

IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE

[2020] NZERA 510  
3092932

BETWEEN

**GRAHAM WESTERBY**

Applicant

A N D

**INTERPRODUCTS LIMITED**

Respondent

Member of Authority: David G Beck

Representatives: David Cain, advocate for the Applicant  
Anna Oberndorfer, advocate for the Respondent

Investigation Meeting: Did not proceed as Applicant withdrew claims

Submissions Received: 18 November 2020 from the Respondent  
4 December 2020 from the Applicant

Date of Determination: 8 December 2020

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**COST DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] Graham Westerby worked as a painter for Interproducts Limited from 1 July 2017 to 19 July 2019 when he was dismissed. Mr Westerby challenged the dismissal by way of a personal grievance letter of 14 August 2019 from his advocate. Interproducts, using an advocate, responded to the grievance by letter of 28 August comprehensively addressing all issues including contested factual issues and alerted Mr Westerby to cost issues should he proceed. Without further contact between the parties, Mr Westerby's advocate filed the matter

with the Authority on 21 February 2020. Interproducts advocate filed a comprehensive statement in reply on 5 March 2020 with relevant supporting documentation (not provided by Mr Westerby despite such being available to him). Interproducts refused to attend mediation explaining in their view that

The disciplinary process was genuinely and properly undertaken, from both a substantive and procedural perspective. There is not substantive foundation for the Respondent to incur further costs attending mediation.

[2] I then directed the parties attend mediation that took place on 25 June 2020 but this failed to resolve matters.

[3] A case management conference was set by the Authority for 22 September 2020 but did not proceed as Mr Westerby's advocate withdrew his Authority application on 18 September 2020 citing that Mr Westerby had insufficient means to pursue the matter further.

[4] Interproducts, in a costs application of 18 November 2020, is seeking a contribution to costs in the amount of \$1,255.24 supported by invoices for their advocate's work in response to the filed application and attendance at mediation.

### **Submissions from Interproducts Limited**

[5] Interproducts' advocate, Ms Oberndorfer, submitted that Mr Westerby had essentially pursued an unmeritorious or vexatious claim and they seek a contribution to costs in accord with the principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup> on the basis that although the matter was withdrawn it involved the preparation and presentation of material to respond to Mr Westerby's application to the Authority. Ms Oberndorfer did not specifically address why a portion of the costs incurred for her client's attendance at mediation should be met.

### **Submissions from Mr Westerby**

[6] Mr Westerby's advocate Mr Cain made a submission in response that his client should not meet any costs associated with mediation and in support of such he referenced an

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<sup>1</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

Authority Practice note of 30 June 2016 in which then Chief of the Authority Member Crichton advised costs incurred for preparation and attendance at mediation are:

....not typically included in costs awards of the Authority (unless some particular or unusual circumstance of the case makes it appropriate to do so).

[7] Mr Cain pointed to Interproducts initial resistance to attending mediation and that this had necessitated that his client file a statement of problem to obtain a direction to mediation.

[8] Mr Cain asserted that had Interproducts initially agreed to attend mediation they would not have incurred the costs they are claiming.

[9] Mr Cain concluded that it was equitable to let costs lie where they fall as Mr Westerby was currently impecunious having not worked since his employment was terminated by Interproducts, although no evidence was provided to validate this claim.

### **Costs principles**

[10] The Authority discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *Da Cruz* one being that costs are not to be used as a punishment or as reflection of how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.<sup>2</sup>

### **Assessment**

[11] A general principle for a successful party is that costs should 'follow the event' but when no litigation event has occurred it is difficult to assess if the costs were unreasonably incurred by the respondent's approach to initially avoiding low level dispute resolution (attending mediation) and balancing this up with the merits of Mr Westerby's claim that remains untested. I do, however, have the benefit of viewing an extensive and well-prepared response by Interproducts to the initial personal grievance and can make an observation that Mr Westerby's claim appeared highly speculative but it would not have reached the threshold of being considered vexatious.

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<sup>2</sup> Section 160(2) Employment Relations Act 2000.

[12] In these circumstances, whilst rejecting the notion of letting costs lie where they fall as being inequitable, I exercise a positive discretion in Mr Westerby's favour and award a sum less than that sought by Interproducts Limited including rejecting the claim for a portion of the costs being incurred for attendance to mediation.

**Award**

[13] I order Mr Westerby to pay Interproducts Limited the sum of \$400 as a contribution to the legal costs incurred.

David Beck  
Member of the Employment Relations Authority