

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 247  
3021292

BETWEEN DANIEL SMITH &  
LORETTA SMITH  
Applicants

AND STUART MUIR  
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicants in person  
M A Pollak, Counsel for the Respondent

Costs Submissions Received: 12 July 2018 from Respondent

Determination: 10 August 2018

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**COSTS DETERMINATION**

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**A. There is no costs payable by either party.**

**Employment Relationship Problem**

[1] On 26 June 2018 I issued a determination in which I found that Daniel and Loretta Smith were unjustifiably dismissed from their employment by Stuart Muir. However, I awarded no compensation to them because of their egregious conduct. In addition, I found they were not unjustifiably disadvantaged and Mr Muir did not make unlawful deductions from their wages.

[2] I reserved costs and set a timetable for submissions. The parties were encouraged to resolve costs by agreement. If that was not possible, then Mr Muir had

14 days to file a costs memorandum. From the date of service of that memorandum Mr and Mrs Smith then had 14 days to lodge any reply memorandum.

[3] In accordance with the directions of the Authority, Mr Muir made attempts to resolve the issue of costs with Mr and Mrs Smith. His offer was to let costs lie where they fall. Mr and Mrs Smith did not respond to this offer.

[1] Mr Muir filed cost submissions on 12 July 2018 requesting the Authority to make a determination that costs should lie where they fall. No submissions were filed by Mr and Mrs Smith.

### **The Law**

[2] The Authority's power to award costs arises from Schedule 2, Clause 15 of the Employment Relations Act 2000. This confers a wide discretion on the Authority to award costs on a principled basis.

[3] The principles to be applied by the Authority are well settled. They are outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.<sup>1</sup> These principles were affirmed by the Employment Court in *Fagotti v Acme & Co Limited*.<sup>2</sup>

[4] Costs principles include:

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

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<sup>1</sup> [2005] ERNZ 808 at page 819.

<sup>2</sup> [2015] NZEmpC 135.

- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- f) Without prejudice' offers can be taken into account.
- g) Awards of costs will be modest, and must be reasonable.
- h) Frequently costs are judged against a notional daily rate.
- i) Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- j) The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

**Should costs lie where they fall?**

[8] For the reasons that shall follow I am satisfied that costs should lie where they fall.

[3] Firstly, Mr and Mrs Smith were unsuccessful in their unjustified disadvantage and unlawful deduction from wages claims. In addition, their egregious and disgraceful conduct resulted in no award of damages for their unjustified dismissal. As such, Mr Muir was in large part the successful party. Ordinarily a successful party's costs are paid by the unsuccessful party. In this case, Mr Muir does not claim costs from Mr and Mrs Smith.

[4] Secondly, Mr and Mrs Smith do not claim costs from Mr Muir. This is likely to be because they represented themselves throughout the Authority's investigation. It is more likely than not in that Mr and Mrs Smith did not incur any legal costs.

Jenni-Maree Trotman  
Member of the Employment Relations Authority

