IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2020] NZERA 186
3051192

BETWEEN	WPY Applicant
AND	J B ROOFING MAINTENANCE AND REPAIR LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Graham Ogilvie, advocate for the Applicant David Lunn, for the Respondent
Submissions Received:	7 April and 7 May 2020 from Applicant 7 April and 6 May 2020 from Respondent
Date of Determination:	7 May 2020

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 17 February 2020 I issued a determination addressing 5 claims brought by WPY. I concluded WPY had a personal grievance in that he had been unjustifiably dismissed but refused to grant remedies on the grounds his conduct meant they should be forfeit.[1] WPY was wholly successful with a claim for unpaid wages but failed with the other three.

[2] Costs were reserved and WPY now seeks a contribution of $4,500 toward a total of $5827.50 incurred establishing he had a grievance and that wages were payable.

[3] When notified about the costs application JB Roofing advised the conclusion regarding wages had been challenged. It also expressed incredulity there was a costs application given WPY *was decisively ruled against*.

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[1] [2020] NZERA 68

[4] The challenge actually means it is desirable the issue of costs be determined as it is preferable the Authority's process is complete and the Court has a complete picture of the issues before it.[2] JB was advised of this and asked if it wished to provide a substantive response.

[5] It did. JB notes WPY received no remedies for the dismissal and attributes that to the fact he was a thief, though I note the prospect of criminal proceedings remains no more than a *consideration* with alternate strategies to address JB's alleged loss being considered. It is said Mr Ogilvie should have assessed his client as *unreliable and risky* and by choosing to proceed therefore accept the commercial risk that would result. JB goes on to say it *simply dismisses the notion that it is required to pay costs to an Applicant who is the author of his own misfortune and Mr. Ogilvie is mistaken if he thinks he is "entitled" to an automatic payout for turning up on behalf of his client who he knew to be a unreliable*. Issue is also taken with the amount sought with an assertion the tariff is excessive.

[6] The response then turns to the conclusion regarding wages and while not saying so expressly, seems to take issue with my use of s 132 by saying it never received a request for the time and wage records. I must say that does not sit well with the content of Mr Ogilvie's letter of 12 December 2018 raising the grievance and Mr Lunn's oral acceptance, when questioned by Mr Ogilvie at the investigation, that he received the letter and it contained a request for the time and wage records.[3]

[7] Perhaps more important is reference to the grounds of challenge which are essentially that an external payroll provider made some mistakes and JB now has evidence of that which was not before the Authority. While that may be so it is a matter for the Court and does not alter my determination as that evidence was never before me.

[8] Finally JB dismisses the case law referred to by Mr Ogilvie as irrelevant but unfortunately for JB that misses a key point. The cases so casually dismissed reflect numerous instances in which an applicant has received a contribution toward costs after having established the existence of a grievance but then being deprived of remedies as a

[2] *Swales v AFFCO New Zealand Ltd* EmpC Auckland AC19/01, 23 March 2001 and *Sandilands v Chief Executive of the Department of Corrections* ERA Wellington WA67A/09, 10 September 2009
[3] See also paragraph [53] of the substantive determination: above n 1

result of their conduct. Of those cited *Kostic v Dodd*[4] is the most pertinent as it was a decision of the Employment Court. The Court said:

> [103] … The employer challenged that award on the grounds that, having made a finding that Mr Kostic contributed 100 percent to the situation giving rise to his personal grievance and awarded him no remedies, he should not have received a contribution to his costs.
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> [104] I agree with the Authority's reasoning that it is wrong in principle to deprive an employee who has been found to have been unjustifiably dismissed of an award of costs because there has also been a substantial finding of contribution. I repeat in the context of this case what I said recently in *Davis v Harbour Inn Fisheries Ltd* unreported, 15 May 2007, CC 9/07:
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> *[11] ... A declaration that an employer has acted unjustifiably will often play a significant part in resolving an employment relationship problem and be of considerable value to an employee independent of any remedies which may flow from it. That is because the employment relationship is usually more than a purely commercial arrangement. Emotions and feelings are frequently involved, including pride. A declaration that an employee has been unjustifiably dismissed, even when qualified by a finding of substantial contribution, can of itself assuage some of the feelings of humiliation, loss of dignity, and injury to the feelings of the employee arising out of a dismissal.* ….
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> *[12] By obtaining a declaration that he had been unjustifiably dismissed, Mr Davis therefore acquired something of actual or potential value. To an extent, it offset the Authority's subsequent conclusion that Mr Davis had contributed very substantially to his own dismissal. As Mr Brown aptly submitted, the outcome was that both parties were found to be at fault.*

[9] In WPY's case I applied *Xtreme Dining Limited v Dewar*[5] as opposed to deducting 100% as occurred in *Kostic* though I conclude the outcomes comparable. It is simply that *Xtreme* is now considered a more appropriate approach but there is nothing to suggest *Kostic* no longer remains good law as it remains consistent with the principles still applied to an award of costs.

[10] The simple fact is costs follow the event. The event is WPY's success in obtaining a declaration he was unjustifiably dismissed and perhaps, more importantly, an order wages were due. While WPY failed with three claims they were minor. It follows, given the case law referred to above, WPY is due a contribution toward his costs as costs are not to be used to punish as JB is essentially urging me to do. In any event I have to conclude WPY's behaviour has already been addressed via the removal of remedies for the dismissal.

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[4] *Kostic v Dodd and Milligan and/or Motoworld Systems Limited* [2007] NZEmpC 86
[5] [2016] NZEmpC 136 at [216]

[11] Costs are to address the fact of litigation, the outcome and how the parties conducted themselves when addressing the issues and in this instance there was, other than some testiness between the parties, nothing out of the ordinary.

[12] Normally the Authority will use a daily tariff approach when addressing a costs claim with the normal starting point being $4,500 for the first day.[6] From there adjustment may be made depending on the circumstances. As already said JB takes issue with the tariff and its amount ([5] above) but this misses two points. First it is to cover not just the investigation meeting but preparation. Second both the approach and the amount have long been accepted by the Court as appropriate with the most recent confirmation of that occurring as recently as yesterday.[7]

[13] JB also seems to think it is Mr Ogilvie seeking costs and takes issue with that. It is not Mr Ogilvie seeking costs but WPY who seeks a contribution toward those he incurred for professional services he was entitled to obtain.

[14] The investigation meeting took just over half a day which, applying the tariff, would see an award in the order of $2,500. The claim for $4,500 represents a significant uplift.

[15] It is submitted an uplift is warranted:

> *... due to time and costs in the Respondent failing to comply with directions and also statutory requirements. These include the failure to provide an employment agreement, and failure to provide time and wages records and holiday records on request.*

[16] Reference is also made to the fact the wages are yet to be paid despite an order that occur by 16 March 2020. On this I simply advise JB a challenge does not act as a stay and it might be prudent to seek some advice, though I acknowledge an e-mail from JB which suggests that may have happened.

[17] WPY does not say what he is referring to when commenting on a failure to comply with directions but a reading of the Authority's file would suggest it is a reference to the fact there were delays in the early stages. While that is so, JB communicated actively and its position was clear. The delay which occurred appears to be attributable to a lack of knowledge about the process and the law as opposed to a deliberate attempt to delay.

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

[7] *Johnson v Chief of New Zealand Defence Force* [2020] NZEmpC 59

[18] The reference to a failure to provide an employment agreement does not persuade as that was one of the claims with which WPY failed. Similarly the failure to provide time and wage records is not a compelling argument. If anything it made it easier for WPY with respect to the wage claim as it allowed s 132 to be applied and on that I have already commented in paragraph [6]. I also note little time was spent on that claim given JB's admissions and its inability to explain the difference between what WPY claimed and what it thought owing.

[19] In the circumstances, and having considered the submissions I conclude there is no reason to depart from the normal tariff. Accordingly I order the respondent, JB Roofing Maintenance and Repair Limited, pay WPY the sum of $2,500.00 (two thousand, five hundred dollars) as a contribution toward the costs he incurred pursuing his claims.

[20] Finally I again note there is an order prohibiting the publication of anything which identifies the applicant, WPY.[8]

Michael Loftus
Member of the Employment Relations Authority

[8] Clause 10 of schedule 2 of the Employment Relations Act 2000 and the original determination (n 1 above)