

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 86
3038816

BETWEEN ANDREW GRAHAM
Applicant

AND DRIVETRAIN LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
Ashley Sharp, counsel for the respondent

Submissions received: Nothing received from the applicant
11 December 2019 and 16 and 20 February 2020 from the
respondent
25 February 2020 from the Insolvency and Trustee
Service

Date of determination: 26 February 2020

COSTS DETERMINATION OF THE AUTHORITY

- A. Andrew Graham is ordered to pay Drivetrain Limited the following sums within 28 days of the date of this determination:**
- (a) \$6,500.00 as a contribution to costs; and**
 - (b) \$476.13 for disbursements.**

Employment Relationship Problem

[1] The Authority issued a determination in Andrew Graham's claim against Drivetrain Limited (Drivetrain or the company).¹ Mr Graham did not establish his disadvantage claim about suspension and Drivetrain was found to have justifiably dismissed him. Mr Graham was not successful in his claim that Drivetrain breached its duty of good faith.

[2] Mr Graham had been informed about the potential to have costs awarded against him and the Authority's notional daily tariff by way of a Member's Minute issued well prior to the investigation meeting.

[3] The determination encouraged the parties to resolve the question of costs. Drivetrain's representative attempted to contact Mr Graham but received no response. A memorandum seeking costs was filed on the company's behalf.

[4] Nothing was received from Mr Graham but given the Christmas period and Mr Graham being self-represented, the Authority extended the time for submissions. Mr Graham's email address for service became inoperative and the Authority arranged for a letter to be sent to him seeking submissions on costs. I am satisfied that Mr Graham is on notice of Drivetrain seeking costs against him and of his opportunity to respond to that application. No submissions were received.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received but has stated findings of fact and law, expressed conclusions and specified resulting orders.

Is the costs claim halted by Mr Graham's bankruptcy?

[6] I have considered whether Mr Graham's bankruptcy status has any effect on the awarding of costs against him. I sought comment from the parties and the New Zealand Insolvency and Trustee Service². Drivetrain considered that a costs determination could and should be issued. I refer to the Service's comments below.

¹ *Andrew Graham v Drivetrain Limited* [2019] NZERA 661.

² Part of the Ministry of Business, Innovation and Employment.

[7] According to the Service's Insolvency Register Mr Graham was adjudicated bankrupt on 4 July 2016 and remains a current bankrupt.³ The adjudication predates the commencement of Mr Graham's employment with Drivetrain in April 2017.

[8] The Insolvency Act 2006 contains the following restriction:

Court proceedings are halted

76 Effect of adjudication on court proceedings

(1) On adjudication, all proceedings to recover any debt provable in the bankruptcy are halted.

(2) However, on the application by any creditor or any other person interested in the bankruptcy, the court may allow proceedings that had already been begun before the date of adjudication to continue on the terms and conditions that the court thinks appropriate.

[9] The court permission in subsection (2) cannot apply in this case as the proceeding was not commenced at the time of adjudication of bankruptcy.

[10] The issue is then whether the costs matter is halted by s 76(1). There are several questions under that head, although I leave the first two questions open.

[11] First, is the Authority's process caught by the section? The two headings refers to "court proceedings" whereas subs (1) refers to "proceedings". The Authority is an investigative body rather than a court⁴, although its proceedings are declared to be "judicial proceedings" in the Employment Relations Act.⁵

[12] Second, does the section only applies to proceedings in existence immediately prior to the adjudication of bankruptcy? Mr Graham was already bankrupt when this proceeding began. The section refers to "on adjudication". That wording does not fit comfortably with proceedings commenced after adjudication. Difficulties with not covering such cases were noted by Justice Whata in *Walker v Forbes*, where the question was left open.⁶

[13] Lastly, is the procedure for a provable debt? Under s 232(1) of the Insolvency Act a provable debt is a debt or liability that the bankrupt owed:

(a) At the time of adjudication; or

³ As at 26 February 2020.

⁴ S 157 of the Employment Relations Act.

⁵ S 176(2) of the Employment Relations Act.

⁶ *Walker v Forbes* [2013] NZHC 412 and 828.

(b) After adjudication but before discharge, by reason of an obligation incurred by the bankrupt before adjudication.

[14] There has been a shift to see more contingent liabilities, including potential costs liability, as captured within the description of provable debts. I refer to the United Kingdom Supreme Court decision in *Re Nortel*⁷, which was followed by the New Zealand Supreme Court in *Bradbury v Commissioner of Inland Revenue*⁸. A similar approach was taken by the Employment Court, just prior to *Bradbury*, in *Gapuzan v Pratt & Whitney Air NZ Services*⁹.

[15] However, those cases concern claims filed before bankruptcy commenced where an obligation to potentially pay costs can be seen to have been taken on when the claim was filed or received, prior to adjudication of bankruptcy.

[16] In the present case Mr Graham had not even commenced employment with Drivetrain at the time of his adjudication, let alone been dismissed or filed a claim regarding that dismissal.

[17] This case appears more akin to *DJM Trustees 40 Ltd v Young* where damages which had arisen since adjudication were found not provable in bankruptcy and so s 76 of the Insolvency Act was found by Justice Venning not to apply.¹⁰

[18] This is in keeping with the Insolvency and Trustee's Office comment to the Authority that any debt incurred after bankruptcy is Mr Graham's responsibility for payment.

[19] I conclude that costs in this proceeding are not a provable debt in Mr Graham's bankruptcy and thus s 76 of the Insolvency Act does not apply and I am able to proceed to consider costs.

What are the principles regarding costs?

[20] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act. There is a wide discretion to award costs, on a principled basis.

⁷ *Re Nortel* [2013] UKSC 52.

⁸ *Bradbury v Commissioner of Inland Revenue* [2015] NZSC 80.

⁹ *Gapuzan v Pratt & Whitney Air NZ Services t/a Christchurch Engine Centre* [2015] NZEmpC 37.

¹⁰ *DJM Trustees 40 Ltd v Young* HC Auckland CIV-2009-49408522 12 March 2010 at [5], affirmed *Young v DJM Trustees No 40 Ltd* [2010] NZCA 103.

[21] The Employment Court set out principles to guide the Authority's approach to costs in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹¹, which include:

- a. The statutory jurisdiction to award costs is consistent with the equity and good faith jurisdiction of the Authority.
- b. Equity and good conscience is to be considered on a case by case basis.
- c. Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased the costs unnecessarily can be taken into account in inflating or reducing an award.
- d. Costs generally follow the event.
- e. Awards will be modest.
- f. Frequently costs are judged against the notional daily tariff.

[22] The Authority's notional daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day of hearing.

How long was the investigation meeting?

[23] This matter was originally set down for a one day investigation meeting with five witnesses anticipated. A start time slightly earlier than usual was arranged. Drivetrain decided to call one additional witness. The meeting time set was insufficient and an arrangement was made to reconvene the investigation meeting by telephone to hear the final witness's evidence. However, Mr Graham was unable to be contacted as outlined below. A further investigation meeting by phone was later held for about two-and-a-half hours to complete the evidence. Submissions were received in writing.

What submissions were made on behalf of Drivetrain?

[24] Drivetrain considers that costs should follow the event and as it was successful in defending all of Mr Graham's claims, costs and disbursements should be ordered to be paid to the company. Submissions emphasise the statement in the determination that Mr Graham's conduct was so egregious that it would have disintitiled him from any relief even if his termination had been found to be unjustified.¹²

¹¹ [2005] 1 ERNZ 808.

¹² *Andrew Graham v Drivetrain Limited* [2019] NZERA 661 at [111].

[25] Drivetrain seeks costs on the basis of a two (full) day investigation meeting due to Mr Graham's unavailability for the first telephone investigation meeting. That was said to lead to a total award of \$7,500, although I calculate this to be \$8,000. In addition, an uplift of one-and-a-half times is sought, meaning a total of \$11,250.

[26] One basis for the claimed uplift was that Mr Graham's claims were spurious and without reasonable explanation. This includes his alleged attempts to clarify his situation with the real estate agency, when considered against the objective documentary material at hand. Those "defences" unduly prolonged the investigation meeting and incurred unnecessary costs, it was submitted. Drivetrain was said to have needed to brief two additional witnesses and seek witness summons, and go to the expense of having those witnesses served and paid conduct money. The adjourned telephone proceedings was another reason for seeking an uplift.

[27] Invoices totalling \$15,612.45 (GST inclusive) were filed. Counsel for Drivetrain had acted in this matter on the basis that much of the preparatory work had been done by the advocate for the company and so an agreed fee of \$13,000 plus GST and disbursements was agreed. Counsel's disbursements were \$551.04 plus GST of \$82.66.

[28] Total disbursements incurred by Mr Edwards in coming to New Zealand for the company's investigation meeting with Mr Graham, mediation and the Authority's investigation amounted to AU\$4,608.70. The submissions recognised that no special damages claim had been pursued as regards the investigation and mediation, but suggested that the Authority's finding regarding Mr Graham's egregious conduct, means that those disbursements should be allowed.

[29] The air fares and hotel accommodation for Mr Edwards, counsel and the advocate/witness, directly related to the Authority's investigation meeting, amounted to AU\$1,800.28.

What costs should be awarded to Drivetrain?

[30] I can see no justification for costs not to follow the event in this case. Mr Graham was wholly unsuccessful in his claims and should make a contribution to Drivetrain's costs. The starting point on the basis of the daily tariff. For the actual hearing time of one day and the partial second day I have calculated the tariff as \$6,000.

[31] Other than as regards the adjourned telephone hearing, I am not satisfied that Mr Graham's conduct of the matter increased the costs of Drivetrain unnecessarily. Mr Graham was entitled to make his personal grievance claim and the hearing did not last longer than within the range of usual for the number of witnesses and documents involved. Although I did not accept Mr Graham's explanations, they were largely matters which he had raised with the company during his disciplinary meeting and was entitled to explore through the Authority's process.

[32] I do consider that an uplift is justified for the adjourned telephone hearing. Mr Graham was aware of the date and time, having agreed to it at the first investigation meeting day. Attempts were made at 10am to contact Mr Graham on both numbers which the Authority had for him. Mr Graham did contact the Authority shortly thereafter and was asked to move to another place in case cellular reception was an issue. Another time was agreed by him. However, he was again not able to be contacted on either number at 12 noon. I uplift by \$500.00.

[33] I order Mr Graham to pay Drivetrain Limited \$6,500.00 as a contribution to its costs, within 28 days of the date of this determination.

What disbursements should be awarded?

[34] It was submitted that disbursements should be allowed for Mr Edwards' trips to New Zealand for the company's investigation meeting and mediation. Invoices were also filed for the advocate's involvement which included advising Drivetrain as regards its disciplinary process, attending the disciplinary meeting and involvement in the preparation for and attendance at the investigation meeting.

[35] In the absence of a successful claim for special damages, I am not prepared to award disbursements for the costs of the company's investigation and disciplinary meeting which led to Mr Graham's dismissal. Disbursements claims should be focused on expenses incurred in relation to the litigation.

[36] Travel and accommodation expenses are sought for Mr Edwards, who was the Drivetrain representative at the Authority's investigation meeting as well as a witness. The costs of a party's attendance at an investigation meeting are not usually the subject of any costs or disbursements award and I can see no basis for departing from that practice in this case.

[37] The accommodation cost in Tauranga for the advocate who gave evidence was \$214.87 (incl GST) and I allow for that. There was no indication of any flight or car rental cost being incurred for the advocate.

[38] Disbursements of counsel of \$633.70 are claimed. Part of that is for the costs of the company's legal representative's return flight to Tauranga. As noted in *Hines and Eastland Port Limited*¹³ costs of travel and accommodation for counsel are not allowed as a standard award, and particular reasons are needed for the use of out of town counsel in order to justify such an award. No such arguments were made in this case. I therefore do not order disbursement for counsel's air fare, nor for his accommodation.

[39] I allow for the other disbursements totalling \$261.26 which concern process servers, witness costs and copying costs for the extensive bundle of documents which the respondent's counsel arranged for.

[40] I order Mr Graham to pay \$476.13 for disbursements to Drivetrain Limited within 28 days of the date of this investigation.

Nicola Craig
Member of the Employment Relations Authority

¹³ [2018] NZEmpC 111 at [25].