ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 367
3107952

	BETWEEN	JEREMY INGLE Applicant
	AND	INFLITE CHARTERS LIMITED First Respondent
	AND	INFLITE SKI PLANES LIMITED Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Naoimh McAllister, Counsel for the Applicant Aaron Harlowe, Counsel for the Respondent	
Submissions Received:	24 May 2021 from the Applicant 10, 11 and 26 May 2021 from the Respondent	
Date of Determination:	17 August 2021	

COSTS DETERMINATION OF THE AUTHORITY

A I order Jeremy Ingle pay to Inflite Charters Limited and Inflite Ski Planes Limited the sum of $1500 being costs.

Non-publication order

[1] The first and second respondents seek an order for non-publication of confidential and sensitive business information in a memorandum of counsel as to costs dated 10 May 2021. I accept the information is commercially sensitive.

[2] I prohibit from publication the contents of paragraph 16(k) of the memorandum for the first and second respondents dated 10 May 2021 under clause 10(1) of the second schedule to the Employment Relations Act 2000 (the Act).[1]

Costs application

[3] The application for costs is made by the first and second respondents following the withdrawal of the applicant's claims of unjustified disadvantage, unjustified dismissal, holiday pay, wage arrears and breaches of minimum entitlements. The claim was withdrawn on 7 May 2021. An investigation meeting date was set for 20 May 2021 for one day.

The respondent's submission

[4] The respondents seek costs following the withdrawal of the proceedings in the sum of $6,000 with its actual costs being $17,589 excluding GST. Mr Harlowe submits that the costs comprise a contribution to those incurred in defending the claim until it was discontinued, this being three quarters of the daily tariff of $3,000 and an uplift of $2,000 to reflect:

(a) actual costs incurred;

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[1] The application for non-publication referred to paragraph 15(k) but it is paragraph 16(k) that contains the commercially sensitive information.

(b) withdrawing close to the investigation meeting;

(c) the applicant's conduct during the second redundancy process;

(d) the delay in filing an amended statement of problem;

(e) the seeking by the applicant of disclosure of documents when he could have done so earlier in the process; and

(f) $1,000 being a contribution to the costs of preparing the costs memorandum.[2]

[5] Mr Harlowe refers to the legal principles appropriate for costs in the Authority and consistent with its functions and powers in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.[3] He sets out the chronology of the proceedings in his submissions. The respondent had already commenced drafting briefs and undertook extensive work to meet the applicant's disclosure request before the withdrawal of the applicant's claim.

[6] Mr Harlowe refers to the applicant's delay in engaging new counsel, filing an amended claim and seeking widespread disclosure of information weeks out from the hearing that resulted in the timeframe upon which the respondents were working to being condensed. Mr Harlowe submits that the claim was unmeritorious. He refers to several Employment Court judgments and Authority determinations where there has been a discontinuance and costs awarded.

The Applicant's submissions

[7] Ms McAllister submits that costs should lie where they fall, or that the alternative nominal costs only be awarded against the applicant and refers to *Da Cruz* in her submissions.[4] She submits that discussions occurred between 4 and 5 May 2021 to resolve the claim with no issue as to costs. There was a request for information to be provided urgently so

[2] The Authority had some difficulty in assessing how the amount of $6000 had been arrived at from the submissions.
[3] *PBO v Da Cruz* [2005] ERNZ 808 at [44].
[4] Above n 2.

instructions could be sought. Ms McAllister submits that the information sought by the applicant should have been proactively provided by the respondent and was not provided in a timely way, leading to delays and changes to the timetable.

[8] Ms McAllister does not accept the applicant withdrew his claim for lack of merit and that there are other reasons why a claim may be withdrawn. She submits that the matter was not unduly complex and only limited steps were taken before the matter was discontinued. Ms McAllister submits awards in the Authority should be modest and that if the respondent had successfully defended the applicant's claims, the respondents would have been awarded a contribution towards costs of $4,500. She submits that the costs sought are unreasonable and excessive and refers to additional Authority determinations where awards against applicants who have discontinued proceedings are generally nominal and less than the daily tariff rate.

[9] She submits that if the Authority exercises its discretion to award costs against the applicant, then an award of $450 would be appropriate being 10 percent of the daily tariff and that in the event any payment would have to be made by way of instalment because of the applicant's circumstances.

The Issues

[10] The Authority needs to determine the following issues:

(a) What are the costs principles that apply?

(b) Are costs available where a claim is withdrawn in the Authority?

(c) If so, what costs were incurred before withdrawal?

(d) Should costs be awarded in the exercise of the Authority discretion and if so in what quantum?

Costs principles in the Authority

[11] The Authority has its own costs regime. Clause 15(1) of the second schedule to the Act provides that the Authority may order any party to a matter to pay to the other party such costs and expenses as it thinks fit.

[12] In *Da Cruz* it was recognised that the Authority is able to set its own procedure and has held to some basic tenets when considering costs. These include that there is a discretion as to whether costs will be awarded and in what amount. The discretion should be exercised in accordance with principle and not arbitrarily. Further to this, the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority and that equity and good conscience is to be considered on a case by case basis. Costs are not to be used as a punishment or an expression of disapproval and costs generally follow the event. Costs will be modest in the Authority. Frequently costs are judged against a notional daily tariff set for current matters at $4,500 per day for the first day and $3,500 for each subsequent day.[5]

[13] The full Court of the Employment Court in *Fagotti v Acme & Co Limited* endorsed the broad principles in *Da Cruz* about costs in the Authority and stated that they should not be departed from or even altered generally or in the particular case.[6]

[14] The difference between the Authority and the Employment Court was recognised in *Da Cruz* as being such to warrant the Authority taking a different approach to the question of costs.[7] The Employment Court in *Stevens v Hapag-Lloyd (NZ) Ltd* stated that it would be generally inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority.[8]

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[5] Above n 2 at [44].
[6] *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [114].
[7] Above n 2 at [39].
[8] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94] – [95].

Costs where a claim has been withdrawn before the investigation meeting

[15] The Authority is able to in the exercise of its discretion, consider whether there should be an award of costs to the respondents in circumstances where the claim has been withdrawn in accordance with the principle that costs follow the event.

What costs were incurred by the respondents before withdrawal?

Timing of withdrawal of the claim

[16] The claim was withdrawn just short of two weeks before the scheduled investigation meeting. The Authority held a telephone conference with counsel on 4 May 2021.

[17] The Authority made orders about the confidentiality of financial information to be disclosed. It adjusted a previously set timetable for an exchange of statements of evidence to enable the investigation meeting to proceed on the originally agreed date with a path forward for further disclosure. The claim was withdrawn on the date that the applicant was timetabled to lodge and serve statements of evidence and other relevant documents not already before the Authority.

Statements in reply lodged by respondents

[18] A statement in reply and amended statement in reply was lodged.

Attendance at two telephone conferences

[19] Attendance was required at two telephone conference on 1 December 2020 and 4 May 2021.

Statements of evidence

[20] The respondents had commenced preparation of statements of evidence. Statements of evidence had not been finalised and lodged because the claim was withdrawn before the applicant's statements were lodged.

Identity of employer

[21] In the original statement in reply to the claim against the first respondent the employer was referred to as "INFLITE [ ] Limited." The original statement in reply did not appear to directly state that the first respondent was not the employer as the amended statement in reply did.

[22] The amendment to the statement of problem to include the second respondent was appropriate to enable the Authority to more effectually dispose of the matter. The employment agreement named the second respondent. The basis for maintaining the claim against the first respondent is not altogether clear. I do not conclude costs to the date of withdrawal incurred as a result of maintaining the claim against the first respondent would be particularly significant in the circumstances.

Delay in change to counsel and disclosure requests

[23] Some weight is placed by Mr Harlowe on the late instruction of Ms McAllister with resulting delay and late disclosure requests impacting on the timetable and work required. Ms McAllister by way of response in her submissions said that the disclosure should have been "proactively provided". Furthermore, that disclosure was not provided in a timely manner and the financial spreadsheet was inadequate and not what was requested. There is also a dispute as to whether an email sent on 5 May 2021 supported the position of the applicant or respondents. Mr Harlowe does not accept that the financial information provided was inadequate and submits that Ms McAllister's recollection of the 5 May 2021 email is wrong.

[24] I am not in a position to resolve disputes about whether what was provided by way of disclosure was adequate. I accept that disclosure requests necessitated an enlargement to the agreed timetable for an exchange of statements of evidence and the condensing of the timetable required the respondent to brief its witnesses earlier.

Conduct by applicant during the second redundancy process

[25] Mr Harlowe places weight on the conduct of the applicant during the second restructuring process being inconsistent with the obligations to be constructive and communicative. He has provided some correspondence during this period to illustrate his submission. That was before the proceedings were lodged with the Authority. The purpose of a cost award is not to punish or express disapproval of the unsuccessful party's conduct. The Authority is not in a position to reach a view about the merits of the matter the matter did not proceed to investigation.

Preparation of costs submissions

[26] Mr Harlowe claims $1000 for preparation of the application for costs. The cases he relies on for preparing a costs memorandum are those of the Employment Court. The different approach taken in the Authority to costs with its nominal daily tariff needs to be recognised and taken into account.

Overall work undertaken

[27] I accept that costs were incurred by the respondents in lodging statements in reply, starting to prepare evidence by briefing its witnesses, attending two case management conferences with the Authority and lodging the costs memoranda. Furthermore, there was attendance to disclosure. I accept Ms McAllister's submission that the matter was withdrawn before consideration of statements of evidence, preparation of legal submissions and attendance at an investigation meeting.

Should costs be awarded in the exercise of the Authority discretion and if so in what quantum?

[28] Ms McAllister submits that in equity and good conscience costs should lie where they fall. She submits that this would accord with the purpose of the Act to promote individual choice and to recognise the inherent inequality of power in employment relationships.

[29] The discretion to award costs must be exercised in accordance with principle and not arbitrarily. The claim was withdrawn fairly close to the investigation meeting when the respondent had incurred costs. It is appropriate to consider an award of costs in favour of the respondents. I do not consider there is good reason for an award that would be greater than the nominal daily tariff and what the respondents could be expected to receive had they successfully defended the matter.

[30] A suitable award should be assessed in light of the nominal daily tariff for a one day matter. Mr Harlowe has referred to two Authority determinations where matters were discontinued and awards were made for $2,500 and $6000.[9] Both those matters were set down for two day investigation meetings and the assessment of costs following discontinuance took that into account. In *Tag Oil* some weight in arriving at an award of costs in the sum of $6000 was placed on the size of the claim that the respondent was facing of $2,500,000 and the steps taken to defend the claim. Forty six pages of evidence had been lodged by the respondent and that was referred to with respect to the extent of time spent defending the matter.[10]

[31] Ms McAllister has submitted an amount of 10 percent of the daily tariff would be suitable being $450. I do not find that would fairly represent the costs incurred by the respondents. I consider an appropriate calculation of costs in all the circumstances and in line with the costs principles in the Authority would be on the basis of one third of the daily tariff

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[9] *Tag Oil (NZ) Limited and James Watchorn* [2014] NZERA Wellington 59 and *Duddy and Ors v Vector Limited* [2020] NZERA 64.
[10] Above n 9 at [14] and [16].

of $4,500 for a one day matter. That is the sum of $1500. I am not satisfied that there are additional circumstances in this case that call for a further uplift to that amount.

[32] The Authority has not been advised how the award is to be apportioned between the respondents. It will therefore order the payment to be made to the respondents for them to determine how the costs are to be apportioned. Leave is given to return for further orders if required.

[33] Ms McAllister has advised that the applicant would have difficulty paying any sum and would have to pay by instalment. Ms McAllister should advise Mr Harlowe of the amount the applicant can afford each week. Leave is reserved for the applicant to return to the Authority if required under clause 15(2) of the second schedule to the Act.

[34] I order Jeremy Ingle to pay to Inflite Charters Limited and Inflite Ski Planes Limited the sum of $1500 being costs.

Helen Doyle
Member of the Employment Relations Authority