

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 399
3004596

BETWEEN

WAYNE REGINALD
THOMAS
Applicant

AND

AIRWAYS CORPORATION
OF NEW ZEALAND LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Richard McCabe, counsel for the Applicant
Penny Shaw, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 01 November 2018 from the Applicant
15 November 2018 from the Respondent

Determination: 12 December 2018

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 23 August 2018 I issued a determination in which I found Mr Thomas had not suffered an unjustified disadvantage to his employment and, in the absence of consent from Airways, I was unable to make a recommendation to the parties. In addition, I declined Airways' application for non-publication orders.

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions. Submissions were filed by Airways Corporation of New Zealand Limited on 1 November 2018 and by Mr Thomas on 15 November 2018.

Application for costs

[3] Airways Corporation applies for a contribution towards its costs in the amount of \$4,500 representing the current daily tariff in the Authority. This is opposed by Mr Thomas. He takes the position that costs should lie where they fall as each party was partially successful in their respective claims.

Legal Principles

[4] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and were outlined by a full Court in *PBO Ltd v Da Cruz*.¹

[5] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.² The principles include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.

¹ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

² *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] Although costs generally follow the event, that is not always the case. As the Court of Appeal noted in *Health Waikato Ltd v Elmsly*, there are cases where the parties have mixed success and “in such instances it is not necessarily easy to determine who won” the case so as to be entitled presumptively to costs.”³ The Court in *Elmsly* also noted:

[39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

Analysis

[7] I regard the present case as being one in which there has been a mixed measure of success.

[8] Airways Corporation successfully defended Mr Thomas’ claim that he suffered an unjustifiable disadvantage to his employment. However, it was unsuccessful in its application for a non-publication order. In addition, while Mr Thomas was unsuccessful in obtaining a recommendation, the Authority’s decision not to grant non-publication essentially provided more, in terms of the release of information, than what was being sought by Mr Thomas in his draft recommendation.

[9] In light of the mixed success, I have considered the attendances devoted to the respective claims by the parties at the investigation meeting itself and in the lead up to the meeting. In terms of attendances devoted to the respective claims, the following factors are relevant:

- a) A larger amount of time and effort went into resolving Mr Thomas’ claims both before and at the investigation meeting.
- b) In part, this was due to the position Airways took in refusing to release Mr Mathers from his undertaking of confidentiality. Mr Mathers was one of the employees who were interviewed by the investigator as part of the

³ *Health Waikato Ltd v Elmsley*, [2004] 1 ERNZ 172 (CA) at [35].

investigation into the allegations of bullying and was party to a meeting with Mr Healey where the outcome of that investigation was, in part, disclosed. Mr Healey had undertaken to keep the details of the investigation confidential. During a telephone conference with the parties on 3 July 2018 the identification of witnesses was discussed and Mr Mathers was named as a relevant witness to the Authority's investigation. No objection to his providing evidence to the Authority was raised at the time by Airways Corporation. However, following the telephone conference, Airways refused to release Mr Mathers from his undertaking of confidentiality so as to allow him to provide a statement to the Authority unless Mr Thomas agreed to "blanket suppression and non-publication orders". In light of Airways' refusal to release Mr Mathers from this undertaking, Mr Thomas asked the Authority to summons him to provide evidence. This was by way of oral evidence and his handing up a written recollection of the investigation that he had been a party to. This unnecessarily prolonged the investigation.

- c) Airways' application required fewer attendances from Mr Thomas, in that he was not required to formally respond and did not address the application in his witness statement. However, in light of the importance to Mr Thomas in having the outcome of the investigation revealed, it was reasonable that careful preparation be devoted to this aspect of the claim. It is clear from the information provided to the Authority that the parties engaged in dialogue relating to the non-publication orders ahead of the investigation meeting. In addition, there was questioning of Airways' witnesses in terms of this claim and the issue was addressed in Mr Thomas' closing submissions.

[10] Standing back and looking at matters "in the round" I assess costs on the same basis as the Court in *Rodionov v Ozone Technologies Limited*.⁴ I assess costs on the basis that Airways is entitled to 60% of the costs that it would otherwise be entitled to in successfully resisting Mr Thomas' claims.

[11] Mr Thomas has not applied for costs and therefore there is no award in his favour.

⁴ [2018] NZEmpC 56 at [79]-[83].

[12] The Authority's normal daily tariff is \$4,500 for the first day of an investigation meeting. 60% of this figure is \$2,700.

Outcome

[13] Mr Thomas is ordered to pay Airways the sum of \$2,700 towards its legal costs being 60% of the daily tariff of \$4,500. This sum must be paid within 28 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority