

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2022] NZERA 69
3086092**

BETWEEN RAYMOND UTUTAONGA
Applicant

AND NORTH WESTERN FARMS
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Sharon Henare, Representing the Applicant
Emma Smith, counsel for the Respondent

Submissions: 1 March 2022 from the Applicant
27 January 2022 from the Respondent

Determination: 4 March 2022

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has issued two determinations in this matter. The first was issued on 14 September 2020 ([2020] NZERA 370) The second determination was issued on 22 February 2022 ([2022] NZERA 49). Both were determined ‘on the papers’.

[2] The Respondent, North Western Farms Limited (NWFL) was the successful party in both matters and has applied for costs in respect of those matters and in respect of an abandoned claim for unpaid wages made by the Applicant, Mr Raymond Ututaonga.

[3] NWFL is seeking a contribution to its actual costs on the basis of two days of an investigation hearing at the Authority’s notional daily tariff rate of \$8,000.00 plus an uplift of 50% due to the protracted nature of the proceedings as a direct consequence of the conduct of

Mr Ututaonga's claim (specifically Ms Henare's presentation of irrelevant and inadmissible material and the multitude of irrelevant and inadmissible material and the multitude of unfounded serious allegations against the employer, its director and counsel).

[4] Mr Ututaonga submits that he should be awarded a 'reward' of \$10,000.00 which I understand as meaning that costs to the sum of \$10,000.00 should be awarded to the applicant.

[5] The Respondent submits that increased costs can be awarded in circumstances in which the losing party's actions resulted in increased costs, noting that in *Smith v Air New Zealand* Judge Colgan remarked that: "conduct in litigation tending to exacerbate it may properly sound in costs".¹ Counsel specifies these actions by the Applicant as:

- a) The dismissive attitude towards guidance and recommendations presented in good faith by both the Member and Counsel for the Respondent that the Applicant seek advice or guidance. This constituted fair warning of the consequences of pursuing a course of conduct provided by Counsel which was simply dismissed by the Applicant as 'threats or attempts to 'intimidate';
- b) The significant amount of unnecessary and irrelevant material which was presented by Ms Henare on behalf of Mr Ututaonga to accompany what was a confused and illogically presented case which meant considerable additional time was spent by the Respondent and the Authority member in considering this material; and
- c) The Applicant and his representative, pursuing their course of action, seeking to rewrite and escalate their claims at every opportunity without pause to consider if their escalated causes of action had merit or were capable of substantiation legally or factually.

Principles

[6] The Authority's power to award costs is at the discretion of the Authority pursuant to clause 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.

¹ *Smith v Air New Zealand* [2001] EmpC31 at [15]

[7] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*². Relevant to this matter are the following principles:

- Costs generally follow the event;
- There is a discretion as to whether costs are awarded and in what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- Awards will generally be modest; and
- Frequently costs are judged against a notional daily rate.

Costs Award

[8] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Principles also include that costs are reasonable and that they normally follow the event.

[9] I see no reason for not applying these principles in this case. NWFL was the successful party in both determinations and it is entitled to a contribution towards its costs.

[10] The claim for payment below the minimum wage rate was abandoned before the Authority considered it fully and before submissions were made in respect of it. On that basis I do not make a costs award in respect of it.

[11] In respect of the two matters the Authority did address, I take into consideration that Mr Ututaonga was represented by his wife, Ms Henare, neither of whom have any legal experience.

[12] However, it is not necessary that parties are legally represented before the Authority which regularly deals with unrepresented parties. Further in this case, advice was provided to Ms Henare by both the Authority and Counsel for the Respondent about her conduct of the case and its implication for costs. This advice was largely ignored and resulted in the Authority and the Respondent having to consider a large amount of submission material which was not relevant to the issues.

[13] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing and \$3,500.00 for the second day. The

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

two determinations were made ‘on the papers’ and in that case, I consider that costs based upon two half days of hearing time is the appropriate starting point for each. That provides a starting point of \$4000.00.

[14] From that starting point I consider that there should be some uplift in costs based upon the conduct of the case by the Applicant. This resulted in increased costs being incurred by the Respondent which has had to defend a large number of unmeritorious and unsubstantiated claims by the Applicant. I consider that an uplift of 20% is appropriate.

[15] Accordingly, Mr Ututaonga is ordered to pay NWFL the sum of \$4,800.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority