

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 23
5607387

BETWEEN DAMON THOMAS
 Applicant

AND CENTRAL HAWKE'S BAY
 COLLEGE BOARD OF
 TRUSTEES
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person
 Alastair Hall and Joelle Avery, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: None from Applicant
 9 March 2017 from Respondent

Determination: 6 April 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 14 December 2016¹ I dismissed Mr Thomas' claim to have been disadvantaged in his employment by an unjustifiable action of his employer. I found he was not being asked to undertake any duties that were outside his job description and I was not persuaded he was being required to do any more than could reasonably be expected of him under that job description.

[2] Central Hawke's Bay College Board of Trustees (the Board) seeks an award of costs against Mr Thomas. Counsel for the Board cites the principles applicable to the award of costs in the Authority as expounded in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.² A Full Court of the Employment Court reconfirmed the

¹ [2016] NZERA 154

² [2005] ERNZ 808 (EmpC)

appropriateness and applicability of those principles to costs awards in the Authority in *Fagotti v Acme & Co Limited*.³

[3] Those principles are well known and it is unnecessary to repeat them all here. Amongst them are:

- There is a discretion as to whether costs would be awarded and what amount;
- The discretion is to be exercised in a principled manner and not arbitrarily;
- costs generally follow the event;
- costs are frequently judged against a notional daily tariff;
- *Calderbank* offers can be taken into account.
- Costs are not to be used as a punishment or as 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;

[4] The Board considers Mr Thomas' conduct to be relevant to an award of costs in this instance. In its submission Mr Thomas' claim to have been disadvantaged in his employment was flawed from the outset as the tasks for which he was claiming to be disadvantaged were clearly set out in his job description. Nonetheless the Board said it attended a number of informal and formal mediations with Mr Thomas in a good-faith attempt to reach a sensible outcome with him.

[5] Counsel for the Board submits Mr Thomas' pursuit of his claim in the face of his union deciding not to act for him, and in the knowledge that he faced significant challenges, was irresponsible and unreasonable resulting in the Board incurring significant costs.

[6] While acknowledging that self-represented litigants should not, as a matter of policy, be discouraged from litigation, either as a result of procedural complexities or burdensome costs, counsel submits that the Board should not be left to "wear the cost of (Mr Thomas') conduct and disregard for the pursuit of a 'doomed' claim". In the Board's submission, if Mr Thomas had been "properly represented and proceeded reasonably" the investigation meeting would not have proceeded.

³ [2015] EmpC 135

[7] Counsel notes the Board considered seeking indemnity costs but decided instead to seek an uplift to the usual daily tariff to reflect "the unreasonable way" Mr Thomas conducted the litigation, which increased its costs. The Board has advised it incurred costs of \$22,990 plus GST and disbursements of \$556.44 in successfully defending Mr Thomas' claims. It has provided no documentation or analysis of how the costs were incurred to support that advice.

[8] The Board also referred to the effort it made to resolve the issue of costs with Mr Thomas following the determination of his application to the Authority, and to Mr Thomas' written response. The Board's correspondence was made on a *without prejudice* basis. Mr Thomas' response to the Board was also made *without prejudice*. This is not a *Calderbank* situation as the determination of Mr Thomas' application had already been determined. I therefore disregard that part of the Board's submissions.

[9] Mr Thomas had the opportunity to make submissions in response to the Board's application for costs but chose not to do so.

[10] In the circumstances I find it appropriate that the principle of costs normally following the event should apply and an award of costs be made in the Board's favour. The Board was put to the expense of defending a claim which I found lacked merit. As the investigation meeting occupied one day, the starting point for a consideration of the quantum of costs is the Authority's notional daily tariff which, at the time, was \$3,500.

[11] That is a significantly lower sum than the costs claimed to have been incurred by the Board. It is relevant, however, to note that the Full Court in *Fagotti*⁴ cited with approval Judge Inglis' costs judgment in *Booth v Big Kahuna Holdings Limited*⁵ where she stated that parties who elected to incur costs that were likely to exceed the Authority's notional daily rate were entitled to do so but could not confidently expect to recoup any additional sums⁶.

[12] I am not persuaded that an uplift to the tariff is justified by Mr Thomas' failure to obtain representation or by the way he proceeded in his pursuit of what he perceived to be a personal grievance. The Authority "is not intended to be an overly

⁴ n3 at [108]

⁵ [2015] NZEmpC 4

⁶ n5 at [108]

legalistic or costly forum."⁷ Mr Thomas was entitled to represent himself in the Authority and should not be penalised for exercising that right.

Determination

[5] Mr Thomas is ordered to contribute towards the costs incurred by Central Hawke's Bay College Board of Trustees in the sum of \$3,500.

Trish MacKinnon
Member of the Employment Relations Authority

⁷ *Stevens v Hapag-Lloyd (NZ) Limited* [2015] NZEmpC 28 at [94]