

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 322
5458942

BETWEEN DARREN ABBOT
Applicant

A N D THE PALLET COMPANY (BOP)
LIMITED (PREVIOUSLY
KNOWN AS BAY PALLETS
(2012) LIMITED)
Respondent

Member of Authority: Rachel Larmer

Representatives: Frances Meikleham & Jeremy Sparrow, Counsel for the
Applicant
Natalie Cooper, Advocate for the Respondent

Investigation Meeting: On the papers

Submissions: 28 September 2015 from Applicant
07 October 2015 from Respondent
12 October 2015 from Applicant

Date of Determination 14 October 2015

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The Authority issued its substantive determination of this matter on 18 September 2015.¹ Mr Abbott succeeded on two of his personal grievance four claims.

[2] Mr Abbot's unjustified dismissal personal grievance succeeded as did one of his unjustified disadvantage grievances (namely the one involving Mrs Sass accessing his private information). Mr Abbot did not succeed on two other unjustified disadvantage grievance claims (namely being subjected to undue stress and being prevented from returning to work).

¹ [2015] NZERA Auckland 269.

[3] The parties were encouraged to resolve costs by agreement but that has not occurred. Mr Abbot now seeks a \$7,000 costs in his favour while The Pallet Company (BOP) Limited (previously known as Bay Pallets (2012) Limited) seeks \$7,000 costs against Mr Abbot. I refer to the respondent in this determination as “PCL”.

[4] Costs are discretionary with the discretion to be exercised judicially on a principled basis. The factors relating to costs in the Authority are so well known there is no need to set them out here again. Suffice to say I have been guided by these well-established costs principles.

Issues

[5] The issues to be determined are:

- (a) Should Mr Abbot be awarded costs?
- (b) Should Mr Abbot be awarded disbursements?
- (c) Does s.45 of the Legal Services Act 2011 (LSA) apply?
- (d) If so, should PCL be awarded costs?

Should Mr Abbot be awarded costs?

[6] Mr Abbot can be said to have achieved only partial success because two of his four claims did not succeed. I therefore consider that both parties had an equal measure of success. In such circumstances I do not view Mr Abbot as the successful party who is automatically entitled to a contribution towards his actual costs.

[7] I do not accept Mr Abbot’s submission that he ultimately succeeded on his most significant claim. All four grievances were pursued equally and all four claims required full investigation. It cannot be said that more time or resources was devoted to the two claims Mr Abbot succeeded on. I do not consider Mr Abbot was predominantly successful or succeeded on his most significant claim and I do not accept he had a “*most significant*” claim as he submits was the case.

[8] Mr Abbot’s costs application does not succeed.

Should Mr Abbot be awarded disbursements?

[9] Mr Abbot seeks disbursements of \$697.46 which he submits were predominantly incurred through the provision of bundles for the investigation meeting.

[10] While I would normally be inclined to equally share the cost associated with bundle preparation between the parties I simply was not given sufficient evidence by Mr Abbot to satisfy me to the required standard that he did in fact incur third party disbursements (rather than normal office expenses).

[11] Nor was I given any evidence as to why or how the actual disbursements claimed were incurred. It is well established that the Authority does not make awards for normal office expenses that a party may incur as a result of engaging counsel.

[12] The invoices submitted by Mr Abbot's lawyer only show "general office expenses" which are itemised as being for "*stationary, forms, telephone*". These items all appear to be the normal costs associated with running a legal practice and not specific disbursements that were actually incurred by Mr Abbot.

[13] The legal aid forms submitted by Mr Abbot also do not assist because while they refer to "*disbursements*" they do not identify what the disbursements were for and no explanation has been provided to the Authority by Mr Abbot relating to such disbursements.

[14] I am therefore left in the dark about the details of the disbursements claimed so am unable to determine whether they were properly incurred and/or whether the amounts claimed were reasonable and/or whether it is appropriate for PCL to contribute to disbursements.

[15] One of the legal aid forms filed by Mr Abbot records that \$150 was charged for Court directed bundles that were printed in house which again indicates that these disbursements were part of Mr Abbot's lawyer's normal office expenses rather than outside disbursements he actually incurred.

[16] The lack of clarity about what is claimed and why and lack of supporting evidence to establish what amounts were actually paid for what specific disbursements means Mr Abbot's claim for disbursements does not succeed.

Does s.45 LSA apply?

[17] Mr Abbott is legally aided. Under s.45 LSA costs orders are not to be made against a legally aided person except in “*exceptional circumstances.*” PCL submits that Mr Abbot falls within the exceptional circumstances requirement identified in s.45. LSA.

[18] PCL submits that Mr Abbot’s situation falls within s.45(3)(c) LSA because he allegedly engaged in “*misleading and deceitful conduct*” because he hid the breach of privacy evidence from PCL until the day of the investigation meeting.

[19] That submission is rejected. Mr Abbot did not hide evidence. As is usual with investigation meetings more detail about the claim came out as a result of witnesses (including PCL’s witness Mrs Sass) being questioned by the Authority and/or cross examined by the other party.

[20] I reject PCL’s claim that Mr Abbot engaged in misleading or deceptive conduct because he clearly raised his breach of privacy concerns from the outset (see personal grievance letter of 02 October 2013). There was no attempt to hide anything as alleged by PCL.

[21] PCL submits that s.45(3)(d) LSA applies because Mr Abbot unreasonably pursued his claim for lost remuneration. I do not accept that submission. Mr Abbot’s lost remuneration claim did not succeed but it was not unreasonably pursued by him.

[22] It was a legitimate claim that was investigated by the Authority which ultimately concluded that the particular evidence proffered in support of it actually fell short of the evidential threshold required to establish the claim to the required standard. I find Mr Abbot’s actions in connection with his lost remuneration claim do not fall with s.45(3)(d) LSA.

[23] PCL submits that s.45(3)(e) LSA applies because Mr Abbot unreasonably refused to negotiate a settlement or participate in alternative dispute resolution. I do not accept that submission. The parties attended mediation with Mediation Services and they also engaged in a number of without prejudice communications via their respective lawyers. I therefore find that s.45(3)(e) does not apply to Mr Abbot’s situation.

[24] I do not consider that Mr Abbot's refusal of PCL's Calderbank offer dated 19 June 2015 brings him within s.45(3)(e) LSA.

[25] I am not satisfied that any of the non-exhaustive factors set out in s.45(3) LSA apply. Nor do I consider any other "*exceptional circumstances*" as required by s.45(3) LSA exists that warrant a costs order being made against Mr Abbot. I therefore find that s.45(3) LSA does not apply.

[26] As per PCL's request under s.45(5) LSA that I indicate what costs I would have awarded against Mr Abbot had he not been legally aided I advise that I would not have awarded any costs against Mr Abbot (see below).

Should costs be awarded against Mr Abbot?

[27] An award of costs must do justice between the parties. I am not satisfied this is an appropriate case in which to award PCL costs. Each party had a measure of success so justice is best served by costs falling where they lie to demonstrate the equal measure of success the parties had.

Rachel Larmer
Member of the Employment Relations Authority