

**Attention is drawn to an
order prohibiting publication
of parties' identification**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 237
3087392

BETWEEN XJ
Applicant

AND UH Limited
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
Jessica Ann Babe, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 28 May 2021 from the Applicant
12 May 2021 from the Respondent

Date of Determination: 2 June 2021

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] On 14 April 2021 the Authority issued a determination that pursuant to s 10(1) Schedule 2 Employment Relations Act 2000 (the Act) resolved not to publish the parties' names. The determination found that XJ was not in an employment relationship with UH Limited and was therefore unable to pursue his personal grievance claims. This determination deals with costs issues and first summarises submissions received.

Submission from UH Limited

[2] UH Limited's counsel submitted that, having successfully resisted XJ's unjustified dismissal claim, particular aggravating factors present in this matter warrant consideration of full indemnity costs in the amount of \$18,940.25 (inclusive of GST and office disbursements). Counsel cited the civil case of *Bradbury v Westpac Banking Corp*¹ as authority for guidance in awarding indemnity costs and suggested XJ had pursued his claims for an ulterior motive (here being to further an extant relationship property dispute and to place continued psychological pressure on a party to litigation, being a former business and domestic partner). I will not traverse the history of the parties' sadly toxic relationship, suffice to say there is some merit in counsel's assertion that XJ pursued litigation for motives that appeared to be driven to antagonise his ex-partner and/or to circumvent a relationship property settlement.

Submission from XJ

[3] XJ confirmed in his submission that he was linking his unsuccessful employment dispute with an extant relationship property dispute rather than accepting that he was unsuccessful in his claims before the Authority. XJ's submission sought to aggravate the situation by trying re-litigate matters dealt with by the Authority instead of addressing costs issues.

[4] XJ also alluded to financial difficulties he had but he provided no documentary evidence to support this. XJ was directed to file an IRD statement up to the time of the investigation meeting of 25 February 2021 but he only provided such for the period up to 31 March 2020. XJ provided no up to date indication of whether he is in employment beyond his disclosure during the investigation meeting that he was working in an accounting role for a local company and had been since 1 October 2020.

Costs principles

[5] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Act. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² including: that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards

¹ *Bradbury v Westpac Banking Corp* [2009] NZCA 238.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

are to be made consistent with the equity and good conscience jurisdiction of the Authority.³ In addition, it is reasonably well understood that costs in the Authority ought generally to be modest to reflect the jurisdiction and accessibility of the forum.⁴

Assessment

[6] A general principle for a successful party is that costs should 'follow the event' and here UH Limited were wholly successful on a threshold issue (that XJ was not in an employment relationship) that prevented XJ's personal grievance claim proceeding and they are entitled to a contribution to their costs of representation that had to be incurred due to the complexity of the issues involved UH Limited's counsel highlighted and had to be rebutted by evidence and legal submissions.

[7] I have heard an outline of exceptional circumstances that I do consider warrant an uplift beyond the daily tariff of \$4,500 but I am cautious in determining an ulterior motive as existing as that would be close to using costs as a punishment for the unsuccessful party. I do however, have regard to XJ pursuing a claim without legal merit and choosing to do so without legal representation and advice whilst UH Limited incurred significant legal costs to rebut the claims advanced.

[8] In these circumstances, and having regard to the overall justice of the situation an uplift in the daily tariff is warranted.

Award

[9] I order XJ to pay UH Limited the sum of \$8,000 as a contribution to legal costs incurred.

David G Beck
Member of the Employment Relations Authority

³ Section 160(2) Employment Relations Act 2000.

⁴ See *Canterbury and Westland kindergarten Association v Barnes* [2020] NZEmpC 349/2019 at [22].