

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 138
3074872

BETWEEN DAVID WALFORD
 Applicant

AND DEPARTMENT OF CORRECTIONS
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Jeff Goldstein, counsel for the Applicant
 Andrew Shaw, counsel the Respondent

Investigation Meeting: On the papers

Submissions and further 30 January 2020, from the Applicant
Information received: 13 February 2020 from the Respondent

Date of Determination: 1 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 23 December 2019 I issued a determination in which I found David Walford had been unjustifiably dismissed by the Department of Corrections (Corrections). However, as a result of my findings of egregious conduct, no remedies were ordered.

[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. Cost submissions were filed by Mr Walford on 30 January 2020 and by Corrections on 13 February 2020.

Application for costs

[3] Mr Walford applies for a contribution towards his costs in the amount of \$8,000. This sum represents the daily tariff for a two day investigation meeting in the Authority. This is opposed by Corrections. It 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. 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

Analysis

[7] Both parties had a measure of success, Mr Walford in obtaining a declaration that he was unjustifiably dismissed, and Corrections in not having to meet any remedies, including reinstatement.

[8] Corrections submit that this outcome should result in costs lying where they fall. It submits that it proved that Mr Walford’s actions against Prisoner V were egregious and that he should not be entitled to any remedies, including reinstatement to his position. This success should be recognised in any award of costs.

[9] Mr Walford maintains that to allow costs to lie where they fall would amount to a punitive costs award and double counting of misconduct/contribution. He relies on the Court of Appeal’s decision in *White v Auckland DHB*.⁴

[10] The outcome in *White v Auckland DHB* was that, although it was open to the Judge at first instance to reduce the remedies provided to the successful plaintiff because of his contributory conduct, it was not permissible for him to refuse the appellant costs by reason of the very same behaviour.⁵ While that case concerned the approach to costs in the Court, the principle is applicable to the Authority.⁶

[11] The Court went on to say:

In reaching our conclusion we do not overlook Mr Toogood’s submission that the Judge may have reached the same conclusion on costs having regard to overall outcomes and on the basis that each side achieved some level of success. However, we cannot be confident that the Judge would have reached the same conclusion on this basis if he had confined the issue of the appellant’s contributory conduct to the issue of remedies.

³ *Health Waikato Ltd v Elmsley*, [2004] 1 ERNZ 172 (CA) at [35]. *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156 at [37] – [43].

⁴ [2008] ERNZ 635 (CA).

⁵ Above at n 4 at [40].

⁶ *Nathan v Broadpectrum (New Zealand) Ltd* [2016] NZEmpC 135 at [75].

[12] The above dicta are clear that I cannot take into account Mr Walford's egregious behaviour in awarding remedies. However, I do not take from the Court's findings that I cannot undertake an assessment of the attendances by the parties devoted to the respective claims at the investigation meeting itself, and in the lead up to the meeting, to assess whether costs should be awarded and to whom.

[13] In terms of attendances, there can be no doubt that a substantially larger amount of time and effort went into resolving Mr Walford's claim for unjustified dismissal than to his claim for remedies. However, although his claim for remedies involved fewer attendances, it was nonetheless an important aspect of Mr Walford's claim, particularly in terms of his claim for reinstatement.

[14] It was reasonable in those circumstances for Corrections to devote careful preparation to this aspect of Mr Walford's claim. This included providing written evidence from its witnesses to establish that reinstatement was neither reasonable nor practicable, and filing comprehensive submissions following the completion of the investigation meeting. It must also be noted that the investigation meeting was lengthened somewhat by the questioning of witnesses on the reasonableness and practicality of Mr Walford being reinstated to his former role.

[15] Standing back and looking at matters "in the round", I assess costs on the basis that Mr Walford is entitled to 80% of the costs that he would otherwise be entitled to for the success he achieved, and Corrections is entitled to 20% for its successful resistance of Mr Walford's claim for remedies, including reinstatement.

[16] Applying these percentages results in legal costs payable by Corrections to Mr Walford of \$6,400 and legal costs payable by Mr Walford to Corrections of \$1,600. A difference of \$4,800.

[17] Corrections is ordered to pay Mr Walford an amount of \$4,800 as a contribution towards his legal costs together with a sum of \$71.56 being the Authority's filing fee on his application and the sum of \$306.66 being the sum charged by the Authority to Mr Walford for hearing fees. These sums are payable within 28 days of this determination.

Outcome

[18] The overall outcome is:

- a) Corrections is ordered to pay Mr Walford an amount of \$5,178.22 within 28 days being made up of:
- i. The sum of \$4,800 towards its legal costs;
 - ii. The sum of \$71.56 being the Authority's filing fee.
 - iii. The sum of \$306.66 being the Authority's hearing fees.

Jenni-Maree Trotman
Member of the Employment Relations Authority