

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 58  
5551087

BETWEEN                      CRAIG COOPER  
Applicant

A N D                              SAECOWILSON  
LIMITED  
Respondent

Member of Authority:        David Appleton

Representatives:              Angela Morgan-Roberts, Counsel for the Applicant  
Catherine Murray, Advocate for the respondent

Investigation Meeting:        Determined on the papers

Submissions Received:        29 April 2016 from Ms Morgan-Roberts  
13 April and 2 May 2016 from Ms Murray

Date of Determination:        11 May 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A.        I order that costs lie where they fall.**

[1]        The respondent seeks costs against Mr Cooper after he withdrew his personal grievance before the Authority for unjustified dismissal. The total claimed by the respondent is \$3,842.25, which is made up of \$1,573 of flight costs, incurred by the respondent in attending mediation, \$2,229.25 of representative's fees<sup>1</sup> and \$40 of courier and copying costs.

[2]        The respondent asserts that it had always regarded Mr Cooper's grievance as frivolous and vexatious, as he had resigned, and that it had stated to Mr Cooper more

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<sup>1</sup> Excluding GST.

than once that it would pursue costs against him if he pursued a claim in the Authority.

[3] Ms Morgan-Roberts states on behalf of Mr Cooper that he did not resign, and believed that he had a good claim. However, he withdrew his personal grievance because he *has had to deal with other matters beyond his control and the stress that he is experiencing as a result is taking a toll on his health.*

[4] Ms Morgan-Roberts also states that Mr Cooper is owed \$143.85 in unpaid wages.

*The statutory provision and legal principles applicable to assessing costs in the Authority*

[5] 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.*

[6] It is well established that the Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup> when setting costs awards<sup>3</sup>. These include:

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

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<sup>2</sup> [2005] ERNZ 808

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

- 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*

[7] Whilst it may be the case that the respondent has always believed that Mr Cooper's claim was frivolous and vexatious, it is often the case that parties hold strong views as to the merits of their respective case and the demerits of their opponent's, but it is only when the Authority has investigated matters objectively that the true picture becomes clear. It is my long experience that matters are often less clear, and more nuanced than parties initially believe them to be.

[8] Whilst the respondent's belief of the lack of merit of Mr Cooper's claim may be accurate, the Authority is in no position to assess that belief objectively as Mr Cooper has withdrawn his application before any investigation could take place. I cannot, therefore, just accept as a matter of trust that Mr Cooper's claim was always doomed to fail. I must proceed on the basis that there could have been merit in it.

[9] Having established that position, I cannot accept that the respondent's attendance at mediation was inevitably a waste of its resources, as it is as likely as not that the parties

could have reached agreement during that mediation. Therefore, I cannot accept that it is appropriate to award to the respondent the costs of that attendance at mediation.

[10] As for the costs of representation, it appears that the mediation took place on 19 November 2015. The bulk of the costs of representation (all but \$74.50) related to work done by Ms Murray up to and including attendance at mediation. Again, as there is no objective evidence that Mr Cooper's claim was doomed to fail, the mediation had potential value, and so cannot be regarded as having caused wasted costs. It is not clear what the \$74.50 of costs incurred in December 2015 related to, but there is nothing to indicate that it was incurred unnecessarily at that point, solely because of an unmeritorious claim by Mr Cooper.

[11] I therefore decline to award the costs of Ms Murray's representation to the respondent. This includes the \$40 copy and courier fees, which were incurred up to the date of the mediation.

[12] In addition, whilst Mr Cooper has not sworn an affidavit to depose under oath as to the reasons for his withdrawal, there is no cogent evidence that he withdrew because he realised that his claim was doomed, and should always have known that. Furthermore, he withdrew prior to lodging statements of evidence, so it cannot be the case that the respondent incurred costs preparing replies.

### *Conclusion*

[13] Having considered whether it would be just to award costs against Mr Cooper, I believe that it would not be. This is because I cannot be satisfied on a balance of probabilities that his claim was frivolous and vexatious, nor that his withdrawal was prompted by a late realisation that his claim was doomed to fail, which he should have realised from the beginning. Had he withdrawn after the respondent had prepared statements of evidence, close to the investigation meeting date, I may well have been prepared to have awarded the costs of that work, but that is not the case.

[14] Finally, as Mr Cooper has withdrawn his application, the Authority has no jurisdiction to investigate whether he is owed arrears of wages as submitted by Ms Morgan-Roberts.

**Orders**

[15] I order that the parties' costs lie where they have fallen. No cost award is made to either party.

David Appleton  
Member of the Employment Relations Authority