

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 221  
5613977

BETWEEN

NIGEL FRENCH  
Applicant

AND

THE ORDER OF ST JOHN  
SOUTH ISLAND REGION  
TRUST  
Respondent

Member of Authority: Christine Hickey

Representatives: Andrew McKenzie, counsel for the applicant  
Ben Nicholson, counsel for the respondent

Costs submissions received: From the applicant on 30 September 2016  
From the respondent on 7 September and 4 October 2016

Determination: 15 December 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Background**

[1] On 24 August 2016, Mr McKenzie notified the Authority that his client wished to withdraw his claim, lodged on 6 May 2016.

[2] Mr French's application claimed that he had been unjustifiably disadvantaged in his employment. The claim arose out of his failure to pass a practical assessment for his Authority to Practice (ATP) as an Intensive Care Paramedic.

[3] Mr French claimed the internal review of that decision to decline his ATP was unfair and negatively affected his prospects of advancement in his employment. Mr French alleged that St John failed or refused to give him full access to the materials relating to his practical assessment and claimed that an audio recording of the assessment had been altered after the assessment.

[4] Mr French attached a report from NZ Forensics that said that the audio file had been modified after the recorded assessment by the addition of a piece of audio track.

[5] On 24 May 2016, St John filed a statement in reply and an application to strike out Mr French's claim. St John claimed that Mr French's allegations could not amount to a tenable cause of action. It claimed that the matters referred to in the statement of problem did not amount to a personal grievance for unjustified disadvantage. It agreed that Mr French did not pass his Intensive Care Paramedic assessment but says that was not due to any unjustified action or actions of St John.

[6] In addition, St John supplied a report from deCipher, dated 10 May 2016, finding no evidence to conclude the audio recording had been edited or modified from its original form. The report was commissioned to counter conclusions in the forensic report commissioned by Mr French.

[7] I held a telephone case management conference on 7 July 2016 during which Mr McKenzie indicated that he wished to lodge an amended statement of problem. I gave him the opportunity to do that as well as to reply to the strike out application. The due date for the amended statement of problem, which was set in consultation with Mr McKenzie, was 20 July 2016.

[8] Mr McKenzie did not lodge the documents as directed and on 4 August 2016, Mr Nicholson, for St John, asked whether the Authority had received an amended statement of problem and if not, asked the Authority to progress St John's application to strike out the statement of problem.

[9] On 6 August 2016, Mr McKenzie apologised to the Authority that he had not been able to meet the due date for the amended statement of problem. He indicated that within a fortnight he would be able to file an amended statement of problem or withdraw the current matter. He asked for an extension of time to allow this to happen. Mr Nicholson had no objection to the proposed extension of time.

[10] I granted Mr McKenzie a fortnight's extension.

[11] On 22 August 2016, Mr Nicholson enquired whether an amended statement of problem had been filed yet.

[12] On 24 August 2016, Mr McKenzie advised the Authority that Mr French withdrew his claims. Mr McKenzie apologised for his difficulty in meeting the Authority's directions.

[13] The parties have not been able to agree on costs.

### **St John's submissions**

[14] St John's seeks indemnity costs because it says the claim was vexatious. St John submits:

- Mr French's personal grievance claim had no prospect of success.
- Allegations of fraud should not have been made against St John.
- Mr French rejected reasonable settlement offers. St John offered to allow Mr French to resit his ATP assessment under the same process. Since he sat his ATP the process for obtaining the ATP had changed and was more onerous. Therefore, St John was making a reasonable offer to settle which had some benefit for Mr French.
- Mr French should disclose the second forensic report he commissioned after he received deCipher's report from St John.

[15] St John seeks \$8,027.02, made up of legal costs of \$5,105.02 and \$2,925, that was the cost of the forensic report, dated 10 May 2016.

### **Mr French's submissions**

[16] Mr McKenzie submits:

- The proceedings were not so misconceived that they would have been struck out if they had not been withdrawn. The strike out application was premature.
- The case was not vexatious and indemnity costs are not appropriate.
- There was a genuine dispute between the parties.
- St John accepted the personal grievance being raised outside of the 90-day period and in so doing impliedly accepted there was some validity to the proceedings.
- Mr French acted reasonably in withdrawing the claim after reflecting on the Authority's preliminary views expressed in the case management conference.

- Costs of between \$500 -750 may be appropriate, especially in view of the ongoing employment relationship.
- The cost of the forensic report obtained by St John should not be met by Mr French because Mr French intends to bring proceedings in the Human Rights Review Tribunal and the forensic reports will be referred to in those proceedings.
- Costs could lie where they fall.
- Mr French made no allegation of fraud, but the issue of possible alteration of the audiotaped assessment was relevant to whether Mr French was treated fairly by his employer in his quest for promotion.
- Mr French does not accept that St John made any reasonable settlement offer.
- Indemnity costs for the deCipher report are not appropriate as St John was facing an internal complaint and presumably would have incurred this cost even if proceedings had not been lodged.

### **Determination**

[17] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act.

[18] I have not ordered Mr French to disclose any second report to St John as the only matter that remains in my jurisdiction since the withdrawal of the claim is the matter of costs. I do not need to see the second report in order to determine costs.

[19] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup>. The Employment Court, in *Fagotti v Acme & Co Limited*<sup>2</sup>, recently affirmed these principles.

[20] 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.

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<sup>1</sup> [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

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

- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction. Equity and good conscience must be considered on a case-by-case basis.
- d. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- e. 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.
- h. Frequently costs are judged against a notional daily rate, which would have been \$3,500 for these proceedings.
- 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.

[21] The Authority does not use the High Court Rules to determine costs. I consider it reasonable that Mr French should make some contribution towards St John's legal costs. However, this is not a case in which indemnity costs should be awarded. Although Mr French's case may have been ill-considered, which he eventually accepted by withdrawing his claims, it is not possible to say the conduct of his case was so outrageous as to attract indemnity costs.

[22] I do not consider I should use costs as a punishment for Mr French's lodgement of proceedings. I do not consider Mr McKenzie's failure to comply with the Authority's timetable had the effect of unnecessarily increasing St John's costs.

[23] I have taken into account the cost St John incurred in commissioning the deCipher report, and conclude that report contributed to Mr French's decision to withdraw proceedings. The natural assumption from the allegation that the audiotape

of the recording was altered was that, at very least, Mr French considered there was some deliberate act done for the purpose of hiding what had actually been said within his examination. The clear implication was that the alleged alteration was done to disadvantage Mr French. That was a very serious allegation but it was one that was made on 14 September 2015, well in advance of proceedings being filed.

[24] I have considered:

- the early stage at which Mr French withdrew his claim,
- the ongoing nature of the employment relationship,
- the fact that St John is a charitable organisation,
- that no Human Rights Review Tribunal proceedings had been brought as at the date of the parties' costs submissions, and
- the other relevant factors set out in *Da Cruz*.

[25] Nigel French must pay The Order of St John South Island Region Trust \$1,000 in costs.

Christine Hickey  
Member of the Employment Relations Authority