

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 312  
3097933

BETWEEN

BIGSON GUMBEZE  
Applicant

AND

THE CHIEF EXECUTIVE OF  
ORANGA TAMARIKI – MINISTRY  
FOR CHILDREN  
Respondent

Member of Authority: Philip Cheyne

Representatives: Applicant in person  
Greg Cain and Katie Alexander, counsel for the Respondent

Submissions Received: 30 June 2022 from the Applicant  
16 June & 6 July 2022 from the Respondent

Date of Determination: 12 July 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Bigson Gumbeze considered that he had been unjustifiably dismissed by Oranga Tamariki – Ministry for Children (OT).

[2] Several years later, Mr Gumbeze instructed counsel who wrote to OT. In response, OT asserted that Mr Gumbeze had not raised his personal grievance within time. When he lodged these proceedings, Mr Gumbeze sought leave to raise his personal grievance out of time. However, following a preliminary investigation, I determined that Mr Gumbeze had

raised his personal grievance within time, based on his own communications at the time and shortly after the dismissal.<sup>1</sup> Costs were reserved.

[3] Following the substantive investigation, I dismissed Mr Gumbeze's personal grievance claims. Costs were reserved, with submissions timetabled.

[4] OT lodged submissions in support of its application for costs, in accordance with the timetable. Mr Gumbeze responded, seeking a stay on proceedings in the Authority. At my direction, OT was given an opportunity to respond. It opposes a stay and seeks a determination on costs.

[5] This determination resolves the stay and costs applications.

**The Authority declines the application for a stay.**

[6] Mr Gumbeze has applied to the Employment Court for leave to extend time to file a challenge against the Authority's determination. As is standard and by way of courtesy, Mr Gumbeze's application was copied to the Authority by the Court. However, the application is solely a matter for the Court.

[7] Mr Gumbeze also lodged in the Authority on 30 June 2022 an affidavit, a Form 2A application for leave and an application for stay of proceedings. These appear to be the same as the documents he filed in the Employment Court, although lodged with the Authority in response to our reminder about the provision of submissions on costs. The 30 June 2022 stay application is headed Form 14 - the form provided in the Employment Court Regulations 2000 for an application for a stay. It refers to the Employment Court at several points. It also refers to Regulation 65 of the Employment Court Regulations 2000. However, in an analogous situation, the Court held it had no jurisdiction to order a stay where the Authority had not yet made a determination.<sup>2</sup> Mr Gumbeze's application is directed to the "Registrar" of the Employment Relations Authority. I will take Mr Gumbeze as applying to the Authority to stay the determination of costs.

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<sup>1</sup> *Bigson Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* [2021] NZERA 84.

<sup>2</sup> *Smith v Sovereign Ltd* EmpC Auckland AC10/04, 1 March 2004.

[8] The only unresolved aspect of the Authority's investigation is the question of costs. Either I determine costs now leaving the parties potentially able to challenge that as part of the Court proceedings,<sup>3</sup> or I stay costs with the parties to revert to the Authority to determine costs once the challenge is resolved. The better course is to conclude the Authority's investigation, to achieve finality at this level. It is the approach commonly adopted by the Authority.

[9] I decline to stay the remaining issue on costs.

### **Setting costs**

[10] There is no reason to depart from the principle that the successful party is entitled to costs. Overall, OT was successful. OT seeks costs of \$21,500.00 as a contribution to its actual costs. That is an uplift from the daily tariff approach often applied by the Authority.

[11] The preliminary investigation took a little less than a single day and subsequently the substantive investigation took approximately three days. OT submits that the day spent on the preliminary matter should be regarded as the first day (\$4,500.00) with three subsequent days for the purposes of considering the application of a daily tariff assessment. OT submits that the tariff for the first of the subsequent days should be reduced to \$2,625.00 to take account of time devoted to a discussion between the parties, at the Authority's request, about resolving the matter. On that approach, a daily tariff calculation would come to \$14,125.00, before any adjustment.

[12] However, the brief time taken during the investigation meeting at my request need not be discounted. Legal costs were still incurred. I am also mindful that OT took responsibility for bundle preparation for both investigation meetings, more than offsetting the time spent during the investigation meeting canvassing the possibility of resolution. On an unadjusted daily tariff approach, OT would be entitled to costs of \$15,000.00.

[13] OT then submits that there should be a reduction of the daily tariff awarded to it with respect to the preliminary investigation meeting to reflect some success for Mr Gumbeze.

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<sup>3</sup> Subject to the Employment Court Regulations 2000 and applicable rules and practice.

[14] OT was not the successful party with regard to the preliminary matter. Mr Gumbeze initially commenced an action for leave to raise the dismissal grievance. There was mention in documents and evidence of other grievances, but as noted in the determination, the application only concerned the dismissal claim.<sup>4</sup> Mr Gumbeze was found to have raised his unjustified dismissal personal grievance within time. Leave was not required.

[15] Assessing the outcome on the preliminary matter might appear more complicated than just saying Mr Gumbeze achieved success. If leave had been required, Mr Gumbeze would have failed. However, if Mr Gumbeze had simply lodged his personal grievance claim instead of the application for leave, OT may have raised the same preliminary point, there might have been a preliminary investigation and Mr Gumbeze would have prevailed on that point. In substance, Mr Gumbeze was the successful party on the preliminary point of whether he was entitled to have the substance of his personal grievance claim investigated and determined. Assessing costs overall should reflect that. I set \$3,000.00 as the offset for Mr Gumbeze to reflect his success, as less than a full day was required. After that allowance, OT would be entitled to costs of \$12,000.00 on a daily tariff basis.

[16] I acknowledge points made in support of OT's position that only \$2,250.00 should be allowed as an offset: the volume of irrelevant information; lack of clarity; and the stale nature of some of Mr Gumbeze's concerns advanced on the leave application. However, allowing only half of the first day's rate would not sufficiently recognise Mr Gumbeze's success on the preliminary point.

[17] OT seeks an increase to the daily tariff on the basis that Mr Gumbeze rejected a *Calderbank* offer it made after the preliminary determination. OT seeks double the daily tariff rate for three days for the substantive investigation meeting, subject to the reduced rate it seeks for the first of those days. A number of determinations and judgments are cited.

[18] Here, Mr Gumbeze was dismissed for serious misconduct following a disciplinary investigation. OT then notified the occupational registration agency, as required. Through his personal grievance claim, Mr Gumbeze sought a finding that OT's actions and how OT acted lacked justification. The *Calderbank* offer was to pay a specified gross sum, fund

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<sup>4</sup> *Bigson Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children*, above n 1 at [3].

career coaching and contribute to Mr Gumbeze's costs. However, it would not have rescinded or otherwise modified OT's actions and how it had acted. By that observation, I mean no criticism of OT. After all, OT established that the dismissal was justified. To the extent that OT could reasonably have endeavoured to resolve the proceedings, it attempted to do so.

[19] As a matter of principle, costs should not be used as a punishment or to express disapproval of a party's conduct. While some uplift should be allowed here to recognise costs incurred after Mr Gumbeze declined the reasonable settlement offer, the extent of the uplift should be such as to avoid amounting to punishment or disapproval. I note that the Employment Court approved an uplift of \$1,000.00 per day as appropriate when a party has declined a reasonable *Calderbank* offer.<sup>5</sup> I adopt that here to recognise the effect of OT's *Calderbank* offer.

[20] Applying that uplift to each of the three days of the substantive investigation meeting increases costs to \$15,000.00, after allowing \$3,000 to recognise that Mr Gumbeze prevailed on the preliminary investigation. Costs at that level are consistent with the public interest in awards of costs by the Authority being modest and reasonably predictable.<sup>6</sup>

### **Conclusion**

[21] Bigson Gumbeze is to pay the Chief Executive of Oranga Tamariki – Ministry for Children costs of \$15,000.00 by no later than 28 days from the date of this determination.

Philip Cheyne  
Member of the Employment Relations Authority

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<sup>5</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135

<sup>6</sup> *Canterbury Westland Kindergarten Association Incorporated v Barnes* [2020] NZEmpC 199 at [29].