

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 209  
3028277

BETWEEN SCOTT CUNNINGHAM  
Applicant

AND ANGUS FORSYTHE  
First Respondent

AND CLAUDIA FORSYTHE  
Second Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Greg Bennett, advocate for the Applicant  
Paul Fisher, counsel the Respondent

Investigation Meeting: On the papers

Submissions and further 12 February and 23 March 2019 from the Applicant  
Information received: 12 February and 19 March 2019 from the Respondent

Date of Determination: 9 April 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] On 1 February 2019 I issued a determination in which I found Scott Cunningham had not suffered an unjustified disadvantage to one or more of the terms of his employment. I further found Mr Cunningham was unjustifiably dismissed from his employment by Angus and Claudia Forsythe. However, no award of compensation was payable to him due to his egregious conduct.

[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. This

timetable included a direction that “all submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence”.

[3] Costs submissions were filed by both parties on 12 February 2019. Neither party provided a breakdown of how and when their costs were incurred as directed. Following a request being made by the Authority this breakdown was provided by Mr and Mrs Forsyth’s representative on 19 March 2019 and by Mr Cunningham’s representative on 23 March 2019.

### **Application for costs**

[4] Mr and Mrs Forsyth apply for a contribution towards their costs in the amount of \$10,000 representing the daily tariff for a two day investigation meeting in the Authority plus an uplift of 25%. This is opposed by Mr Cunningham. He takes the position that costs should lie where they fall as each party was partially successful in their respective claims. Alternatively he submits he should be awarded \$4,000 towards the costs he has incurred.

### **Legal Principles**

[5] 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*.<sup>1</sup>

[6] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.<sup>2</sup> 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.

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

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

- 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.
- 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.

[7] Although costs generally follow the event, that is not always the case. 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."<sup>3</sup>

[8] In *William Coomer v JA McCallum and Son Limited* the Employment Court considered the position where a party had mixed success in a matter. At paragraphs [37] to [43] His Honour Judge Smith stated the following (omitting citations):<sup>4</sup>

[37] Determining which party has been successful can be problematic. Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any "realistic appraisal". That conclusion followed because they obtained a monetary award and a finding the Council had breached a duty owed to them. It was immaterial that they had not succeeded to the full extent of their claim because "...success on more limited terms is still success".

[38] In the earlier decision of *Health Waikato Ltd v Elmsly*, the Court of Appeal considered costs in the Employment Court, stating they usually follow the event. It observed that in most cases it is clear

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<sup>3</sup> *Health Waikato Ltd v Elmsly*, [2004] 1 ERNZ 172 (CA) at [35].

<sup>4</sup> [2017] NZEmpC 156 at [37] – [43].

who has been successful and is, prima facie, entitled to an award. The Court said cases where the parties have mixed success are by no means rare and: ... in such instances it is not necessarily easy to determine who “won” the case so as to be entitled presumptively to costs.

[39] That difficulty is illustrated by the costs order that was made. In *Elmsly* both parties had spent approximately the same amount of money on the case. Most of that was spent in arguing about issues where, in the end, Health Waikato was successful. However, Health Waikato was required to pay a contribution towards Dr Elmsly’s costs.

[40] The Court of Appeal said that the trial Judge’s implicit conclusion, that Dr Elmsly had sufficient success at trial to warrant an award of costs, was open to him. The Court had this to say on the entitlement to costs:

The result of the present case was that Dr Elmsly was awarded relief and it would appear (given that there was no Calderbank letter) that he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing Judges are prepared to react appropriately where there has been a Calderbank offer. In any event, whatever the merits of current costs practice, there is nothing out of the ordinary in the conclusion of the Judge that Dr Elmsly was entitled to costs.

[41] The comments in *Elmsly* were echoed by the Supreme Court in *Manukau Golf Club Inc v Shoye Venture Ltd*. The Court held that a fundamental principle applying to the determination of costs, in all the general courts in New Zealand, is that they follow the event.

[42] While I accept the submission for McCallum & Son that the Authority is not a court, the fixing of costs by it is subject to the principles in *Da Cruz and Fagotti* which acknowledge that costs generally follow the event. Inevitably that involves assessing which party has succeeded. *Weaver* is an illustration of that principle.

[43] I agree with the Authority that it was appropriate to consider costs in this case by standing back and looking at things “in the round” and, in doing so, to conclude there had been mixed success...

## **Analysis**

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

[10] Mr Cunningham was successful in establishing he was unjustifiably dismissed. However, he was unsuccessful in his claim for a remedy and in his claim that he suffered unjustified disadvantages to his employment.

[11] 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 substantially larger amount of time and effort went into resolving Mr Cunningham's claims, relating to compensation and unjustified disadvantages to his employment, both prior to and during the investigation meeting. This was because Mr and Mrs Forsyth essentially accepted, to a degree, that they had failed to follow a correct process in terms of the dismissal. They therefore focused their defence on establishing Mr Cunningham's egregious conduct and their denial of the claims of unjustified disadvantage.
- b) Although the claim for unjustified dismissal involved fewer attendances at the investigation meeting, it was nonetheless potentially a very significant claim. It was not unreasonable for careful preparation to be devoted to this claim, and for the relevant issues to be explored.

[12] Of the factors which I have just summarised, the one which has the greatest impact on costs relates to time and effort. I am persuaded that the matters that Mr and Mrs Forsyth were successful on required more time and effort than did Mr Cunningham's success in establishing he was unjustifiably dismissed.

[13] Standing back and looking at matters "in the round" I assess costs on the basis that Mr and Mrs Forsyth are entitled to 70% of the costs that they would otherwise be entitled to in successfully resisting Mr Cunningham's claims and Mr Cunningham is entitled to 30% for the success that he achieved.

[14] The Authority's normal daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for the second day. The investigation meeting was 1.5 days in duration. However, I consider it appropriate to take into account the time

spent by the parties in preparing and filing closing submissions. This is because the filing of closing submissions following the investigation meeting was required to enable Mr and Mrs Forsyth an opportunity to address any matters arising out of Mr Cunningham's Sentencing Indication Notes and the Sentencing Notes of 7 December 2018. These notes were provided by Mr Cunningham to the Authority prior to the investigation meeting but were unable to be shown to Mr and Mrs Forsyth prior to Mr Cunningham's sentencing by virtue of s 63 of the Criminal Procedure Act 2011.

[15] I therefore accept both parties' submission that the starting point for assessing the daily tariff should be \$8,000.

[16] This results in a starting point for legal costs payable by Mr Cunningham to Mr and Mrs Forsyth of \$5,600 and \$2,400 for legal costs payable by Mr and Mrs Forsyth to Mr Cunningham. A difference of \$3,200.

*Uplift in the daily tariff?*

[17] Mr and Mrs Forsyth submit the Authority should increase the legal costs that might ordinary apply by 25% because of the degree of their success and because of the way the litigation was conducted. Particularly:

- a) Mr Cunningham failed to provide disclosure of relevant documents in accordance with directions made by the Authority.
- b) Mr Cunningham was incapable of answering questions during the first investigation meeting requiring a second day to be allocated.

[18] Relevant to this issue is the principle articulated by the full Court in *PBO Ltd* that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct. However, conduct which increases costs unnecessarily can be taken into account in increasing or reducing an award; the Authority's equity and good conscience provision may also be relevant.

*Disclosure*

[19] By minute dated 14 August 2018 Mr Cunningham was directed to provide a copy of various documents to the Authority and to Mr and Mrs Forsyth. There was a

delay in the provision of these documents which required attendances by both parties and the Authority. The outcome was a minute dated 27 August 2018 in which I recorded:

The Authority has received the following documents from the Applicant:

1. Summary of Facts (Cannabis Charge)
2. Summary of Facts (Firearms Charges)
3. Sentencing Indication on Cannabis and Firearms Charges

Mr Bennett opposes the production of these documents to the Respondents in reliance on s 63 of the Criminal Procedure Act 2011 and due to his client's "present mental state".

I see no reason justifying the Authority not releasing the Summary of Facts to the Respondent. The provision of the summary was discussed during the case management conference with the parties and it was agreed that the Applicant would provide these to the Respondent. Furthermore, s 63 of the Criminal Procedure Act 2011 does not prohibit publication of the summary of facts.

At this stage I am not satisfied that the Authority can release the Court's sentencing indication. In order to satisfy myself that it is appropriate to release this indication to the Respondent, I have asked Mr Bennett to advise me the date when the Applicant was (or will be) sentenced. I will then decide whether or not it is appropriate to release the sentencing indication to the Respondent and, if so, whether any conditions will be placed on its release.

[20] I have reviewed the time and attendance records provided by Mr and Mrs Forsyth's representative. I am satisfied that a reasonable contribution towards the costs incurred in relation to the disclosure attendances is \$200. It is appropriate that the daily tariff is uplifted by this amount. I do not award any additional increase for time spent reviewing this material at the investigation meeting as this is already taken into account in the daily tariff.

*A second day*

[21] A second investigation day was required due to Mr Cunningham being unfit to continue providing evidence on the first day. However, any additional legal costs expended by Mr and Mrs Forsyth attending the investigation on the second day are recognised by the daily tariff. I therefore decline to order an uplift of the daily tariff under this head.

## **Outcome**

[22] Mr Cunningham is ordered to pay to Mr and Mrs Forsyth an amount of \$3,400 towards their legal costs within 14 days of the date of this determination. This sum represents the difference between the legal costs payable by Mr Cunningham to Mr and Mrs Forsyth (\$5,800) and the legal costs payable by Mr and Mrs Forsyth to Mr Cunningham (\$2,400).

Jenni-Maree Trotman  
Member of the Employment Relations Authority