

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 618
3137186

BETWEEN JUHYUN LEE
 Applicant

AND MR&MRS LEE LIMITED t/a
 MOTOR KING
 First Respondent

AND KIHYE RACHEL LEE
 Second Respondent

Member of Authority: Rachel Larmer

Representatives: Seungmin Kang, counsel for the Applicant
 Stephen Langton and Sarah Lim, counsel for the
 Respondents

Investigation Meeting: On the papers

Submissions Received: 23 November 2022 from the Respondent

Date of Determination: 24 November 2022

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority issued its substantive determination in this matter on 9 November 2022.¹

[2] The Applicant's personal grievances, breach of employment agreement and penalty claims against the first respondent, Mr&Mrs Lee Limited trading as Motor King, and the penalty claims he made against the second respondent, Mrs Kihye Rachel Lee, did not succeed.

¹ *Lee v Mr&Mrs Lee Limited* [2022] NZERA 582.

[3] In paragraphs [133] to [136] of its substantive determination, the Authority encouraged the parties to resolve costs by agreement, but if case that did not occur, a timetable was issued for the parties to exchange costs submissions.

[4] Because the Respondents had been successful, the Applicant would normally be required to contribute towards their actual legal costs. The Authority indicated that it would likely adopt its usual notional daily tariff based approach to costs.

[5] The Respondents filed costs submissions on 23 November 2022. They sought an order that the Applicant contribute \$11,852.90 towards their actual costs and disbursements.

[6] The Respondents also noted in their costs submissions that the Applicant was legally aided, so they claimed this was a matter in which there were exceptional circumstances that made it appropriate for the Applicant to be ordered to pay costs.

[7] The Applicant has not filed costs submissions.

Authority's investigation

[8] The Authority has determined costs on the papers, based on the Respondents' submissions and supporting documentation.

[9] It has done so without the legally aided Applicant being required to incur the time and expense of filing costs submissions, because it was clear to the Authority that there were no exceptional circumstances that would have deprived the Applicant of the protection of s 45(2) of the Legal Services Act 2011 (the LSA).

[10] There was therefore no need for the Authority to hear from the Applicant about that.

[11] Instead the Authority considered justice was best served by giving the parties closure as soon as possible, by issuing this costs determination without further delay.

Issues

[12] The issues to be determined were:

- (a) Are there exceptional circumstances that require a costs order to be made against the legally aided Applicant?
- (b) If not, should the Authority exercise its discretion under s 45(5) of the LSA?

- (c) If there were exceptional circumstances, as required by s 45(2) of the LSA, then what costs and disbursements should the Respondents be awarded?
- (d) If costs are to be awarded, should the Respondents also be awarded costs in respect of this costs application?

Are there exceptional circumstances that require a costs order to be made against the legally aided Applicant?

[13] The Authority discovered that the Applicant was legally aided via the Respondents' costs submissions.

[14] The Applicant had informed the Respondents of his legal aid status in "*without prejudice save as to costs*" communications dated 15 March 2022. However, the Authority obviously did not see that letter until it was filed on 23 November 2022, as an attachment to the Respondents' costs submissions.

[15] If, at the time it issued the substantive determination, the Authority had known the Applicant was legally aided then it would recorded that in the determination, instead of indicating that, if costs were not agreed, it intended to adopt its usual 'notional daily tariff' based approach to awarding costs in the Authority.

[16] As a legally aided person, the Applicant had qualified protection against costs. Section 45(2) of the LSA states that "*no order for costs may be made against an aided person in a civil proceedings unless the court is satisfied that there are exceptional circumstances.*"

[17] Section 45(3) of the LSA sets out five non-exhaustive factors that may be taken into account when determining whether or not exceptional circumstances exist, as required by s 45(2) of the LSA.

[18] The Respondents sought to convince the Authority there were exceptional circumstances. Those submissions were not accepted.

[19] The Applicant was entitled to pursue his constructive dismissal claim and the disadvantage grievances were relied on as part of the chain of events that had caused his resignation. Likewise, the breach of contract also formed part of the constructive dismissal claim. The penalty claims followed the breach of employment agreement allegations. It was essentially all part of the same overall factual matrix the Authority had to consider.

[20] The Applicant pursued his claims in a professional and appropriate matter that did not give rise to exceptional circumstances. Although his claims did not succeed, it was not unreasonable in all the circumstances for him to have sought to have pursued the claims he did. He engaged appropriately in the Authority's investigation process, he did not engage in misleading or deceptive conduct, and there were no abuses of the Authority's process.

[21] The fact that the Applicant declined to accept a 'walk away' *Calderbank* offer that was made halfway through the second day of the Authority's two day investigation meeting was not an "*exceptional circumstance*", as required by s 45(2) of the LSA.

[22] The Authority further finds that there are no other factors (additional to those set out in s 45(3) of the LSA) that would make this a matter in which there were "*exceptional circumstances*", that would warrant a costs order being issued against the legally aided Applicant.

[23] The threshold criteria in s 45(2) of the LSA was therefore not met, because the Respondents failed to establish the existence of the required exceptional circumstances.

Should the Authority exercise its discretion under s 45(5) of the LSA?

[24] The Authority did not consider it appropriate to exercise its discretion under s 45(5) of the LSA, to record the costs it would have ordered the Applicant to have paid, had he not been legally aided, so it has declined to do so.

Outcome

[25] The Authority declined to order the legally aided Applicant to contribute anything towards the Respondents' actual legal costs, because there were no "*exceptional circumstances*" that permitted such a costs order to be made.

Rachel Larmer
Member of the Employment Relations Authority