

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2024] NZERA 207
3240099

BETWEEN THOMAS MAKINSON
 Applicant

AND HOG FUEL NZ LIMITED
 Respondent

Member of Authority: Shane Kinley

Representatives: Hayley Johnson, advocate for the Applicant
 Roger Philip, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further 18 January, 5 February and 22 March 2024 from the
information received: Respondent
 1 and 9 February, and 22 March 2024 from the
 Applicant

Determination: 10 April 2024

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] On 8 January 2024 the Authority issued a determination in relation to an employment relationship problem that found Thomas Makinson’s employment with Hog Fuel NZ Limited (HFNZ) was a casual employment relationship and that Mr Makinson’s claims of unjustified dismissal and breach of good faith were not made out.¹ As a consequence no orders were made, with costs reserved and the parties encouraged to resolve the matter of costs between themselves.²

¹ *Makinson v Hog Fuel NZ Limited* [2024] NZERA 3 at [33], [42] and [44].

² *Ibid* at [46].

[2] Unfortunately the parties have been unable to reach agreement on costs and Mr Philip has filed submissions on behalf of HFNZ seeking a contribution to HFNZ's costs from Mr Makinson.

[3] The discretion to award costs, whilst broad, is to be exercised in a principled way. The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.³

[4] The primary principle is that costs 'follow the event'. The Authority has power to award any party to pay to any other party such costs and expenses as the Authority thinks reasonable.⁴ Costs are awarded in the Authority generally starting from the daily tariff, currently \$4,500 for the first day and \$3,500 for each subsequent day, with upward and downward adjustments made if appropriate to the circumstances of the case.⁵

The parties' submissions

[5] Mr Philip submitted on behalf of HFNZ that the grievance proceedings lacked merit and the investigation meeting consumed the majority of one day, with an award for costs of \$4,500 being sought.

[6] Ms Johnson submitted on behalf of Mr Makinson that the investigation meeting took just over half a day, so the starting point for a costs award should be \$2,250. She said that Mr Makinson was unable to pay a costs award, providing affidavit evidence from him of his income and expenses, suggesting that in this case costs should lie where they fall or a nominal costs award of \$100 should be made. Ms Johnson also said that given Mr Makinson's financial position, leave would be required for time to pay.

[7] Mr Philip provided confirmation that HFNZ had paid legal costs of greater than the amount it was seeking, and said that the investigation meeting was:

not simply a half day hearing and it through [sic] the lunch hour into the early afternoon by the request of all parties which justify a day of litigation if consideration is given to the extra time involved for the Respondent in travelling to Napier.

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁴ Employment Relations Act 2000, schedule 2, clause 15.

⁵ For further information about the factors considered in assessing costs, see <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>.

[8] I sought further information in relation to one of Mr Makinson's stated expenses related to lawyer's expenses, with a response that advised that those expenses were not related to this matter. I also sought further information in relation to Mr Makinson's financial position in terms of assets, including bank balances, with screenshots from Mr Makinson's banking app from his mobile phone provided by his representative on 22 March 2024. Counsel for HFNZ commented on that information on the same day. I provided a further opportunity for information about Mr Makinson's assets and bank account balances to be provided on 27 March 2024 however no further response was provided on Mr Makinson's behalf, meaning no further comment was sought from HFNZ.

Analysis

[9] HFNZ was the successful party in this case and costs usually follow the event. There is no reason to displace that approach in this case and HFNZ is entitled to an award of costs.

[10] Submissions for Mr Makinson said that the investigation meeting was half a day, while submissions for HFNZ said the investigation meeting ran through the lunch hour into the early afternoon. I consider that the amount of time for this investigation meeting justifies an award of costs for two-thirds of a day, which generates a starting point of \$3,000. I do not consider that travel time warrants an award of a full day, as was sought by HFNZ.

[11] Submissions for Mr Makinson have raised ability to pay as a reason for letting costs lie where they fall or making a very modest award of costs. Evidence was presented of Mr Makinson's limited income and expenditure, with submissions on his behalf that "he was unable to pay an award to costs" and "any award would be most overwhelming for him to meet".

[12] I accept that it is not appropriate for the Authority to impose undue hardship upon an unsuccessful party to proceedings. However, I also note the observation of the Court that:⁶

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the

⁶ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [22].

exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account. ...

[13] Given HFNZ have incurred and paid costs in relation to this matter, they are entitled to an award of costs, notwithstanding Mr Makinson's asserted financial position. In the absence of specific information about Mr Makinson's assets and bank balances I do not consider that a nominal award of costs would be in the interests of justice.

[14] I consider that it is just given the evidence provided about Mr Makinson's income and expenditure, and the general statements about Mr Makinson's ability to pay, to reduce the amount of the award to \$2,000.

[15] Submissions for Mr Makinson indicated that leave would need to be sought for time to pay. I encourage the representatives for Mr Makinson and HFNZ to agree a payment plan for the above award of costs. If they are unable to do so, then HFNZ may seek compliance with the award of costs or the representatives may revert to the Authority to request that the order above be varied or altered under cl 15(2) of sch 2 to the Act. If asked to vary or alter the order above, my preliminary view, taking into account Mr Makinson's income and expenditure, and the amount of the order for costs, is that a reasonable period of time for a payment plan is likely to be between six and twelve months.

Order

[16] I order that Thomas Makinson must pay Hog Fuel NZ Limited \$2,000 as a contribution towards its costs in relation to this matter within 28 days of the date of this determination.

Shane Kinley
Member of the Employment Relations Authority