

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 92
3022516

BETWEEN DAVID KOPA
 Applicant

AND BRYCOL LIMITED (formally
 known as ASSOCIATED
 ENVIRONMENTAL SERVICES
 LIMITED)
 Respondent

Member of Authority: M B Loftus

Representatives: Nil for Applicant
 Jaesen Sumner and Angela Yiavasis, Counsel for
 Respondent

Investigation meeting On the papers

Submissions Received: 18 September 2018 from Respondent
 Nil from Applicant

Determination: 24 October 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] This is an application for the reimbursement of costs incurred by the respondent, Brycol Limited, when addressing a personal grievance application which did not proceed.

[2] Mr Kopa's views are unknown as he failed to avail himself of the opportunity he was given to respond to Brycol's application and nor did his representative, Sacked Kiwi, have instructions to do so on his behalf.

Citation of respondent

[3] Mr Kopa claim, as originally lodged, cited Associated Environmental Services Limited as the respondent with that being the name of the company at the time he was

employed. However by the time of lodgement the name had changed and it is by the new name, Brycol, that I refer to the respondent.¹

Background

[4] On 9 November 2017 Sacked Kiwi, an employment advocacy firm, lodged a claim with the Authority on behalf of Mr Kopa. It was alleged Mr Kopa had been both unjustifiably dismissed, albeit constructively, and unjustifiably disadvantaged. To its response, which denied Mr Kopa's claims had validity, Brycol added a counterclaim.

[5] After some difficulties in arranging one, a telephone conference occurred on 21 March 2018 to discuss the claims' management. It resulted in a two day investigation meeting being scheduled for 8 and 9 August. A prior exchange of written witness briefs was also scheduled with Mr Kopa's being first.

[6] Mr Kopa's briefs were not furnished according to the schedule and when this was queried by Brycol's solicitors they were told it was due to Sacked Kiwi's inability to obtain instructions.

[7] Further correspondence followed which culminated in Sacked Kiwi advising it had received instruction from Mr Kopa to withdraw the claim.²

[8] Brycol replied that while that may be so the same could not be said of the counterclaim which it intended pursuing. This was communicated to Sacked Kiwi. It was advised the scheduled investigation would therefore proceed and asked to advise Mr Kopa's intentions regarding a defence. Despite further follow up communications from the Authority there was no response.

[9] On the afternoon of 7 August and given a continuing absence of input from Mr Kopa, Brycol's solicitors sent a memorandum which, amidst other things, implied it would forgo putting the parties to the trouble of an investigation by withdrawing its counterclaim provided it could pursue costs. There can be little doubt this was prompted by the fact Brycol's counterclaim was of a nature it could, and perhaps should, be pursued in another jurisdiction.

¹ Refer Certificate of Incorporation dated 21 September 2017

² E-mail Sacked Kiwi to the Authority (copied Brycol's solicitor) on 24 July 2018 at 2.05pm

[10] That led to a further telephone conference during which Sacked Kiwi advised its failure to respond to earlier communications was due to Mr Kopa not replying to its queries of him. As a result it had no instructions as to how to respond to Brycol's memo nor did it know Mr Kopa's intentions in respect to defending the counterclaim though it believed he was not going to do so.

[11] As a result Brycol advised it would withdraw its claim and pursue it elsewhere. It would also proceed with a costs application in the Authority and it is that this determination addresses.

[12] It transpired Sacked Kiwi was correct in saying Mr Kopa was unlikely to defend the claim against him. While the investigation had been abandoned he was not told, yet failed to appear at the scheduled time.

Determination

[13] While Brycol initially indicated it would seek full solicitor/client costs it has not done so. It asks I award \$10,000 which is less than the total billed according to the invoices and charging schedule attached to the application. Also attached in support of the claim are submissions, an affidavit from Brycol's sole director/shareholder and other supporting documents.

[14] That a defending party may seek an award of costs when the claim it faces is withdrawn prior to hearing is well established in the employment jurisdiction.

[15] In determining the level of costs to be awarded in such situations there should be a consideration of issues such as the length of time between withdrawal and the scheduled hearing, the level of preparation already undertaken by the parties and the behaviour of the withdrawing party.

[16] An extreme example of the last point is *Pars Transport Ltd v Lardelli*³ where the Court made an order of indemnity costs against the withdrawing party. It did so in a situation described in a later decision as one in which the withdrawing ...party has behaved badly or very unreasonably.⁴ The Court then went on to observe that to

³EmpC Wellington WC25/06, 13 December 2006

⁴ *Thunderbird One Limited v Harrington* [2014] NZEmpC 66 at [10(e)]

justify an order for indemnity costs ... *there must be misconduct that can be described as flagrant.*⁵

[17] In *Pars* the court described the conduct, which involved a late withdrawal, delaying tactics, timetabling breaches and conduct that resulted in the other side's preparation being unnecessarily duplicated as *totally unacceptable*.⁶

[18] Here Mr Kopa's actions can only be considered less than helpful – indeed unacceptable. His input subsequent to lodging his claim effectively amounted to nothing. Notwithstanding that Brycol had to continue preparing its defence until the withdrawal came and that only occurred after prompting from Brycol when it was struggling to craft its statement's in the absence of ones from Mr Kopa. The billing records show that by then a considerable amount of time, and with it money, had been expended.

[19] Mr Kopa's failure to participate in the process and meet timelines undoubtedly increased that expenditure with Brycol spending money on querying his intentions and having to consider issues that may not have been relevant had the claim been properly explained via the required but absent briefs. Here, and as an aside, I note Brycol's solicitor's hourly rate can only be considered very reasonable.

[20] Notwithstanding the above comments which all favour a significant award in Brycol's favour there is, in my view, one significant difficulty. The documents before me give no indication as to what proportion of the expenditure was attributable to defending Mr Kopa's claim and what might have resulted from pursuit of the counterclaim which did not proceed. That said it is fair to conclude the later might be relatively small as I had, given Mr Kopa's failures, advised Brycol it could support the counterclaim with oral evidence as opposed to pre-prepared written briefs though that occurred relatively late in the timeline.

[21] Having considered the papers before me I consider the most appropriate way to deal with this is to order costs according to the normally accepted tariff and as if the investigation had proceeded for a day which is likely give the truncation that normally occurs with oral as opposed to briefed evidence.⁷ This is because the late withdrawal

⁵ Referring to *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA) at [28]-[29].

⁶ Above n 2 at [18]

⁷ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

meant the bulk of the preparation must already have occurred and notwithstanding the fact the investigation did not proceed Mr Kopa's unreasonable and unexplained failures undoubtedly increased those costs in a way that would have been recognised in an increase in the tariff. In my mind those two factors balance each other.

[22] For the above reasons I order the applicant, Mr Kopa, pay the respondent, Brycol Limited, \$4,500 (four thousand, five hundred dollars) as a contribution toward the costs Brycol incurred in defending the original application.

M B Loftus
Member of the Employment Relations Authority