

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 447
3038051
3042371

BETWEEN

DEVAN HAGBERG
Applicant in 3038051
Respondent in 3042371

AND

NEW ZEALAND WINE AND
SPIRIT MERCHANTS LIMITED
Respondent in 3038051
Applicant in 3042371

Member of Authority: Nicola Craig

Representatives: Devan Hagberg in person
Garry Critchley for New Zealand Wine and Spirit
Merchants Limited

Investigation Meeting: On the papers

Submissions And Other Information Received: 18 June 2019 from Devan Hagberg

11 and 15 July 2019 from New Zealand Wine and Spirit
Merchants Limited

Date of Determination: 30 July 2019

COST DETERMINATION OF THE AUTHORITY

- A. New Zealand Wine and Spirit Merchants Limited is ordered to pay Devan Hagberg within 28 days of the date of this determination \$2,500.00 as a contribution towards his costs, along with \$419.02 for disbursements.**

The first determination

[1] On 18 June 2019 I issued a determination¹ finding that:

- (a) Devan Hagberg had been subject to unjustified action by New Zealand Wine and Spirit Merchants Limited (NZWSM or the company) to his disadvantage and had been unjustifiably dismissed by it;
- (b) NZWSM was to pay Mr Hagberg \$11,307.65 gross as reimbursement of remuneration, \$12,000 as compensation for humiliation, loss of dignity and injury to feelings; and
- (c) NZWSM had not established its claims against Mr Hagberg.

[2] The parties were invited to attempt to resolve the question of costs between themselves. It is unclear whether they attempted to do so, but Mr Hagberg filed submissions seeking costs on the same day that the first determination was issued.

[3] Later Garry Critchley for NZWSM made contact with the Authority indicating the company's inability to pay. He then filed a memorandum of costs.

Submissions from Mr Hagberg

[4] Mr Hagberg seeks the national daily tariff of \$4,500 for the first day of the investigation meeting and \$3,500 for the second day, along with the filing fee.

[5] Although Mr Hagberg represented himself at the investigation meeting, he received advice and assistance during the case from an employment advocate. Invoices totalling \$11,948.60 (inclusive of GST) from the advocate's company were supplied.

Submissions from NZWSM

[6] Mr Critchley's email of 11 July 2019 to the Authority states that the company has no ability to pay the first determination's awards. An instalment plan involving modest weekly payments, in comparison to the total award.

[7] The Memorandum on Costs applies for full reimbursement of the costs incurred by NZWSM at the daily tariff rate of \$4,500 for the first day and \$3,500 for the second day,

¹ *Devan Hagberg v New Zealand Wine and Spirit Merchants Ltd* [2019] NZERA 360

along with the filing fee incurred for the counterclaim. Supporting the application were invoices from an employment law advisor. This was the same advisor who had assisted NZWSM for the restructuring process and disciplinary process leading to Mr Hagberg's dismissal, referred to in the first determination. The invoices appear to include time spent on both those processes. That advisor did not represent NZWSM at the investigation meeting.

Costs award

[8] Under clause 15 of Schedule 2 of the Employment Relations Act 2000 the Authority has the power to award costs. The Authority's discretion is governed by principles set out by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*². These include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Also, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[9] Costs usually follow the event, that is the unsuccessful party will be required to make a contribution towards the successful party's costs. Mr Hagberg was largely successful in his claims, in that he established unjustified disadvantage and unjustified dismissal claims. No finding was made on the good faith claim as I considered the issues were captured by the grievance claims and remedies. NZWSM on the other hand did not establish any of the claims in its counterclaim.

[10] In those circumstances I find that Mr Hagberg is entitled to receive a contribution from NZWSM for his costs and the company is not entitled to any award of costs to it. For the sake of completeness I also note that a portion of the costs claimed by NZWSM related to events whilst Mr Hagberg was still employed and were not costs incurred in relation to this litigation.

[11] In terms of Mr Hagberg's claim for costs, I start by considering the daily tariff. The investigation meeting lasted two days. The notional daily tariff is \$4,500 for the first day and \$3,500 for the second and subsequent days, amounting to \$8,000 for the hearing time here.

[12] Mr Hagberg however was not represented at the investigation meeting. Looking at the invoices filed by him, the time billed for starts from 27 August 2018 when the

² [2005] 1 ERNZ 808

restructuring process was underway. In the absence of a claim for special damages, costs should relate to the litigation in question. Mr Hagberg's representative did file his initial claim whilst Mr Hagberg was still employed and I take into account the preparation for that claim. However, the invoices also include time in preparation for an attendance at mediation, which are not usually claimable.

[13] I have estimated that around \$3,700 plus GST of the attendances relate to litigation matters which I would be prepared to award costs on. Mr Hagberg is entitled to a contribution to those costs. I am not satisfied that he should receive the full amount or indemnity costs, as such costs are usually only awarded in cases involving exceptionally bad behaviour³, which is not the situation here.

[14] I order NZWSM to pay Mr Hagberg within 28 days of the date of this determination the sum of \$2,500.00 as a contribution towards his costs.

[15] Mr Hagberg also claims \$347.46 as the transcription costs for a lengthy meeting which he had with Mr Critchley. That meeting formed part of Mr Hagberg's unjustified disadvantage claim and the transcription was required for the Authority's process. In addition Mr Hagberg is entitled to be reimbursed for the Authority's filing fee of \$71.56. I order NZWSM to pay Mr Hagberg within 28 days of the date of this determination the sum of \$419.02 for disbursements.

Nicola Craig
Member of the Employment Relations Authority

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [8]