

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 30
3095892

BETWEEN	HENDRIKA KILLGOUR Applicant
AND	WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority: Michael Loftus

Representatives: Allan Halse, advocate for the Applicant
Anthony Russell, counsel for the Respondent

Submissions Received: 20 December 2021 from the Respondent
3 February 2022 from the Applicant

Date of Determination: 8 February 2022

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 7 December 2021 I issued a determination in which I concluded Ms Killgour had failed to establish she had been unjustifiably dismissed.¹

[2] Costs were reserved and as the successful party Waikato District Health Board (WDHB) now seeks a contribution toward those it incurred defending the claim.

¹ [2021] NZERA 545

[3] Normally the Authority will apply a daily tariff when addressing costs with the current starting point being \$4,500 for the first day and \$3,500 for each day thereafter.² From there adjustment may occur depending on the circumstances.

[4] The investigation saw the parties in attendance for five hours though written submissions were filed later. In such circumstances it would be fair to accept WDHB's submission that a full day is an appropriate *conservative* estimate of the time taken. Applying the tariff would see a contribution of \$4,500 which, despite incurring higher costs, is what WDHB seeks.

[5] On Ms Killgour's behalf it is submitted she should be exempt from contributing toward WDHB's costs due to a disparity of resource available to the parties. She says that *while not agreeing with the Authorities determination [she was] reluctantly prepared to accept it*³ but did not consider she should also reimburse some of WDHB's costs. She says she also incurred a considerable cost to have her claim heard but is personally liable for that while WDHB ... *is taxpayer funded and able to engage expensive lawyers [which] creates a huge disparity of power between the parties*⁴ hence the disparity.

[6] The submission goes on to note Ms Killgour has now challenged the substantive determination and argues it would therefore be inappropriate the Authority determine costs as to do so ... *would prejudice the applicant's ability to pursue her challenge at the Employment Court*⁵ and would, in any event, be premature.⁶ It is submitted the Authority should simply close its file.

[7] First I shall deal with the suggestion the Authority close its file. It is a submission I reject. I do so as case law strongly suggests the opposite applies and normal practice in the employment jurisdiction is to conclude all outstanding matters, including costs, pending an appeal or challenge. That is what the ... *Court expects will happen on appeals from the*

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

³ Applicant's submission at [7]

⁴ Above n 3 at [11]

⁵ Above n 3 at [13]

⁶ Above n 3 at [14]

*Employment Tribunal to the Employment Court*⁷ and while *Swales* refers to the Employment Tribunal that has remained the practice of its replacement which is the Authority.⁸

[8] Turning to Ms Killgour's other submissions. The argument about disparity of resource does not sway me. It is well established that costs follow the event and here the event was Ms Killgour's failure to establish her claim which, all things being equal, entitles WDHB to a contribution toward costs. Indeed, I have to say various admissions Ms Killgour made when giving oral evidence meant her claim never had a realistic chance of success and I would have to suggest she should, given the evidence as presented, perhaps have been counselled against continuing.

[9] The argument about where WDHB's funds come from also fails to convince and here I note a recent decision of the Employment Court, albeit when discussing funding by insurance.⁹ The Court upheld the principle the source of funds is not a decisive factor and this is, I conclude, even more pertinent where, unlike an insurance scenario, the funds used here would have remained available to WDHB for other purposes had they not been spent defending this claim.

[10] Lastly there is the argument an order against Ms Killgour would prejudice her ability to pursue her challenge. Again this elicits little sympathy as it is undermined by what has occurred. The statement Ms Killgour was willing to accept the substantive determination, albeit grudgingly ([5] above), reflects sentiments aired in an earlier e-mail to the Authority which essentially advises the challenge is only being pursued as retribution for WDHB's vindictiveness (*vindictive* being the word used in the e-mail) in pursuing costs.¹⁰ That, in turn, reflects an earlier e-mail in which Mr Halse states *It is extremely unfortunate that the Waikato DHB's representative has taken this aggressive approach* (seeking costs) and, as a result, he would advise Ms Killgour to challenge.¹¹

[11] Accepting Ms Killgour's case might be presented to the Court somewhat differently from the way it played out in the Authority and the result may therefore differ, the fact remains it was her admissions in the Authority that primarily determined the outcome. Given that and

⁷ *Swales v AFFCO New Zealand Limited* EmpC Auckland AC19/01, 23 March 2001 at [3]

⁸ For example *Sandilands v Chief Executive of the Department of Corrections* ERA Wellington WA67A/09, 10 September 2009

⁹ *Smithson v Wellington College Board of Trustees* [2022] NZEmpC 8

¹⁰ E-mail Mr Halse to Auckland ERA (copied Mr Russell) dated 24 January 2022

¹¹ E-mail Mr Halse to Auckland ERA (copied Mr Russell) replying to the submission of WDHB's costs application dated 20 December 2021

the reason why the challenge is being pursued I consider it would be inappropriate not to recognise the costs WDHB incurred and apply the normal principle costs follow the event. It would be improper to subsidise the challenge by depriving WDHB of what should, in the normal course of events, rightfully be its.

Conclusion

[12] By way of summary WDHB has only sought the tariff which has long been recognised as appropriate and I conclude, for reasons expressed above, there is no persuasive argument for a reduction.

[13] As a result I order Hendrika Killgour pay Waikato District Health Board the sum of \$4,500.00 (four thousand, five hundred dollars) toward the costs WDHB incurred defending Ms Killgour's claims.

[14] Payment is to be made within 28 days of this determination.

Michael Loftus
Member of the Employment Relations Authority