

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 305  
3082832

BETWEEN                      HANSHENG LIU  
Applicant

AND                              NAVIGATOR ACCOUNTING NZ  
LIMITED  
Respondent

Member of Authority:              Jenni-Maree Trotman

Representatives:                      Michael Kim, counsel on behalf of the Applicant  
Scott Russell, counsel on behalf of the Respondent

Investigation Meeting:              On the papers

Submissions and further              31 July 2020 and 4 August 2020 from the Applicant  
Information received:              4 August 2020 from the Respondent

Date of Determination:              06 August 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      On 30 July 2020, I issued a determination in which I found Hansheng Liu had suffered an unjustified disadvantage, and had been unjustifiably dismissed, from his employment with Navigator Accounting NZ Limited.

[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.

**Application for costs**

[3]      Mr Liu applied for an uplift to the Authority's daily tariff. A specific sum was not sought, although invoices provided showed that he had been invoiced a sum of \$14,380.76 for the period from when he first instructed his solicitors to raise a personal grievance to the conclusion of the Authority's investigation.

[4] Mr Liu's application was opposed by Navigator. It took the position that costs should be awarded to it, or costs should lie where they fall. In summary this was because, first, it was more successful than Mr Liu in that he received less by way of remedies than he claimed and was only partially successful in the claims that he brought. Second, Navigator offered to settle with Mr Liu for an amount that was significantly more than he was awarded by the Authority.

### **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.
- 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.

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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].

- 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.

### **The starting point for assessing costs – Mixed success**

[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 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:

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

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

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...

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

[10] Mr Liu was successful in establishing both his claim for unjustified disadvantage and his claim that he was unjustifiably dismissed. However, in terms of the later, while establishing the process following by Navigator was flawed, he was unsuccessful in establishing that his redundancy was not genuine. This led to the remedies awarded to Mr Liu being substantially less than what he claimed.

[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 larger amount of time and effort went into resolving Mr Liu’s claims relating to unjustified disadvantage to his employment, and the redundancy process followed by Navigator, than to the genuineness of the redundancy and to remedies.

- b) Although the genuineness of Navigator's decision to make Mr Liu redundant involved fewer attendances, it was nonetheless a very important component of Navigator's defence as it was relevant to the award of remedies. It was not unreasonable for careful preparation to be devoted to this claim, and for the relevant facts 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 Liu was successful on required more time and effort than did Navigator's success.

[13] Standing back and looking at matters "in the round" I assess costs on the basis that Mr Liu is entitled to 80% of the costs that he would otherwise be entitled to and Navigator is entitled to 20% for the success that it achieved.

[14] The Authority's normal daily tariff is \$4,500 for the first day of an investigation meeting.<sup>5</sup> The investigation meeting was 1 day in duration.

[15] The starting point for assessing the daily tariff is \$4,500. This results in a starting point for legal costs payable by Navigator to Mr Liu of \$3,600 and \$900 for legal costs payable by Mr Liu to Navigator. A difference of \$2,700.

### **Should the daily tariff be adjusted?**

#### *Navigator's conduct*

[16] Mr Liu submits that the daily tariff should be adjusted upwards because, first, Navigator's conduct in failing to concede wage arrears were owing until the investigation meeting prolonged the proceedings, and increased Mr Liu's costs. Second, Navigator's settlement efforts were "extremely limited".

[17] I was not persuaded that either of the grounds advanced by Mr Liu warrant an uplift to the daily tariff. There is no evidence before the Authority that establishes Mr Liu's costs were unnecessarily increased by Navigator's alleged conduct. As the full Court in *PBO Ltd* said, costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.

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<sup>5</sup> Practice Note 2, Costs in the Employment Relations Authority.

[18] Any legal costs expended by Mr Liu in relation to his unjustified disadvantage claim are already recognised by the daily tariff. I therefore decline to order an uplift of the daily tariff under this head.

### *Settlement offers*

[19] The making of a Calderbank offer is a relevant factor when considering costs. If a Calderbank offer is made, and the opposing party does not beat the offer, there should be a steely response by the Courts and the Authority, as that is in the broader public interest.<sup>6</sup>

[20] The memoranda from Counsel, filed in support of their client's claims for costs, contain various assertions of fact in relation to settlement offers. Neither memorandum is supported by any evidence from the parties themselves.

[21] In terms of Navigator's claim, it simply submits that it offered Mr Liu a significantly better settlement offer at mediation than he achieved from the Authority's determination. The Authority is unable to conclude from this limited information that Mr Liu acted unreasonably in rejecting Navigator's offer.<sup>7</sup>

[22] In relation to Mr Liu's claim, attached to his Counsel's memorandum was a copy of a power point presentation that contained an offer that Counsel submitted was made at a meeting between the parties. Even if the offer was made as described, it was for an amount considerably higher than the remedies that Mr Liu was ultimately awarded in the Authority's determination. As such, Navigator's rejection of this offer if indeed it was made, could not be deemed unreasonable.

[23] For the foregoing reasons, I make no adjustment to the daily tariff under this head.

### **Outcome**

[24] Navigator is ordered to pay Mr Liu an amount of \$2,700 towards his legal costs within 14 days of the date of this determination. This sum represents the difference between the legal costs payable by Navigator to Mr Liu of \$3,600 and the legal costs payable by Mr Liu to Navigator of \$900.

Jenni-Maree Trotman  
Member of the Employment Relations Authority

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<sup>6</sup> *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 (CA) at [53]; *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18]-[20]; *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [109].

<sup>7</sup> *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].