

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2020] NZERA 368
3064878

BETWEEN

IAN GORDON MANAWAITI
Applicant

AND

SECRETARY OF MINISTRY OF
FOREIGN AFFAIRS AND
TRADE
Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person
Susan Hornsby-Geluk, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 3 August 2020 from the Applicant
17 June 2020 from the Respondent

Date of Determination: 14 September 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 6 May 2020 I found that Mr Manawaiti did not raise a personal grievance within the statutory time frame and there were no exceptional circumstances to justify leave being granted to raise a grievance after the expiration of that time frame. I also found Mr Manawaiti's alternative claim alleging breach of contract by his employer could not proceed as it was time-barred by s 142 of the Employment Relations Act 2000 (the Act)¹.

[2] The Secretary of the Ministry of Foreign Affairs and Trade (MFAT) now seeks a contribution to its costs. MFAT submits that, although the matter was determined on the papers by way of submissions from the parties, costs should be awarded at the notional daily tariff of \$4,500. It says its actual costs were significantly higher than this, but has provided no details.

¹ [2020] NZERA 185.

MFAT says this amount is justified as the issues were legally complex and required researched and detailed submissions. No invoices or breakdown of costs were provided.

[3] Additionally, MFAT submits a number of actions by Mr Manawaiti, which it itemised, caused it significant additional preparation work. The actions related, in the main, to deficiencies in Mr Manawaiti's documentation.

[4] Mr Manawaiti resists any order for costs at this stage on the grounds that the Authority's determination was described as a "preliminary determination" and was now the subject of challenge and a request for a de novo hearing in the Employment Court. He submits the application for costs is premature at this stage because the grounds for seeking costs "could realistically be overturned by the Employment Court". For these, and other reasons relating to the detail of the case Mr Manawaiti wishes to argue in the Employment Court, it is his view that costs should be deferred at this time.

[5] If the Authority takes a different view, Mr Manawaiti submits that the claim made by MFAT is excessive and should not exceed \$2,500 plus any disbursements. Mr Manawaiti justifies this as an upper limit by referring to "the daily allowance in the High Court Rules". He also submits that if the Authority awards costs against him favourable consideration should be given to reducing those costs by 15 percent equivalent to the GST component so as not to add "the additional implied penalty".

[6] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Act. Awards of costs are discretionary and it is up to the Authority to decide whether they should be awarded and, if so, in what amount. Underpinning the award of costs in the Authority are well-known principles that were referred to with approval by the full Court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.² The principles were revisited and confirmed in 2015 by the full Court in *Fagotti v Acme & Co Limited*.³

[7] Among those principles are that the discretion to award costs is to be exercised in accordance with principle rather than arbitrarily. Costs will usually follow the event, which normally results in the successful party being entitled to a reasonable contribution to its actual

² [2005] ERNZ 808 (EmpC).

³ [2015] EmpC 135.

costs from the unsuccessful party. Costs should be modest and are to be considered in the light of the particular circumstances.

[8] They are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. If a party's conduct has unnecessarily increased costs, that factor may be taken into account in the award of costs that is made. However, costs are not to be used as a punishment or as an expression of disapproval of a party's conduct.

[9] Having considered the principles against the particular circumstances of this case I find it appropriate that an award of costs be made to MFAT. Mr Manawaiti's claims failed and it is fitting that he should contribute to the costs his employer incurred in defending them. The High Court's cost regime does not apply to the Authority and I see no reason for departing from the Authority's normal mechanism for assessing costs by way of the notional daily tariff, while recognising this matter was determined on the papers, i.e. without an investigation meeting.

[10] I reject Mr Manawaiti's submission that, because the Authority's determination was described as a 'preliminary' decision, it is not appropriate to award costs at this stage. The terminology reflected the agreement of the parties in a case management conference that the Authority would determine Mr Manawaiti's application to raise a grievance out of time as a preliminary issue. At the same time it would also consider whether a six year limitation period arose.

[11] Had Mr Manawaiti's application succeeded, there would have been an investigation into the substantive matters he had raised. In the event, the determination of the preliminary issue and the limitation issue has meant no further investigation is required.

[12] Mr Manawaiti's challenge to my determination is currently before the Employment Court. Section 180 of the Act is relevant here:

The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the court, or the Authority, so orders.

[13] No such orders have been sought or granted in this instance and I consider there is no good reason to delay the determination of MFAT's costs application.

[14] I do not regard the issues as particularly legally complex, as submitted by MFAT, but acknowledge its submissions were detailed and helpful. The current notional daily tariff is \$4,500 for the first day of an investigation meeting. I assess an appropriate starting point as half a day, or \$2,250. I do not consider the factors referred to by MFAT, which I have described as defects in documentation in the main, to be compelling reasons for uplifting that amount. Nor do I accept Mr Manawaiti's submission for a reduction in any amount awarded against him.

Orders

[15] Mr Manawaiti is ordered to pay \$2,250 to the Secretary of the Ministry of Foreign Affairs and Trade as a contribution to the costs the Ministry has incurred.

Trish MacKinnon
Member of the Employment Relations Authority