

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 415
3100712

BETWEEN	JOSH HIGGINS Applicant
AND	SLOANS SADDLERY & CANVAS LTD Respondent

Member of Authority: Michele Ryan

Representatives: Adrian Plunket, advocate for the Applicant
Digby Livingston, advocate for the respondent

Submissions Received: 29 August 2021 from the Respondent
13 September 2021 from the Applicant

Date of Determination: 24 September 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] Josh Higgins' claim that he was unjustifiably dismissed by his former employer, Sloans Saddlery & Canvas (the Saddlery), was not established on the evidence, and his application was dismissed.¹

[2] The Saddlery now seeks a substantial contribution to costs incurred to defend the claim.

[3] Mr Higgins says costs should lie where they fall, or, in the alternative, it is suggested an award of \$500 would be fair, with Mr Higgins paying the award off at \$10 per week.

¹ *Higgins v Sloans Saddlery and Canvas Ltd* [2021] NZERA 363

Should costs be awarded?

[4] The Authority's broad discretion when dealing with costs is exercised in accordance with accepted principles.² A primary principle when assessing costs is that an award usually follows the event, that is, a successful party is generally entitled to a contribution to the costs expended in bringing or defending a claim.

[5] In opposition to a costs award being imposed on him at all, Mr Higgins' submits the respondent's conduct towards him, both at the time the employment relationship problem arose and during the investigation meeting, should result in a finding that costs should lie where they fall.

[6] I am not persuaded the submission alters the presumption that costs should be awarded to the successful party. It is common ground that at the time Mr Higgin's employment finished, the relationship between the parties was fractious. Both parties' apportioned the cause of the dispute to the other. Unsurprisingly, those opposing positions views remained evident throughout the Authority's investigation. The conduct to which Mr Higgins' refers formed the substance of his claim but it is not conduct that unnecessarily increased costs. This submission is not relevant to the assessment.

[7] I can find no reason to allow costs to lie where they fall. The Saddlery is entitled to seek a contribution to costs.

What is an appropriate award?

[8] An assessment as the appropriate quantum of an award typically begins by applying the Authority's daily tariff, currently set at \$4,500 for a first full day investigation. Consideration is then given to whether there were any particular circumstances that arose in the course of the Authority's investigation which would require an uplift or reduction to the tariff.

[9] The Saddlery says its representatives costs amounted to \$4621.50. It seeks the Authority's daily tariff of \$4,500.

² Employment Relations Act 2000, sch 2 cl 15. See also See *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[10] The investigation into Mr Higgins' claim was straight forward. It occupied a total of 4 hours inclusive of both a brief lunch break and an adjournment whilst the parties undertook settlement negotiations.

[11] A pro-rated application of the tariff to a half day investigation equates to \$2,250, and in this case I find it an appropriate starting point from which to assess whether there are any good reasons to increase or reduce an order.

[12] The Authority may consider any offers made without prejudice except as to costs. Mr Higgins' refers to several offers made to the Saddlery of this nature. He says it is plausible that the offers were unreasonably rejected where it [the Saddlery] is now seeking a sum that was offered on at least two occasions prior to the investigation meeting, noting both offers sought a payment of \$5,000 plus GST from the Saddlery in exchange for Mr Higgins' agreement to withdraw his claim. There was a third offer that sought a slightly lower sum on the same basis.

[13] Not one of the offers made however, can be characterised as one that would have left the Saddlery in a better position had it been accepted where Mr Higgins was not able to establish the Saddlery was liable to pay remedies. In this situation, Mr Higgins' offers to settle have no bearing on my assessment.

[14] Next, it is suggested Mr Higgins financial circumstances are such that he would have difficulty meeting a costs order against him. Bank statements were furnished to the Authority in support.

[15] The institutions, including the Authority, recognise financial hardship may be a relevant factor when assessing costs but is not decisive, and the interests of the both parties must be taken into account alongside public policy considerations.³

[16] The banks statements demonstrate Mr Higgins' weekly wages are relatively low although it is also apparent he regularly receives supplementary monies from another source.⁴ No information regarding whether Mr Higgins has assets than can be disposed of or if there are any additional resources available to him to meet a costs liability. On the information disclosed I am not satisfied Mr Higgins' circumstances are such that the Saddlery should be deprived of an award of costs or that the amount to which it would otherwise be entitled should be reduced.

³ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2

⁴ Reflected in statements corresponding to the 03 account.

[17] As already noted, cl 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) provides the Authority with the jurisdiction to order a party to pay costs. It does not however provide a discretion to determine the manner of payment. This is in contrast to the provisions recorded ss 123(2), 135(4A) and 138(4A) of the Act which expressly allow the Authority to order instalment payments if the financial position of the liable party requires it. This is not to say Mr Higgins and the Saddlery are precluded from reaching an agreement to have Mr Higgins pay costs by way of instalments.

[18] I therefore order Mr Higgins to pay costs of \$2,250 to Sloans Saddlery and Canvas Limited. It is left to the parties to discuss and agree on any arrangement for payment of those costs. Absent agreement, that sum is to be paid within 28 days of this determination. Either party may return to the Authority if further orders are required.

Michele Ryan
Member of the Employment Relations Authority