

**IN THE EMPLOYMENT RELATIONS AUTHORITY**

**AUCKLAND**

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

[2021] NZERA 319  
3112359

BETWEEN

EMMA JAMES  
Applicant

AND

THE FARMERS TRADING  
COMPANY LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Alexandria Till, counsel for the Applicant  
Matthew McGoldrick, counsel for the Respondent

Submissions: 16 July 2021 from the Applicant  
2 July 2021 from the Respondent

Determination: 23 July 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] By determination [2021] NZERA 259 the Authority determined that the Applicant, Ms Emma James, had been unjustifiably disadvantaged in connection with a breach of her privacy by the Respondent, The Farmers Trading Company Limited (Farmers).

[2] However Ms James had not been successful in her claims that she had been: unjustifiably dismissed; unjustifiably disadvantaged in relation to a claim of unjustifiable suspension; or that Farmers had breached the duty of good faith it owed to her. In addition Ms James had brought a claim that she was owed wages, a claim which was resolved between the parties and required no determination.

[3] Farmers is seeking a contribution to its actual costs of \$29,000.00 plus disbursements in the sum of \$7,500.00 on the basis that on any realistic assessment it was the successful party.<sup>1</sup>

[4] Ms James is seeking a contribution to her actual costs of \$28,506.34 in the sum of \$4,500.00 on the basis that she was the successful in her unjustifiable disadvantage claim of breach of privacy.

[5] This matter involved two day investigation meeting.

*Submissions of the Respondent*

[6] The Respondent submits that given that costs generally follow the event, it is necessary to identify which party was 'successful'. It notes that in *Weaver v Auckland Council*, the Court of Appeal and said that the appropriate way to determine costs was to make a "realistic appraisal of which party was successful."<sup>2</sup>

[7] Also noted is the Employment Court's statement in *Coomer v JA McCallum and Son* (in which *Weaver* was referred to with approval) that it is appropriate to consider costs by standing back and looking at things "in the round".<sup>3</sup> Farmers submits that on this basis, it was the successful party.

[8] In light of the fact that Ms James brought a large number of claims against Farmers, the majority of which she lost, it submits that it simply cannot be the case that any success, however minor overall, can give rise to a presumptive entitlement to costs.

[9] Whilst Ms James obtained a compensatory payment for a personal grievance, it is submitted that it was very much not the focus of the case, which was Ms James' claims of unjustifiable dismissal, unjustifiable disadvantage relating to a suspension, and a breach of good faith. In all these claims Farmers was entirely successful.

[10] In support of its position, the Respondent refers to an open letter of settlement made by Ms James on 28 April 2021 which referred to 11 asserted issues with Farmers' position. In only one of the issues was Ms James successful. In response Farmers had responded by letter dated 11 May 2021 pointing out that the expectation of the remedies sought by Ms James were unrealistic.

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<sup>1</sup> *Weaver v Auckland Council* [2017] NZCA 330 at [20].

<sup>2</sup> *Weaver v Auckland Council* [2017] NZCA 330 at [20].

<sup>3</sup> *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156 at [43].

### *Applicant's Submissions*

[11] It is submitted for Ms James that she was the successful party on the basis of her claim of unjustifiable disadvantage for a breach of privacy.

[12] In support of its claim for costs the Applicant relies on *Coomer* in which the Employment Court held that in cases where an applicant has been partially successful, the applicant will nonetheless be entitled to an award of costs, albeit at a reduced level.

[13] As in *Coomer* it is submitted that Ms James would not have been successful in her unjustifiable dismissal claim unless she had filed in the Authority. Further that the other claims were submitted in good faith, and the Applicant did not behave inappropriately at the investigation meeting, or engage in practices which unreasonably prolonged the investigation.

### *Principles*

[14] 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.

[15] 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)*<sup>4</sup>. Relevant to this matter are the following principles:

- Costs generally follow the event;
- There is a discretion as to whether costs are awarded and in what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- Without prejudice offers to settle can be taken into account;
- Awards will generally be modest; and
- Frequently costs are judged against a notional daily rate.

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<sup>4</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

## **Costs Award**

[16] The Authority's power to award costs is at the discretion of the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[17] In this case both parties had some degree of success in that Ms James was successful in one of the four claims before the Authority, but Farmers was successful in defending the other three claims.

[18] Whilst Ms James made an open offer to settle that matter prior to the investigation meeting in the letter dated 28 April 2021, in its response Farmers had stated that the remedies Ms James was seeking were unrealistic. This proved to be the case in light of the limited degree of success Ms James had at the investigation. In fact the sum awarded by way of compensation by the Authority was significantly less than the sums claimed as remedies in the letter of 28 April 2021.

[19] Nonetheless Ms James was successful in one of her claims before the Authority and as such could be viewed as the successful party.

[20] Standing back and considering the case in the round, I consider that Ms James should be awarded costs in an amount which takes into consideration the respective positions of the parties, and the 'success' of each party, in the outcome determination..

[21] The starting point for costs is the normal daily tariff as applied in the Authority. For a two day hearing this equates to \$8,000.

[22] In all the circumstances I consider that an appropriate contribution towards costs taking into account the level of success achieved by both parties is \$2,000.00

[23] Farmers is ordered to pay Ms James the sum of \$2,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

**Eleanor Robinson**

**Member of the Employment Relations Authority**