

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 485  
3056552

BETWEEN DANIEL HANCOCK

Applicant

A N D IVAN GASU BRYANT

Respondent

Member of Authority: Nicola Craig

Representatives: Jeremy Ansell, counsel for the Applicant  
Cathy Fisher and Rebecca White, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 2 and 8 August 2019 from Applicant  
7 and 9 August 2019 from Respondent

Date of Determination: 19 August 2019

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**COSTS DETERMINATION OF THE  
AUTHORITY**

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- A. Ivan Gasu Bryant is ordered to pay Daniel Hancock the sums of \$2,500.00 as a contribution to his costs, \$218.50 for the process server's fee and \$71.56 for the filing fee, within 21 days of the date of this determination.**

**History**

[1] This matter has a somewhat lengthy history. In 2017 I found that Daniel Hancock's employer, Ivan Gasu Bryant, had unjustifiably dismissed him and was to

pay him grievance remedies as well as unpaid wages, and statutory and annual holiday pay.<sup>1</sup> A penalty was also imposed on Mr Gasu Bryant for failure to provide Mr Hancock with a written employment agreement. Mr Gasu Bryant had contact with the Authority in the course of that proceeding as set out in the 2017 determination, but did not attend the investigation meeting.

[2] Mr Hancock initially sought through the District Court to recover the money owing. This resulted in the scheduling of a Financial Assessment Hearing on 3 November 2017. Mr Gasu Bryant appears not to have engaged in that process nor attended the hearing. The District Court issued an attachment order against Mr Gasu Bryant in June 2018 but no payments resulted from that process.

### **Compliance order application**

[3] Mr Hancock had been represented by a family member. He then engaged a lawyer to assist. In March 2018 Mr Hancock applied to the Authority for a compliance order as Mr Gasu Bryant had not paid any of the money due under the 2017 determination.

[4] Faced with what is described in submissions as a trenchant refusal to pay, Mr Gasu Bryant was put on notice in the statement of problem that Mr Hancock would be seeking costs on a full indemnity basis. As Mr Gasu Bryant had not provided an address for service and was not represented in this proceeding at that point, Mr Hancock's solicitor had to engage a process server to serve the statement of problem and other documents on Mr Gasu Bryant.

[5] The process server provided affidavit evidence regarding the various difficulties her company had in serving the Authority documents on Mr Gasu Bryant. This is said to have substantially increased legal fees, in terms of the lawyer's dealings with the process server and the Authority regarding service.

[6] Shortly after service was first attempted, the family member who had previously represented Mr Hancock unexpectedly received \$50 from Mr Gasu Bryant. Other payments were later received.

[7] In May 2019 Mr Gasu Bryant filed a partially illegible handwritten statement in reply. The Authority sought that a legible copy be filed but that was not provided.

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<sup>1</sup> *Hancock v Gasu Bryant* [2017] NZERA Auckland 256

Mr Gasu Bryant then obtained legal representation and a fresh statement in reply was received from his lawyer. This denied that Mr Gasu Bryant's relationship with Mr Hancock was one of employment. Mr Hancock was described as a contractor.

[8] A case management conference was held and a timetable set. However, the parties were then able to resolve the issues regarding the compliance order themselves but were to reach an agreement on costs. Submissions on costs were received with both parties also then responding to the other's submissions.

### **Submissions for Mr Hancock**

[9] Mr Hancock seeks an award of indemnity costs and disbursements of \$3,500, on the basis of the non-compliance and delays by Mr Gasu Bryant. That figure is inclusive of the Authority's filing fee and the process server's fees.

[10] Invoices were supplied showing fees incurred to 30 April 2019, inclusive of filing and process serving fees and GST, of \$2,190.21. The claim of \$3,500 includes unbilled time as of 22 July 2019. On 22 July 2019, as part of the wider resolution attempts, a Calderbank offer which included a payment of costs of \$2,000 plus GST was sent.

### **Submissions for Mr Gasu Bryant**

[11] Indemnity costs are opposed, as is any allowance for unbilled time. The awarding of modest costs is emphasised along with the fact of settlement prior to an investigation by the Authority. The quantum of the costs sought was questioned, but invoices were then provided on behalf of Mr Hancock.

### **Costs award**

[12] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000. There is a wide discretion to award costs, on a principled basis.

[13] The Employment Court set out principles guiding the Authority's approach to costs in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup>, which include:

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<sup>2</sup> [2005] 1 ERNZ 808

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

[14] Although there are elements here which come close to what is required for indemnity costs<sup>3</sup>, I consider the matter is best dealt with by way of uplifts to what would otherwise have been ordered.

[15] Although this matter did not require an investigation meeting, I am satisfied that substantial costs were incurred in the pursuit of this application to recover money that has been outstanding for almost two years. I do not make any allowance for costs incurred prior to the matter returning to the Authority however, I do for time incurred after the last invoice date (29 April 2019). After then the statement in reply was filed, correspondence occurred with the Authority and the case management conference held.

[16] Although the purpose of a costs award is not to punish, the delays and non-compliance here significantly inflated Mr Hancock's legal fees well beyond what would normally be incurred for this type of proceeding. I consider that a fairly substantial uplift for those matters should be given on top of a more usual award for a proceeding which has settled before evidence and submissions were filed.

[17] In addition a Calderbank offer was made regarding the costs issue on 22 July 2019. It is clearly identified as being without prejudice save as to costs.

[18] The issue of disbursements is best dealt with separately from the costs award. The process server's fee of \$218.50 was properly incurred, with the invoice provided.

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<sup>3</sup> *Bradbury v Westpac Banking Corporation* [2007] NZCA 234

[19] I order Ivan Gasu Bryant to pay Daniel Hancock within 21 days of the date of this determination, the sums of \$2,500 as a contribution to his costs, \$218.50 for the process server's fee and \$71.56 for the filing fee.

Nicola Craig

Member of the Employment Relations Authority