

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 133
5646753

BETWEEN SCOTT ESTCOURT
 Applicant

AND NAPIER CITY COUNCIL
 Respondent

Member of Authority: M B Loftus

Representatives: Bill Calver, Counsel for Applicant
 Jol Bates, Counsel for Respondent

Submissions Received: 20 November 2017 from Applicant
 4 December 2017 from Respondent

Determination: 19 December 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] On 26 September 2017 I issued a determination in which I dismissed various personal grievance claims brought by Mr Estcourt. He was, however, successful with a claim Napier City Council (NCC) had improperly failed to pay redundancy compensation and awarded over \$50,000.¹ Costs were reserved.

[2] Despite subsequent discussions the parties have been unable to resolve the issue of costs. Mr Estcourt is of the view he should receive a contribution toward those he incurred while, in his words, NCC says honours were shared and costs should lie where they fall.

[3] The impasse has resulted in Mr Estcourt seeking a ruling on the issue. It is his submission that having *succeeded on the major element of the application* he is entitled to a contribution toward costs.

¹ [2017] NZERA Wellington 93

[4] In support of this approach reference is made to my comment ... *the question of whether or not Mr Estcourt is entitled to redundancy compensation [is], as both parties conceded and notwithstanding the grievance applications, the prime issue in this dispute.*²

[5] Comment is made about the grievances with it being submitted their existence was not a surprise given, for example, my conclusion the process to which Mr Estcourt was subjected was suboptimal though not to the extent of constituting repudiatory conduct warranting a resignation (ie: the constructive dismissal claim).³

[6] Mr Estcourt seeks a contribution of \$4,500. In doing so he submits, through Mr Calver, that:

*The respondent did succeed on the two (rather less important) personal grievance issues. But for that the applicant would have sought substantially more than the benchmark of \$4,500 for a one day hearing. However, in the circumstances counsel accepts that the respondent is entitled to a concession in respect of costs having succeeded to some measure [and] that concession can be given by limiting the costs awarded to the applicant to the benchmark figure.*⁴

[7] The reference to a benchmark is recognition of the fact the Authority will normally use a daily tariff approach when addressing a costs claim.⁵ The present tariff is \$4,500 for the first day of investigation and from there adjustment might occur depending on the circumstances.

[8] NCC's response is Mr Estcourt succeeded on only one of three claims and as a result costs should, *at the very least*, lie where they fall. Comment then follows that it is arguable costs should follow the event of dismissal of the grievance claims though NCC makes no application.

[9] NCC's final position is ... *given each party had a measure of success, costs should lie where they fall on the basis the Applicant's partial success is completely eroded by his failure on the other two claims.*⁶

² n 1 at [48]

³ n 1 at [42]

⁴ Applicant's submissions at [21]

⁵ refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

⁶ Respondent's submissions at [7]

[10] The issue of mixed success has recently been commented on by the Employment Court in *Coomer v JA McCallum and Son Limited*⁷ where the Court observed:

*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.*⁸

[11] The Court then considered various precedents and outlined the issues to be considered.

[12] Ultimately I stand back and look at things “in the round” as the Court suggested was appropriate in *Coomer*.⁹ Having done so I conclude Mr Estcourt must be considered to have been successful.

[13] As Mr Calver said the key issue was NCC’s refusal to pay redundancy. That was commented on in my determination and by both counsel at the time. In that respect Mr Estcourt was 100% successful.

[14] Mr Estcourt’s success saw him attain close to 80% of the total remedies originally sought. That is considerable success in almost any language and perhaps illustrates the extent to which the unsuccessful grievance claims might be considered ancillary. Indeed the evidence and the way it came out leads me to conclude that had the redundancy been paid the claims would never have been lodged.

[15] I also have to recognise that large parts of the evidence upon which Mr Estcourt based his grievance claims had to be considered in order to decide whether or not he should have received the redundancy payment. A lot of the correspondence canvassed the party’s views about whether or not the redeployment options offered by NCC were such they removed the obligation to pay redundancy to Mr Estcourt.

[16] I also note the Court’s comment in *Coomer* that *His success, limited as it was, could not have been achieved without lodging a claim in the Authority*.¹⁰ Here and referring again to the 80% comment,¹¹ I would have to conclude Mr Estcourt’s

⁷ [2017] NZEmpC 156

⁸ n 7 at [37]

⁹ n 7 at [43]

¹⁰ n 9 above

¹¹ Paragraph [14] above

success was somewhat more than limited; it was significant but as in *Coomer* could not have been attained without lodging a claim.

[17] Finally I note Mr Estcourt's actual costs and Mr Calver concession regarding the normal daily tariff off-setting to some extent what could easily have been a greater claim. I conclude the \$4,500 sought is appropriate.

Conclusion and orders

[18] For the above reasons Napier City Council is ordered to pay Scott Estcourt the sum of \$4,500.00 (four thousand, five hundred dollars) as a contribution toward the costs Mr Estcourt incurred pursuing his claim.

M B Loftus
Member of the Employment Relations Authority