

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2020] NZERA 303
3066737**

	BETWEEN	EVAN HARVEY Applicant
	AND	INFRACORE LIMITED Respondent
Member of Authority:	Eleanor Robinson	
Costs Submissions	7 July 2020 from Applicant 23 June 2020 from Respondent	
Date of Determination:	04 August 2020	

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 9 April 2020 [2020] NZERA 146, I addressed a preliminary issue of whether or not the Applicant, Mr Evan Harvey, had raised his unjustifiable disadvantage grievances with the Respondent, InfraCore Limited (InfraCore) within the 90 day statutory time frame pursuant to s 114(1) of the Employment Relations Act 2000 (the Act).

[2] In that determination I found that Mr Harvey had not raised 9 out of 10 unjustifiable disadvantage grievances within the 90 day statutory time frame.

[3] Mr Evan subsequently withdrew the remaining unjustifiable claim and the proceedings were accordingly discontinued.

[4] InfraCore is now seeking costs in relation to the preliminary matter.

[5] The matter was determined 'on the papers'.

[6] InfraCore, citing actual costs of \$16,664.07 (including GST) is seeking a contribution to costs in the vicinity of 50 – 75% of the daily tariff rate for a one day investigation meeting (currently \$4,500.00 for the first day of investigation).

[7] InfraCore, although accepting that preliminary matters being dealt with ‘on the papers’ reduces the level of costs for the parties, submits that nonetheless in this particular instance significant time and resources were spent by the Respondent in addressing matters which were historical in nature and which necessitated a response to all 10 grievances.

[8] It is submitted for Mr Harvey that although Mr Harvey withdrew the remaining personal grievance claim which had been found to have been raised within the statutory time frame, this was due to his evaluation of costs versus benefit rather than to any acceptance that it would not succeed..

[9] It is further submitted that Mr Harvey is at the lower end of the socio-economic scale in terms of income.

Principles

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] Costs are at the discretion of the Authority. The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*¹.

Determination

[12] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee* at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”²

[13] Principles also include that costs normally follow the event. In this matter, InfraCore were the successful party

¹ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

² *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305

[14] It is submitted that a costs award against Mr Harvey will be adverse considering his socio-economic status. I accept that it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However I also note the observation of Chief Judge Inglis that:

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.³

[15] InfraCore was the successful party and is entitled to an award of costs. In considering if this is a case in which it is appropriate for the Authority to use its discretion by making an award below the level indicated by InfraCore as appropriate despite the actual costs it occurred in defending this matter, I recognise the merits of the submission regarding Mr Harvey's ability to pay.

[16] However I also recognise the merits of the submission made by InfraCore of the time and resources taken by it in addressing all of the disadvantage claims brought by Mr Harvey.

[17] Further I note that in examining each of the claims, the time spent by the Authority in determining the matter was in excess of half a day of investigation time.

[18] In balancing all of these considerations I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the appropriate measure for costs.

[19] Accordingly Mr Harvey is ordered to pay InfraCore the sum of \$2,250.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

[20] It may be that InfraCore is willing for Mr Harvey to make payment by instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority

³ *Tomo v Chekmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [22]