

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 288
3061272

BETWEEN	JARROD ELLISON Applicant
AND	ROBERT COWAN First Respondent
AND	KELLY COWAN Second Respondent

Member of Authority: Nicola Craig

Representatives: Fraser Wood, counsel for the applicant
Kelly Cowan for the respondents

Submissions Received: 13 April 2023 for the applicant
19 May 2023 for the respondents

Date of Determination: 1 June 2023

COSTS DETERMINATION OF THE AUTHORITY

The Authority's determination

[1] Jarrod Ellison worked on a farm near Rotorua. The Authority issued a determination which found that Mr Ellison was employed by Robert and Kelly Cowan and had been unjustifiably dismissed.¹ Grievance remedies were awarded, along with arrears of wages and penalties for a breach of the Wages Protection Act 1983.

[2] Costs were reserved with the parties invited to resolve the question of costs. A timetable was set with Mr Ellison having 21 days from the date of the determination to provide a

¹ *Jarrod Ellison v Mooventures Limited (in liq), Robert Cowan and Kelly Cowan* [2021] NZERA 38.

memorandum regarding costs if the matter was not resolved. No costs application was received within that period.

[3] At the time the determination was issued a company associated with the Cowans, Mooventures Limited (in liquidation), was the first respondent in the proceeding. The Authority found that it was not Mr Ellison's employer. In November 2021 the company was removed from the Companies Register and so is no longer a party to the proceeding. Mr and Ms Cowans are now the first and second respondents.

The application for costs

[4] In April 2023 the Authority received a comprehensive memorandum of counsel for Mr Ellison seeking costs.

[5] The memorandum describes and attaches documentation of attempts made to ensure payment of the sums owing under the determination and to reach agreement on costs. The Cowans indicated to Mr Ellison's representative that due to their financial position they would need to make payments over time, although that was not provided for by the determination. A plan was agreed regarding the remedies and penalties but not about costs. A number of payments were received towards the amounts awarded. The Cowans were repeatedly chased up about outstanding amounts due but for a time failed to engage, until making contact again very recently it seems.

[6] The Authority took Mr Ellison's application as including an application for leave to seek costs out of time. The memorandum was sent to the Cowans seeking any comment on the leave issue and on costs. An email was received from the Cowans setting out information about their situation and indicating their plans to attempt to pay the amount outstanding.

Leave to seek costs out of time

[7] Mr Ellison's representative sought to reach agreement as to costs promptly after the determination. Correspondence continued for a period about an acceptable amount. Invoices showing Mr Ellison's legal fees were provided to the Cowans on their request. The parties did not reach an agreement on costs. The focus was on obtaining the amounts awarded in the determination and to a large extent that was successful.

[8] Under other circumstances an application after this period may have been unsuccessful as quite a substantial period has elapsed since the determination was issued. However, here the Cowans were clearly aware after the determination that Mr Ellison was seeking costs. They knew the amount of fees he had incurred and that the amount was growing with continuing discussions about payment after the determination was issued. Payments of the remedies awarded continued into 2022. The Cowans were informed that costs continued to be sought.

[9] There is no evidence of any prejudice to the Cowans to grant leave in this matter.

[10] Leave is granted for Mr Ellison's costs application to proceed.

Costs principles

[11] The Authority is empowered to award costs.² Its discretion is governed by principles.³ These include that costs will usually follow the event, so the successful parties receives a contribution to their costs. The Authority specifies a notional daily tariff system with reductions and uplifts permitted.⁴

Costs submissions

[12] Mr Ellison seeks two thirds of the costs he actually and reasonably incurred, namely \$13,828.69. Invoices were provided totalling \$20,952.56 – being \$2,647.56 on 22 July 2019, \$11,500 on 31 March 2020 and \$6,805.00 on 31 March 2023 (reduced by \$959 plus GST). Two thirds of actual costs was what Mr Ellison had been prepared to accept from the outset.

[13] For Mr Ellison, it is acknowledged that the amount sought is more than the Authority's daily tariff. The particular features of this case warranting a different approach are identified, relating to a failure to participate and engage. Considerable extra work was required following the investigation meeting. Increased or indemnity costs are sought.

[14] The Cowans' recent comments did not focus on costs.

²Employment Relations Act 2000, Schedule 2, clause 15.

³*PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

⁴Employment Relations Authority Practice Note 2 - Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi, <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>.

Costs Outcome

Starting point

[15] The in-person hearing lasted a full day. An investigation meeting was held by telephone to hear submissions. The tariff for a full day is \$4,500 and part of \$3,500 for the second day. I assess the starting point as being \$5,700.

Indemnity costs

[16] Indemnity costs are sought, relying on *Bradbury v Westpac Banking Corporation* where the Court of Appeal identified that such costs may be ordered where a party behaved badly or very unreasonably.⁵

[17] I accept the Cowans' behaviour in this proceeding was problematic but do not consider that the high test in *Bradbury* is met.

Conduct of the proceedings

[18] I can still take into account whether the conduct of the proceedings was such that an uplift to the daily tariff is justified.

[19] I concluded in the determination that none of the elements in s 103A of the Act were met, nor the employment agreement's requirements.⁶ Also, there was no consultation as required for deductions under the Wages Protection Act, meaning that the deduction made by the Cowans was unlawful.⁷

[20] For Mr Ellison it is emphasised that the Cowans were represented at the start of the process and again by a lawyer for a short time before the investigation meeting. They must have seen that they were not going to succeed in their defence of Mr Ellison's claim.

[21] Instead the Cowans chose to proceed but their spasmodic and restricted participation increased the costs to Mr Ellison. This included by:

⁵*Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400.

⁶Above n 1, at [67].

⁷Above n 1, at [93].

- (a) not responding to messages regarding case management conferences which resulted in the conferences being postponed;
- (b) communicating on occasions with the Authority but without replying to the questions asked by the Authority;
- (c) not providing witness statements as directed by the Authority, meaning the exploration at the investigation meeting lasted longer than would otherwise have been necessary;
- (d) Mr Cowan not attending the investigation meeting;
- (e) without explanation, not lodging all the documents directed by the Authority to be provided (including wages and time records), when some were indicated by Ms Cowan to be in the Cowans' possession;
- (f) providing unclear versions of documents and not responding to requests for clear versions; and
- (g) Ms Cowan's failure to participate in the investigation meeting resumed at a time arranged to suit her, to hear submissions, with questions then forthcoming from her about what to do.

[22] As recorded in the earlier determination, there was occasional contact with the Authority and attendance by Ms Cowan at the in person part of the investigation meeting but on many occasions no responses were received.⁸ Considerable follow up was required by Mr Ellison's representative.

Instalments

[23] As the Cowans refer to their position of financial difficulty I have considered the question of instalments. I currently have insufficient information to be satisfied that their financial position warrants this. The parties have been able to make such arrangements between themselves but I note if a compliance order is sought there is the ability to consider instalments but robust evidence would be needed of the Cowans' position.⁹

⁸Above n 1, at [11].

⁹The Act, s 138(4A).

Conclusion

[24] I accept that this was a prolonged and expensive dispute and the Cowans bear some responsibility for that.

[25] The fees incurred are reasonable in the circumstances of this case and most could be the subject of a costs award. An exception is some of the first invoice relating to communications with Mediation Services and attendance for mediation, which should not be the subject of a costs award for this Authority proceeding.

[26] I have not taken into account costs incurred in the attempt to obtain payment of the remedies awarded by the Authority as these should be left for any further enforcement determination. The Cowans are encouraged to complete payment on the amount owing under the earlier determination and under this one to avoid incurring liability for further costs.

[27] Costs are not intended to punish or express disapproval at an unsuccessful party's conduct. But whether there was an increase in actual cost where a party acted unreasonably thereby unnecessarily increasing costs, that can be considered. Here costs were considerably increased in an unnecessary manner by the Cowan's actions and inactions.

Orders

[28] Robert Cowan and Kelly Cowan are jointly and severally liable to pay Jarrod Ellison to following amounts within 28 days of the date of this determination:

- (a) \$9,000 as a contribution to his costs; and
- (b) \$71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority