

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 564
3134980

BETWEEN

JULES DEWAR
Applicant

AND

THE WELLINGTON FREE
AMBULANCE SERVICE
INCORPORATED
Respondent

Member of Authority: Claire English

Representatives: Dave Cain, advocate for the Applicant
Paul McBride, counsel for the Respondent

Submissions received: 10 October 2022 from Respondent
20 October 2022 from Applicant

Determination: 1 November 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] On 5 October 2022, the Authority issued a determination in this matter, determining that the applicant was not a permanent employee at the relevant time, and therefore her claim of unjustified dismissal could not proceed.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them. The parties have not been able to resolve costs between themselves, and have filed memoranda accordingly.

[3] The respondent submits that it was the successful party, and it should receive an award of costs of \$15,000, for an investigation meeting that lasted 1 and a half days.

[4] The applicant submits that costs should lie where they fall.

Principles

[5] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act) 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.

[6] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹ as confirmed in *Fagotti v Acme and Co Limited*². The relevant principles set out in the above cases may be summarised as follows:

- a. Costs follow the event;
- b. Costs are to be modest.
- c. Quantification is to be with a view to a reasonable contribution to costs actually and reasonably incurred;
- d. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful parties' conduct.

[7] In addition, the Authority's practice note on costs indicates that certain matters will generally not be subject to the daily tariff, including for example, disputes about the application, interpretation or operation of a collective agreement³. In cases of this type, the presumption is that parties bear their own costs.

[8] In this matter, the respondent was the successful party. This was because of the finding as to the applicant's employment status at the relevant time, which was in

¹ [2005] 1 ERNZ 808.

² [2015] NZEmpC 135 at 114.

³ At paragraph 5 of the Authority's Practice Note 2 – Costs in the Employment Relations Authority.

dispute. Accordingly, my view is that this is properly a matter where costs should lie where they fall.

[9] I have also considered the conduct of the proceedings themselves, and whether any adjustment might be appropriate. Overall, I find that no adjustment is warranted. Although there were some delays in the hearing of this matter, there were genuine reasons for these delays, including the health needs of persons involved in the hearing,. Overall, I do not consider that either party's conduct lead to an undue extension of the hearing time, or was otherwise such that it would be appropriate to impose a costs award.

[10] Finally, the respondent refers to various Calderbank offers exchanged between the parties, including a Calderbank offer from the respondent to the applicant of \$500. I have considered the proper impact of this offer, and in the current circumstances, I find that this is not sufficient to displace my view that costs should lie where they fall.

[11] The applicant was entitled to have her employment status determined in a situation where the parties were in dispute about this, rather than simply accepting the respondent's view of the matter. In addition, as noted at paragraph [53] of the substantive decision in this matter⁴, the respondent did not communicate effectively with the applicant leading up to the decision to cease providing her with casual work, and the letter ending the applicant's casual employment contained incorrect information, and this contributed to the applicant's decision to bring the substantive proceedings.

Orders

[12] Costs are to lie where they fall.

Claire English
Member of the Employment Relations Authority

⁴ [2022] NZERA 506