

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 84
5629396

BETWEEN WILLIAM COOMER
Applicant

A N D JA McCALLUM & SON
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Riki Donnelly, Counsel for Applicant
Leo Wenborn, Advocate for Respondent

Submissions Received: 25 May 2017 from the Applicant
29 May 2017 from the Respondent

Date of Determination: 30 May 2017

COSTS DETERMINATION OF THE AUTHORITY

A. Mr Coomer is to make a contribution towards the respondent's costs in the sum of \$4,500.

[1] By way of a determination of the Authority dated 15 May 2017¹ the Authority found that Mr Coomer had been unjustifiably disadvantaged by the way he was treated at a meeting with his manager, but that he had not been unjustifiably constructively dismissed, and that he was not entitled to be paid for rehabilitative activities which he carried out at the respondent's premises after he suffered a stroke.

[2] In addition, the Authority declined to impose a penalty upon the respondent for an alleged failure to retain a signed copy of an individual employment agreement as no breach of this statutory duty had occurred.

¹ [2017] NZERA Christchurch 75

[3] Costs were reserved in the determination and the parties invited to seek to agree how costs were to be dealt with. They have been unable to do so. Accordingly, the parties' representatives have served and lodged written submissions.

[4] Mr Coomer's counsel seeks a contribution from the respondent in the sum of \$8,000. This is the sum of the Authority's standard daily tariff for a two day investigation in respect of a matter lodged on or after 1 August 2016. He seeks this on the basis that costs should follow the event. He also seeks recovery of a disbursement of \$234.89, being the lodgement fee of \$71.56, the fee for the second day of the investigation meeting and a \$10 witness fee.

[5] Mr Wenborn, on behalf of the respondent, seeks costs in the sum of \$37,087.45. These costs comprise the fees of Mr Wenborn's business, VJ Henderson Associates, together with \$25,000 in respect of 'business interruption' due to the attendance at the Authority's investigation of the Group Managing Director and an administration officer.

Legal principles

[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] It is well established that the Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*² when setting costs awards³. These include:

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

² [2005] ERNZ 808

³ Confirmed as still applicable law by the full Employment Court in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

- 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] This is a case where there was mixed success. In *Best Health Products Limited v Cherie Nee*⁴ the Employment Court reviewed a costs determination of the Authority in which there was mixed success, and approved the approach taken by the Authority, which was to analyse the outcomes for the respective parties.

[9] The main application made by Mr Coomer related to the unsuccessful constructive dismissal claim, and that issue took up the majority of the time spent in the Authority's investigation meeting. However, the Authority's investigation into

⁴ [2016] NZEmpC 16

the meeting with the manager at which I found there had been unjustified disadvantage formed part of the actions which were alleged to have caused the constructive dismissal. It is therefore not a straight forward matter to separate the time spent on investigating Mr Coomer's successful action from the remainder of his unsuccessful allegations.

[10] On standing back, however, I am satisfied that the majority of the time spent in the investigation meeting was spent on allegations which were either found not to be correct, or which did not result in a positive outcome for Mr Coomer. In agreeing that the usual approach of costs following the event should apply, I find that the respondent was 'more successful' than Mr Coomer. Therefore, the respondent is eligible for a costs award from Mr Coomer.

[11] No Calderbank offer was tendered by either party in this matter. Therefore, it is necessary to assess the amount which the respondent is entitled to be awarded in respect of its success in defending most of Mr Coomer's claims on normal principles of reasonableness.

[12] The respondent's claim for costs has two elements. The first is a reimbursement of the costs of its representative. It appears that the respondent is seeking reimbursement of those costs in their entirety. In other words, on an indemnity basis. Indemnity costs are awarded against a party only where there has been "exceptionally bad behaviour" warranting such an approach⁵. In this context, there was nothing noteworthy about the substance of Mr Coomer's claim, nor in the way in which it was pursued before the Authority. Indemnity costs are therefore not appropriate.

[13] The second element of the respondent's costs claim concerns "business interruption". Mr Wenborn has not explained this in any way. First, there is no evidence whatsoever that the attendance at the investigation meeting by the Group Managing Director and his administration assistant caused any "business interruption". Indeed, I find it almost inconceivable that the respondent's business would be materially adversely affected just because the Group Managing Director and his assistant were at a meeting for two days. In any event, they were able to keep in touch with the operation of the business by telephone.

⁵ *Bradbury v Westbank Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [28].

[14] Second, even if there was a loss caused by the absence of the Group Managing Director, no evidence has been tendered to show that it amounted to \$25,000. Finally, attending an Authority investigation meeting is one of those requirements which is part and parcel of running a business. I see it as no different from meeting with any number of regulatory bodies that businesses in New Zealand have to engage with from time to time. This element of the costs claim is therefore rejected in its entirety.

[15] The remaining question is therefore to decide what costs award the respondent is entitled to. The investigation meeting lasted a little under two days. The respondent was not wholly successful, and some credit should be given to Mr Coomer for that fact. I believe that it is appropriate to award the respondent the equivalent of the first day's daily tariff. This is \$4,500.

Order

[16] Mr Coomer is to pay a contribution towards the respondent's costs in the sum of \$4,500. He is to make this payment within 10 days of the date of this determination.

David Appleton
Member of the Employment Relations Authority