

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 371
3024833**

BETWEEN	CHRISTOPHER DILLON Applicant
AND	HAYDEN DILLON First Respondent
AND	TULLYCRINE LIMITED Second Respondent
AND	LISA DILLON Third Respondent

Member of Authority: Eleanor Robinson

Costs Submissions None from Applicant
5 & 8 November 2018 from Respondent

Determination: 26 November 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2018] NZERA Auckland 334 the Authority found that the Applicant, Mr Christopher Dillon, was not an employee of the First Respondent, Tullycrine Limited(Tullycrine).

[2] It was further determined that Mr Christopher Dillon was not owed any monies in respect of unpaid wages or holiday pay entitlement, and accordingly penalties should not be awarded against Hayden Dillon and Lisa Dillon in respect of breaches of the Minimum Wages Act 1983 and the Holidays Act 2003.

[3] In that determination costs were reserved in the hope that the parties would be able to settle this issue between them. However the parties have filed submissions in respect of costs.

Costs

[4] This matter involved a one and a half day investigation meeting. Hayden Dillon, on behalf of Tullycrine, citing actual costs of \$28,943.03 (including GST), is seeking a contribution to costs above the notional daily tariff rate in the Authority on the basis of

exceptional circumstances, specifically (i) that the claims against Tullycrine made by Mr Christopher Dillon were found by the Authority to be without merit, and (ii) that Mr Christopher Dillon's change of counsel during proceedings increased costs due to the necessity to file new statements of claim.

[5] Mr Christopher Dillon was legally aided during the course of the Investigation Meeting. In these circumstances it is normally the case that a recovery of a contribution to costs is unavailable unless there are 'exceptional circumstances' pursuant to s 45 of the Legal Services Act 2011 which states as follows:

- (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
- (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

[6] The exceptional circumstances referred to in s45(2) of the Legal Services Act 2011 are set out in s 45 (3) as follows:

- (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
 - (a) any conduct that causes the other party to incur unnecessary cost;
 - (b) any failure to comply with the procedural rules and orders of the court;
 - (c) any misleading or deceitful conduct;
 - (d) any unreasonable pursuit of one or more issues on which the aided person fails;
 - (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution;
 - (f) any other conduct that abuses the processes of the court.
- (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
- (5) If, because of this section, no orders for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

Principles

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

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.

[8] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[9] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*².

[10] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[11] It is also a principle that costs are not to be used to punish the unsuccessful party.

Determination

[12] Mr Christopher Dillon was unsuccessful in all of the issues he brought before the Authority and as a consequence was not awarded the remedies which he had been seeking. I consider that taking that fact into consideration when assessing the submission that costs should be awarded above the notional daily tariff rate level of costs would have the effect of further ‘punishing’ Mr Christopher Dillon, which is not a principle to be used when assessing costs.

[13] Hayden Dillon submits that costs should be awarded on exceptional grounds against Mr Christopher Dillon as a legally aided person; specifically Hayden Dillon submits that Mr

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

⁴ [2001] ERNZ 305

Christopher Dillon's change of counsel involved the Respondent in incurring additional costs, and that Tullycrine is in a poor financial position which makes payment of its legal costs in this matter onerous.

[14] I have received no submission on the issue of costs from the Applicant.

[15] In *Awa v Independent News Ltd*⁵ the High Court held that exceptional circumstances mean something "quite out of the ordinary". This view was upheld by the Court of Appeal in *Laverty v Para Franchising Limited*⁶

[16] In the circumstances of this case, I accept that a change in counsel and focus of pleading is unusual during the course of an investigation meeting, and may have an adverse impact on the costs incurred by the parties. I further note that during the Investigation Meeting there was financial information provided to the Authority in support of the poor financial position of Tullycrine.

[17] No evidence has been submitted that Mr Christopher Dillon is not financially in a position to pay any costs awarded against him.

Costs award if Mr O'Flaherty had not been legally aided

[18] I record that, if s 45(2) of the Legal Services Act 2011 had not limited Mr Christopher Dillon's liability to pay costs to Tullycrine, I would have awarded costs at the notional daily tariff rate in the Authority on the basis of one and a half meeting.

[19] I accordingly indicate that I would have considered a \$6,250.00 contribution to Tullycrine's costs to have been appropriate.

Eleanor Robinson
Member of the Employment Relations Authority

⁵ [1996] 2 NZLR 184

⁶ [2006] NZLR 650