

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 300  
3081570

BETWEEN                      YOUNG GOO KANG  
Applicant

AND                              KYOUNG YONG LEE  
Respondent

Member of Authority:        Jenni-Maree Trotman

Representatives:              Seungmin Kang, counsel on behalf of the Applicant  
Respondent in person

Submissions Received:        30 June 2020, from the Applicant  
28 June 2020, from the Respondent

Date of Determination:        04 August 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     On 24 June 2020, the Authority issued a determination that declined Young Goo Kang's application for leave to bring a claim against Kyoung Yong Lee.

[2]     Costs were reserved with the parties being encouraged to resolve that issue themselves. In the event that they could not, a timetable was set for the filing of submissions.

**The Respondent's application for costs**

[3]     Mr Lee applies for indemnity costs in the sum of \$13,819.30 including GST. This sum relates to legal costs he says he incurred between December 2019 and April 2020 in relation to the matters before the Authority, and in relation to an application made by Mr Kang to the Court for a freezing order and ancillary order. A copy of

invoices issued to Mr Lee by his legal representatives were provided to the Authority in support of this application.

[4] Mr Kang opposed the Authority making an order for costs. His opposition relied on two key submissions. First, Mr Kang was legally aided throughout the proceedings and therefore no order for costs may be made unless the Authority is satisfied that there are exceptional circumstances, which there are not. Second, part of the costs claimed by Mr Lee relate to legal costs incurred in the Employment court. The parties agreed that those proceedings would be discontinued with no issue as to costs.

### **The Authority's approach to costs**

[5] The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority considers reasonable.<sup>1</sup>

[6] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs.<sup>2</sup> These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.<sup>3</sup> The principles include:

- a) There is discretion as to whether costs would be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

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<sup>1</sup> Employment Relations Act 2000, Schedule 2 clause 15.

<sup>2</sup> *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

<sup>3</sup> *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

### **The effect of s 45(2) of the Legal Services Act 2011**

[7] Mr Kang received legal aid under the Legal Services Act 2011 in relation to the claim before the Authority. Under s 45(2) of that Act, the Authority is not able to award costs against him unless it is satisfied that there are exceptional circumstances.<sup>4</sup>

[8] In determining whether there are exceptional circumstances under subsection (2), s 45(3) sets out conduct that the Authority may take into account. This includes, but is not limited to, the following conduct by the aided person:

- a) any conduct that causes the other party to incur unnecessary cost:
- b) any failure to comply with the procedural rules and orders of the court:
- c) any misleading or deceitful conduct:
- d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
- e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
- f) any other conduct that abuses the processes of the court.

[9] The threshold for a finding of exceptional circumstances is that the conduct must be “sufficiently egregious” or “quite out of the ordinary”.<sup>5</sup>

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<sup>4</sup> Legal Services Act 2011, s 7(1)(e), s 45(2).

## *Analysis*

[10] Having carefully considered the facts in this case, I am satisfied there was nothing in the conduct of Mr Lee's claim that was out of the ordinary or sufficiently egregious so as to warrant forfeiture of Mr Lee's entitlement to the protections afforded by s 45. In making this finding, I have disregarded Mr Kang's conduct prior to the lodging of his statement of problem. This is because the purpose of costs is not to act as punishment or as an expression of disapproval of the unsuccessful party's conduct.

[11] I find Mr Kang is not liable for the payment of legal costs to Mr Lee as the requirements of s 45(2) of the Legal Services Act have not been met.

### **The effect of s 45(5) of the Legal Services Act 2011**

[12] Where the Authority makes no order for costs against a legally aided person, because of s 45 of the Legal Services Act, an order may be made specifying what order for costs would have been made against that person if that section had not affected that person's liability.<sup>6</sup>

[13] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500 for the first day of an investigation meeting.<sup>7</sup> The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case. This matter took place over one day. The starting point for consideration of costs would have been \$4,500.

[14] I was not persuaded that an upwards adjustment to the daily tariff for costs would have been appropriate. There was no evidence of any steps that Mr Lee took that were outside of those steps envisaged by the daily tariff that the Authority has set. Indeed, it appears from what Mr Lee submitted, and from my review of the invoices he provided, that a large part of the costs he sought to have reimbursed relate to the Court proceedings. A joint memorandum provided to the Authority, shows that the parties agreed to the discontinuance of the Court proceeding with no issue as to costs.

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<sup>5</sup> *Laverty v Para Franchising Ltd* [2006] 1 NZLR 650 (CA); *Checkmate Precision Cutting Tools Ltd v Tomo* [2013] NZEmpC 107 at [10]; *Blue Water Hotel Ltd v VBS* [2019] ERNZ 40 at [10]-[12].

<sup>6</sup> Legal Services Act 2011, s 45(5)

<sup>7</sup> Practice Note 2, Costs in the Employment Relations Authority.

[15] I am satisfied however that a downwards adjustment of the daily tariff would have been appropriate. While it is evident that Mr Lee incurred legal costs in relation to steps taken by his representatives prior to the investigation meeting, he was not legally represented at the investigation meeting himself and I understand he prepared the statement in reply himself. An appropriate adjustment would have been to reduce the daily tariff by half, namely to \$2,250. This sum would have been a reasonable contribution payable by Mr Kang towards the legal costs Mr Lee incurred.

### **Outcome**

[16] No order for costs is made against Mr Kang as he was legally aided and there are no exceptional circumstances justifying a costs award being made against him.

[17] If s 45(2) of the Legal Services Act had not applied to his situation, I would have ordered Mr Kang to contribute the sum of \$2,250 towards Mr Lee's costs.

Jenni-Maree Trotman  
Member of the Employment Relations Authority