] The Authority has a discretion whether or not to award costs, and every case must be determined on its merits³. The discretion is broad, and equity and good conscience is one of the appropriate considerations.

[12] When considering whether to exercise discretion in favour of the applicant, and award a contribution to costs, there are three matters in particular that are relevant in this case:

- a. First, did the Authority's finding – in itself an exercise of the Authority's discretion under section 122 of the Act – that the applicant had an unjustified disadvantage grievance, which was not pleaded and did not result in remedies, amount to “success” such that an award of costs necessarily follows this event?
- b. Second, what amount of adjustment to any costs award might properly be needed to reflect that the applicant was not successful in his pleaded claim of unjustified dismissal, and the associated time spent canvassing this issue?
- c. Third, what amount of adjustment to any costs award might properly be needed to reflect the delays by the applicant in filing his witness statements in accordance with the timetabling directions of the Authority?

[13] The applicant did not succeed in his pleaded claim of unjustified dismissal, and no remedies resulted. Although the Authority did find the applicant had a claim of unjustified disadvantage, no remedies resulted from that claim. In this sense, the applicant has not truly been successful, as he was not awarded relief, and it is not clear that he had to file these proceedings to achieve the limited statement made in his favour⁴. He also cannot claim to have been vindicated by this finding, as it was not sought.

³ *Mita New Zealand Ltd v Grieve*, [1995] 1 ERNZ 654.

⁴ See para [4] of *Coomer v JA McCaallum and Son Ltd*, [2017] ERNZ 885.

[14] The court has found in similar circumstances, where all the plaintiff's pleaded causes of action failed and she succeeded only on one minor aspect due to an intervention by the Court, that "That outcome, however, could not possibly outweigh the fact that all the pleaded claims were dismissed. The small success which was achieved could be recognised by an adjustment, so that [the respondent] is not awarded contribution on the matter on which it did not succeed."⁵

[15] Even if the outcome were to entitle the applicant to an award of costs in his favour, significant adjustments to any costs award would still be necessary, in light of fairly allowing for the time spent canvassing the applicant's unsuccessful claim of unjustifiable dismissal (which took up the majority of the investigation meeting)⁶, and allowing for a deduction in respect of the applicant's failure to comply with timetabling directions and the resulting delay in filings⁷.

[16] Standing back and looking at the matter overall, I therefore decline to award any contribution to the applicant's costs.

[17] I am supported in this view by the advice from the respondent that it attempted on multiple occasions prior to the investigation meeting, to verbally negotiate a settlement with the applicant. The applicant declined. However, it seems likely that had the applicant accepted, he would now be in a better position.

[18] I turn now to consider if the respondent should be awarded costs, and if so, should they be in excess of the usual daily tariff.

[19] The respondent suggests in its submissions that the applicant incorrectly interpreted the law when bringing his claim, and that it had told the applicant that his claim was unmeritorious. However, my view is that the applicant was not bound to simply accept the respondent's position on this matter. He was entitled to test his position before the Authority.

[20] The respondent cannot be said to be the successful party. Accordingly, I also decline to make any costs award in favour of the respondent.

⁵ *Nisha v LSG Sky Chefs New Zealand Ltd (No 1)* [2018] NZEmpC 8, at [172].

⁶ A successful party should not be put to unnecessary additional cost because the other party has run arguments that are untenable or not supported by its own evidence, see *Catanuto v Te Runanga O Whaingaroa Inc* [2014] NZERA Auckland 225.

⁷ See for example *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114(EmpC).

[21] On balance, my view is that it is appropriate that costs should lie where they fall.

Orders

[22] Costs are to lie where they fall.

Claire English
Member of the Employment Relations Authority