IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 393
3138843

	BETWEEN	JASON SHAND Applicant
	AND	VIETNEW CORPORATION LIMITED T/A SAIGON RESTAURANT & BAR PALMY Respondent

Member of Authority:	Michael Loftus
Representatives:	Kelly Coley, advocate for the Applicant Jeremy McGuire, counsel for the Respondent
Submissions Received:	28 July 2022 from the Applicant 28 July and 15 August 2022 from the Respondent
Date of Determination:	16 August 2022

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 13 July 2022 I issued a determination in which I concluded Mr Shand had a personal grievance as he had been unjustifiably dismissed.[1] I also concluded he was due unpaid wages but was unable to quantify the amount given insufficient information. A range of counterclaims raised by Vietnew all failed. The question of quantum regarding unpaid wages was addressed in a second determination dated 20 July 2022.[2]

[2] Costs were reserved and as the successful party Mr Shand now seeks a contribution toward those he incurred pursuing his claims.

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[1] *Shand v Vietnew Corporation Ltd* [2022] NZERA 318
[2] *Shand v Vietnew Corporation Ltd* [2022] NZERA 336

[3] The Authority's jurisdiction to order a contribution toward a party's costs is exercised by applying well-established principles.[3] Those principles recognise that:

(a) a successful party should receive a contribution toward reasonably incurred costs and expenses;

(b) costs should generally be modest and may not be used to punish the substantive conduct of the unsuccessful party;

(c) the nature of a case may allow for an order that costs lie where they fall; and

(d) the Authority may use a notional daily tariff as its starting point. From there adjustment may occur either up or down depending on the circumstances of the case. Such adjustment may be to take account of settlement offers, particularly "calderbanks," the financial means of the liable party and whether or not a party unnecessarily increased the costs incurred by the other.

[4] The investigation took a day though a lack of time precluded the presentation of submissions. This occurred later in writing and further time was required to address the quantification of wages. I conclude a day and a half appropriate which, applying the tariff, would see an award in the order of $6,250. The filing fee was also sought.

[5] In this instance actual costs exceeded that but not by much given a reasonable approach by Ms Coley. That said a small uplift is sought with arguments offered as to why this should occur, though it is acknowledged the result would be close to indemnity costs.[4]

[6] The response, which came the same day, argued Mr Shand "is not entitled to costs." In support of this approach it was argued that is due to the fact he could not support his arrears claim as "he did not have the information about the hours he says he worked" and that this was "a vital element of this entire matter". No other argument was offered.

[7] For two reasons I dismiss that approach. The first is that the key claim was one of constructive dismissal, yet this is not what Vietnew concentrated upon throughout this matter and no mention was made of it when responding to the costs application other than to concede Mr Shand had largely been successful.

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[3] *Employment Relations Act 2000, Schedule 2, clause 15, PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[4] Applicant's costs submission dated 28 July at [10]

[8] The second is that I have already commented in the previous determinations about the futility of basing an argument on a proposition that it is the employees duty to maintain the wages and time record and not the employers. This is totally contrary to the Employment Relations Act 2000, particularly s 132, and is futile.

[9] I asked if there was further comment. The second submission was, once again, that costs lie where they fall as counsel "didn't understand" the thrust of the application with this assertion being repeated three times in paragraphs [2], [3]and [4] of a 7 paragraph response. The submission was not helped by the fact paragraphs 2, 3 and 4 are all but one of those that address the substantive issue – namely the quantum of cost that should be awarded against the unsuccessful party, Vietnew. The other comments on the fact I found mediation was not compulsory but that does not help as the finding was not determinative of the outcome.

[10] Clearly the submission costs lie where they fall fails given the lack of any persuasive argument, as would an un-offered submission the tariff be reduced. The only residual question is whether or not Mr Shand's request there be an increase, which would effectively see an award of indemnity costs, be considered.

[11] The answer is no. A costs award is a contribution and not indemnity absent a compelling rationale.[5] While the continued assertion regarding who was responsible for the wages and time record added to the time taken that has already been recognised in the calculation of overall time. Furthermore, and as it as a factor in the original outcome to account for it again would essentially punish Vietnew for its substantive actions. That is not appropriate. The tariff shall apply and the filing fee is a given.

[12] As a result I order Vietnew Corporation Limited pay Jason Shand the sum of $6,321.56 (six thousand, three hundred and twenty one dollars and fifty six cents) as a contribution toward the costs he incurred in successfully pursuing his claims.

Michael Loftus
Member of the Employment Relations Authority

[5] *Westpac Banking Corporation* [2009] 3 NZLR 400