IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 708
3318880

	BETWEEN	GILL ELECTRICAL LIMITED Applicant
	AND	MANI SHARMA Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Simon Greening, counsel for the Applicant Sunny Sehgal, advocate for the Respondent	
Investigation Meeting:	On the papers	
Submissions received:	11 November 2024 from the Respondent 19 November 2024 from the Applicant	
Date of Determination:	26 November 2024	

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Gill Electrical Limited (GEL), lodged an amended statement of problem (ASoP) for its breach of contract counterclaims on 18 September 2024. GEL claimed Mr Sharma had breached the non-solicitation and confidentiality clauses in his individual employment agreement by sending a copy of his personal grievance letter to GEL's largest client.

[2] GEL claimed it had "secured on a preliminary basis a contract with [biggest client]". The Authority has referred to GEL's "biggest client" as "V" in this determination. In response to a query from GEL about when it's work was going to start, GEL said V informed it, "not until the Labour inspectorate complaint against your company are finalised" (sic). GEL said the contract "was ultimately taken away from it".

[3] GEL sought to recover damages of $176,625.00 from Mr Sharma plus penalties for the alleged breaches of his employment agreement.

[4] The respondent, Mr Mani Sharma, denied these claims. He said he had raised "legitimate concerns regarding alleged employment law violations, including wage and underpayment and health and safety concerns." He said he was exercising his legal right to raise those matters with V.

[5] Mr Sharma said the information he shared with V related to "illegal activity, including wage underpayment and workplace conditions, which [he] was legally and ethically entitled to raise."

[6] Directions of the Authority (DoA) were issued on 16 October 2024. Among other things, the Authority set out the various issues that had to be determined on the counterclaim. One of the issues identified was whether "the statements made in Mr Sharma's personal grievance letter […] were "absolutely privileged" under s 121 of the Employment Relations Act". The Authority also observed in the DoA that it "looked like [the counterclaim] will be difficult for GEL".

[7] On 18 October 2024 GEL withdrew the counterclaims. Mr Sharma responded by indicting an intention to seek costs. He lodged his costs application on 11 November 2024. GEL opposed any costs being awarded.

The Authority's investigation

[8] Costs were dealt with on the papers, with the parties lodging written costs submissions.

Legal position

[9] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Although costs are discretionary, the discretion must be exercised on a principled basis.

[10] Costs may not be used to punish a party but conduct that has unreasonably increased the other party's costs may be reflected in the amount of costs awarded.

[11] The Authority usually adopts a 'notional daily tariff' based approach to costs. The current tariff is $4,500 for the first day of an investigation meeting and the $3,500

for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case.

[12] When assessing costs in this matter the Authority has had regard to the 'costs assessment' principles identified by the full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v De Cruz*, which were affirmed by the full Employment Court and *Fagotti v Acme & Co Ltd*.[1]

Issues

[13] The following issues are to be determined:

(a) Should Mr Sharma be awarded costs?

(b) What is the notional starting tariff for assessing cost in this matter?

(c) Should that notional starting tariff be adjusted?

(d) What costs should be awarded?

Should Mr Sharma be awarded costs?

[14] Costs usually follow the event. However, in this case the counterclaim was withdrawn 16 days after the statement in reply (SiR) had been lodged. No case management conference had been held, the parties had not attended mediation, no evidence had been lodged and no timetable directions had been issued regarding an investigation meeting.

[15] As the Authority pointed out in an email to the parties dated 3 November 2024, costs would not normally be awarded for a matter that had been withdrawn so quickly. The Authority also suggested to Mr Sharma that the costs he would incur by applying for costs were likely to outweigh any costs he could potentially be awarded. Nevertheless, Mr Sharma confirmed he wanted a costs award in his favour on the withdrawn counterclaims.

[16] In his costs submissions, Mr Sharma submitted that GEL lodged its counterclaim without any prior discussion or dialogue, which necessitated him incurring the costs associated with lodging a statement in reply (SiR) and an amended statement in reply (ASiR).

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[1] *PBO Ltd v Da Cruz* [2005] ERNZ 808; and *Fagotti v Acme Co Ltd* [2015] NZEmpC 135.

[17] Mr Sharma's SiR consisted of three sentences denying the counterclaims. His ASiR consisted of one scant page, made up of five short paragraphs, which set out his position in a little more detail than the blanket denial in his SiR had. The work involved in lodged the SiR and ASiR would have objectively been very minimal.

[18] Mr Sharma submitted the counterclaim may have been lodged "with the intent to intimidate and pressure" him. Mr Sharma submitted costs were appropriate due to the "lack of evidence supporting the counterclaim, the absence of any preliminary discussions, and the potential intimidating effect of the claim."

[19] The first two points Mr Sharma raised would not give rise to an award of costs in this matter. A party is not required to lodge its evidence when a statement of problem is lodged, so many do not. Nor is a party legally required to discuss their claim with the respondent party before a statement of problem is lodged.

[20] Mr Sharma in his original statement of problem (SoP) lodged on 10 July 2024, claimed (among other things) GEL had engaged in multiple breaches of employment standards and minimum code legislation, and that he had been required to pay an employment premium of $20,000 for his job. GEL denied all of Mr Sharma's claims.

[21] Mr Sharma's submission that the counterclaim was intended to intimidate him regarding the claims he had made was a possibility that had to be considered. GEL employed Mr Sharma as an apprentice/trainee electrician for a minimum of 32 hours per week at $29.66 per hour. His weekly wage would be $949.12 gross if he worked 32 hours a week. The counterclaim against him was in excess of $176,000.00. On the face of it that could potentially be seen to be intimidatory.

[22] However, Mr Sharma was represented and he did lodge a SiR, then ASiR, against the counterclaim, which indicated he was in a position to be able to deal with it appropriately. It also had no effect on his original claims, which remain before the Authority.

[23] GEL in its costs submissions said it had acted in a constructive and appropriate manner after receiving the DoA, by promptly withdrawing the counterclaim "very early on in the proceedings".

[24] GEL said its claim was not frivolous or vexatious, and it had genuine concerns about what had been disclosed by Mr Sharma which it claimed had resulted in the loss of a contract it believed it was going to be awarded by V.

[25] GEL said it was concerned Mr Sharma had shared confidential information with V in breach of the confidentiality clause in his employment agreement. Paragraph 2(i) of GEL's costs submissions set out some lurid and extremely serious allegations that it believed Mr Sharma had made to V.

[26] After weighing the competing considerations, the Authority considered the interests of justice weighed against awarding Mr Sharma costs in this matter. The information in the SiR and ASiR was so minimal that the circumstances did not warrant a costs award being made in Mr Sharma's favour for such a small amount of work, so early in these proceedings.

[27] Costs are not normally awarded in situations like this, and the Authority did not want to encourage other parties to expect costs if a matter was withdrawn at the earliest stage of the investigation process. There was no bad or inappropriate behaviour by GEL in this case that unnecessarily or unreasonably increased Mr Sharma's actual legal costs, beyond the minimal costs he would have incurred by lodging his very basic SiR and ASiR to the counterclaims.

[28] On occasion an Authority Member may elect to share their preliminary thoughts or make observations on the claims before them at a very early stage of the process, in an attempt to assist the parties to resolve their issues themselves without incurring further time and costs. It is appropriate for parties to take such feedback on board, including where appropriate to review whether they should pursue some or all of their intended claims in light of what had been shared with them by the Member.

[29] One of the Act's objectives is to reduce the need for judicial intervention.[2] Awarding costs where the only activity that has occurred was the lodging of a SoP and/or SiR could have a chilling effect on early settlements and/or withdrawals of claims. That potential concern weighs heavily against awarding costs in this matter.

[2] Section 3(a)(vi) of the Act.

Outcome

[30] It is in the overall interests of justice to let costs lie where they fall in this particular matter. The Authority has therefore exercised its discretion against awarding costs in this case, so Mr Sharma's costs application did not succeed. Just to be clear, costs are also to lie where they fall in terms of the costs the parties have incurred in connection with this costs application.

Rachel Larmer
Member of the Employment Relations Authority