# New Zealand Employment Relations Authority Decisions



## Cavanagh v Ritchies Transport Holdings Limited (Christchurch) [2018] NZERA 1063; [2018] NZERA Christchurch 63 (9 May 2018)

Last Updated: 18 May 2018

**IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH**

[2018] NZERA Christchurch 63
3003411

BETWEEN MARIA CAVANAGH Applicant

A N D RITCHIES TRANSPORT HOLDINGS LIMITED Respondent

Member of Authority: David Appleton

Representatives: Applicant in person

Anthony Shaw, Counsel for Respondent

Investigation Meeting: Determined on the papers

Submissions Received: 7 May 2018 from Applicant

2 May 2018 from Respondent

Date of Determination: 9 May 2018

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

[1] By way of a determination dated 18 April 20181 the Authority found that Ms Cavanagh had not been unjustifiably dismissed but had been subjected to an unjustified disadvantage in her employment and was entitled to be paid for two days' pay. She was, however, unsuccessful in a number of other claims.

[2] I reserved costs and directed the parties to seek to agree how costs were to be dealt with. They have been unable to agree, and so this determination disposes of costs.

[3] Mr Shaw seeks a contribution towards his client's costs from Ms Cavanagh in

the sum of $8,300. This is made up as follows;

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a. $4,500 for the first day, based on the usual daily tariff;

b. $2,500 for the second day, which is $3,500 reduced to $2,500 to recognise that the second day ended at 15.00;

c. Reducing the total by 1/10 to reflect Mr Shaw's view that Ms

Cavanagh was successful in 1/10 of her claims; and

d. Uplifted by $2,000 to reflect extra work that Mr Shaw says was necessitated by the way that Ms Cavanagh presented her case.

[4] Mr Shaw says that his client has been charged $14,890.32 plus GST, with a significant further sum accrued which has not been charged.

[5] In reply, Ms Cavanagh says that she succeeded in three out of five matters and claims that she should be reimbursed the costs of the lodgement fee, the investigation hearing fee for the second day, $100 'general expenses' and $10,560 for the costs of her university fees. This latter claim appears to be based upon the premise that she had to study law to bring her claim before the Authority (or, as Ms Cavanagh puts it "my focus of studying law was to enable me to protect my legal rights").

**Discussion**

[6] The Authority's power to award costs is set out in clause 15 of Schedule 2 of

the Act, which provides as follows:

***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party*

*such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[7] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz 2*when setting costs awards. These include:

a. There is discretion as to whether costs would be awarded and in what amount.

2 [2005] NZEmpC 144; [2005] 1 ERNZ 808

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience are to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties'

costs were unnecessary or unreasonable. g. That costs generally follow the event.

h. That without prejudice offers can be taken into account. i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

**Discussion**

[8] On a pure numerical tally, it is arguable that the respondent was significantly more successful, as it defeated 10 claims against one in which Ms Cavanagh was successful (although three of the 10 claims were effectively subsumed into one larger claim relating to the respondent not rostering her on for work after 29 January 2017). The award of two days' pay was a small part of what Ms Cavanagh sought as lost wages arising out of her alleged disadvantage claim. I agree that Ms Cavanagh was successful on a jurisdictional point, but that was a threshold issue for one of her 11 claims.

[9] In *William Coomer v JA McCallum and Son Limited* 3 the Employment Court considered the position where a party had mixed success in a matter. At paragraphs [37] to [43] His Honour Judge Smith stated the following (omitting citations):

[37] Determining which party has been successful can be problematic. Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any "realistic appraisal". That conclusion followed because they obtained a monetary award and a finding the Council had breached a duty owed to them. It was immaterial that they had not succeeded to the full extent of their claim because "...success on more limited terms is still success".

[38] In the earlier decision of *Health Waikato Ltd v Elmsly*, the Court of Appeal considered costs in the Employment Court, stating they usually follow the event. It observed that in most cases it is clear who has been successful and is, prima facie, entitled to an award. The Court said cases where the parties have mixed success are by no means rare and:

... in such instances it is not necessarily easy to determine who "won" the case so as to be entitled presumptively to

costs.

[39] That difficulty is illustrated by the costs order that was made. In *Elmsly* both parties had spent approximately the same amount of money on the case. Most of that was spent in arguing about issues where, in the end, Health Waikato was successful. However, Health Waikato was required to pay a contribution towards Dr Elmsly's costs.

[40] The Court of Appeal said that the trial Judge's implicit conclusion, that Dr Elsmly had sufficient success at trial to warrant an award of costs, was open to him. The Court had this to say on the entitlement to costs:

The result of the present case was that Dr Elmsly was awarded relief and it would appear (given that there was no *Calderbank* letter) that he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing Judges are prepared to react appropriately where there has been a *Calderbank* offer. In any event, whatever the merits of current costs practice, there is nothing out of the ordinary in the conclusion of the Judge that Dr Elmsly was entitled to costs.

3 [2017] NZEmpC 156

[41] The comments in *Elmsly* were echoed by the Supreme Court in *Manukau Golf Club Inc v Shoye Venture Ltd.* The Court held that a fundamental principle applying to the determination of costs, in all the general courts in New Zealand, is that they follow the event.

[42] While I accept the submission for McCallum & Son that the Authority is not a court, the fixing of costs by it is subject to the principles in *Da Cruz* and *Fagotti* which acknowledge that costs generally follow the event. Inevitably that involves assessing which party has succeeded. *Weaver* is an illustration of that principle.

[43] I agree with the Authority that it was appropriate to consider costs in this case by standing back and looking at things "in the round" and, in doing so, to conclude there had been mixed success. That only takes this assessment so far. The agreed statement of facts, and the determination, do not disclose why Mr Coomer's success in establishing his personal grievance and being awarded compensation was outweighed by what was perceived to be the company's success. His success, limited as it was, could not have been achieved without lodging a claim in the Authority. Furthermore, there is no evidence Mr Coomer behaved in some inappropriate way or engaged in practices which unreasonably prolonged the investigation.

**Determination**

[10] In my determination in the substantive matter I criticised aspects of the respondent's conduct towards Ms Cavanagh in what was an on-going dispute where each party breached duties owed to the other. Whilst she did not succeed because her own conduct in the situation relating to her rosters was materially more blameworthy, Ms Cavanagh's claims before the Authority in respect of that situation were not wholly misconceived. In addition, there was an unlawful threat to stand her down, for which she was awarded a remedy. However, there were aspects of Ms Cavanagh's claim which were never likely to succeed, such as the claim in relation to being paid extra for each unit standard she had achieved.

[11] The picture that emerges from this analysis is, therefore, not quite as straightforward as a straight 1 to 10 tally suggests.

[12] The award of costs is at the discretion of the Authority, and a fair and equitable approach will recognise the partial success of both parties. The starting point is that the respondent was largely successful overall. That gives a starting point of a contribution of $7,000 by Ms Cavanagh to the respondent. However, it is also necessary to credit to Ms Cavanagh her partial success. I believe that a fair way of

doing this is to credit to her the first day's daily tariff of $4,500, as she would not have recovered anything if she had not lodged her claims. This leaves a net contribution towards the respondent of $2,500. I deduct from that sum the cost to Ms Cavanagh of lodging her claim in the Authority, which is $71.56. Ms Cavanagh should not be credited with the $153.33 half day hearing fee for the second day because her successful claims could easily have been dealt with in one day.

[13] Ms Cavanagh does not stipulate what her $100 'general expenses' relate to,

and so I decline to take them into account. As for her claim for reimbursement of

$10,560 university fees, I assume that Ms Cavanagh makes this claim tongue in cheek. However, for the avoidance of doubt, I reject this claim. First, Ms Cavanagh had declared an intention to study law before she and the respondent had encountered

most of the difficulties in relation to which she brought claims in the Authority. Second, she will obviously gain significant benefits from her legal studies and eventual degree which extend far beyond her self-representation in the Authority. Third, it is not necessary to embark on a full time degree course in law in order to represent oneself before the Authority.

[14] Should the $2,428.44 contribution towards the respondent's costs be uplifted? Mr Shaw relies on four reasons to argue for an uplift. First, he says that Ms Cavanagh did not present her claims very clearly in the statement of problem. Second, he says that Ms Cavanagh made a late request for an adjournment (which was granted). Third, he says that Ms Cavanagh raised irrelevant issues at the investigation meeting. Last, he says that Ms Cavanagh raised claims that were never likely to succeed.

[15] I agree that Ms Cavanagh did not express her claims very clearly at first. I am in little doubt that this caused the respondent to incur extra costs. However, the Authority did a lot of work itself trying to understand and express in more conventional terms Ms Cavanagh's claims so that it could investigate them. Ms Cavanagh did make a request for an adjournment which was granted, but it is not clear how that would have increased the respondent's costs.

[16] Whilst Ms Cavanagh did raise some issues in the Authority investigation which were not ultimately particularly relevant, she did so within the context of trying to prove multiple claims, some of which were reasonably complex for a layperson. I do not accept that Ms Cavanagh raised any matter in bad faith. Finally, it is true that

some of the claims were unlikely to succeed, but none were completely unmeritorious so as to merit an uplift.

[17] In summary, whilst I agree that the way Ms Cavanagh pleaded her case in her statement of problem will have led to some additional costs being incurred, Mr Shaw does not break down the extra costs he claims in any detail. I believe that a modest uplift is called for, but not in the sum of $2,000. I increase the $2,428.44 to $3,000 to recognise the extra work that is likely to have been incurred by Mr Shaw, and charged for, as a result of Ms Cavanagh's initial unclear statement of problem.

**Order**

[18] I order Ms Cavanagh to pay to the respondent the sum of $3,000 as a contribution towards its costs. She is to pay this sum by no later than 28 days from the date of this determination.

David Appleton

Member of the Employment Relations Authority

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