

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 383
3068932

BETWEEN WILLIAM TELFORD
Applicant

AND SGS NEW ZEALAND
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Paul Depledge, counsel for the applicant
Claire Mansell, counsel for the respondent

Investigation Meeting: On the papers

Submissions received: 31 August 2020 from the applicant
31 March and 15 September 2020 from the respondent

Date of determination: 30 September 2020

COSTS DETERMINATION OF THE AUTHORITY

- A. No order for costs is made against William Telford as he was legally aided and no exceptional circumstances justify an award being made against him.**

What was the Employment Relationship Problem?

[1] In a 2 March 2020 determination the Authority declined to grant leave to William Telford to raise a dismissal grievance with SGS New Zealand Limited (SGS or the company) out of time.¹

¹ *William Telford v SGS New Zealand Limited* [2020] NZERA 100.

[2] The parties were encouraged to resolve the costs question themselves. However, no agreement was reached and SGS applied for costs against Mr Telford. Unfortunately there were difficulties with ensuring that Mr Telford had a prompt opportunity to respond to those submissions. The COVID-19 lockdown occurred. Mr Telford moved to a new lawyer but it became apparent that his lawyer did not receive the costs submissions on behalf of SGS. Mr Telford then withdrew from that lawyer. Mr Telford was given another opportunity to reply and submissions on his behalf were then received. SGS was given an opportunity to reply but did not wish to make any additional comments.

[3] Mr Telford was granted legal aid to pursue the leave application. His former representative informed SGS of that prior to the proceeding being filed. The Authority was also informed that Mr Telford was legally aided.

[4] Under s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all of the evidence or submissions received but states findings and expresses conclusions.

Why does SGS apply for costs?

[5] SGS acknowledges that Mr Telford was on legal aid but submits that exceptional circumstances justify an award to the company of \$4,500; the notional daily tariff.

[6] The exceptional circumstances identified by the company are that Mr Telford:

- (a) Unreasonably pursued a claim for leave to bring a personal grievance out of time some five years after his initial grievance arose; and
- (b) Had not sought mediation as provided by the Ministry of Business, Innovation and Employment.

[7] As SGS successfully defended the leave application, it says it was the successful party and should receive costs at the tariff rate. Invoices are provided indicating actual costs were incurred to well over the tariff level.

What was Mr Telford's response?

[8] Submissions emphasise the high standard for an award of costs against a party on legal aid and the absence of any unmeritorious or grossly exaggerated claims by Mr Telford. No award of costs against him is said to be warranted. Mr Telford's modest financial means are highlighted.

[9] Mr Telford is described as being wholly let down by his advocate and legal representatives who did not raise his grievance in a timely way. The leave process gives some leeway to applicants who raise their grievance out of time and its use is a legitimate use of the Authority's processes.

What are the costs principles?

[10] The Authority has a discretion to award costs in a principled manner.² Generally costs will follow the event but will be modest. Costs are not to be used as a punishment or expression of disapproval but conduct which increases costs may result in an inflated award. A notional daily tariff is often used.

[11] Legally aided parties in civil proceedings may only have costs ordered against them in exceptional circumstances.³ Any conduct which caused the other party to incur unnecessary costs may be taken into account, along with whether issues were unreasonably pursued.⁴

[12] In this context, exceptional circumstances refers to conduct which is "quite out of the ordinary" or "sufficiently egregious".⁵

Are there exceptional circumstances?

[13] Mr Telford's claim was eventually pursued in the Authority a lengthy period after his dismissal. However, the time should not be the only factor considered.

[14] A number of questions needed to be examined in the earlier determination. These included when the grievance was actually raised, whether there were exceptional

² The Act, Schedule 2, cl 15. *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

³ Legal Services Act 2011, s 45(2).

⁴ Legal Services Act, s 45(3)(a) and (d).

⁵ *Laverty v Para Franchising Ltd* [2006] 1 ERNZ 650 CA, *Checkmate Precision Cutting Tools Ltd v Tomo* [2013] NZEmpC 107 at [10] and *Blue Water Hotel Ltd v VBS* [2019] ERNZ 40 at [10] – [12].

circumstances, whether those were causative of the delay, and ultimately whether it was just for leave to be granted. Mr Telford succeeded in establishing he had made reasonable arrangements for his agent to raise the grievance within 90 days and that the agent had failed to do so. Exceptional circumstances thus existed and were found to have caused the delay.

[15] These elements of success support a conclusion that the claim was not unreasonably pursued. Mr Telford only fell at the final hurdle of whether granting leave was just.

[16] SGS refers to Mr Telford not seeking mediation. However, in 2016 Mr Telford's former representative twice sought the company's agreement to go to mediation but received no response. At the Authority's case management conference the company was strongly opposed to mediation although ultimately the Authority did direct the parties to mediation.

[17] SGS has not established exceptional circumstances which would justify an award of legal aid against Mr Telford. No costs award is made.

What order would have been made?

[18] In situations where the Authority makes no costs award because a party is legally aided, an order may be made specifying what costs order would have been made had this not been a legal aid case.⁶ However, no such order has been sought on behalf of SGS and I do not exercise my discretion to provide such an indication.

Nicola Craig
Member of the Employment Relations Authority

⁶ Legal Services Act, s 45(5).