

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 330
3189399

BETWEEN

RICHARD FLANNIGAN
Applicant

AND

CUSHMAN & WAKEFIELD
NEW ZEALAND LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Phil Mitchell, counsel for the Applicant
Michael Witt, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 9 June 2023 from the Applicant
31 May 2022 from the Respondent

Determination: 23 June 2023

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] On 23 May 2023 I issued a determination in relation to an employment relationship problem that found:¹

- i. Richard Flannigan's claims that he was unjustifiably disadvantaged (in relation to the proposal he be placed on a performance improvement plan) or unjustifiably constructively dismissed by Cushman & Wakefield New Zealand Limited (C&W) were not successful and no remedies followed;
- ii. C&W breached Mr Flannigan's employment agreement and s 39 of the Holidays Act 2003 (HA2003), when it used his annual leave without

¹ *Flannigan v Cushman & Wakefield New Zealand Limited* [2023] NZERA 257 at [83].

consultation or agreement, after he exhausted his sick leave, but did not breach its duty of good faith; and

- iii. C&W's counter-claim that Mr Flannigan breached the duty of good faith and his contractual obligations by covertly recording a meeting was not successful and no remedies followed.

[2] I ordered that C&W calculate and pay Mr Flannigan an amount equal to the value of annual holidays that were used in breach of his employment agreement and s 39 of the HA2003.²

[3] Costs were reserved and the parties were encouraged to resolve this matter between themselves. I provided a preliminary view that while this may be viewed as a case of mixed success, C&W were substantially the successful party, with Mr Flannigan successful only with a minor element of his employment relationship problem, which was only articulated in submissions. I suggested that it may be that given the nature of this mixed success, that this is a matter where it is appropriate that costs should lie where they fall.³

[4] I further said that if parties do not agree with the above comments on the approach to costs, then C&W could lead the process of applying for a determination on costs and Mr Flannigan should reply to C&W's submissions in this matter.⁴ The parties did not agree with my suggested approach and both now seek a contribution to their costs.

[5] The discretion to award costs, whilst broad, is to be exercised in a principled way. 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)*.⁵

[6] The primary principle is that costs 'follow the event'. The Authority has power to award any party to pay to any other party such costs and expenses as the Authority thinks reasonable.⁶ Costs are awarded in the Authority generally starting from the daily tariff, currently \$4,500 for the first day and \$3,500 for each subsequent day, with

² Ibid at [83c].

³ Ibid at [85].

⁴ Ibid at [86].

⁵ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁶ Employment Relations Act 2000, schedule 2, clause 15.

upward and downward adjustments made if appropriate to the circumstances of the case.⁷ In this case the investigation meeting took one full day, so the appropriate starting point is the daily tariff for the first day.

The parties' submissions

[7] C&W claimed the full daily tariff for the first day of \$4,500 on the basis that it had been the successful party and there were no reasons to warrant a departure from this amount. C&W did not consider that this was a typical 'mixed success' case, referring to my comments that "C&W were substantially the successful party".⁸

[8] Submissions for Mr Flannigan were that:

... counsel cannot accept that [C&W] was "substantially the successful party." [Mr Flannigan] made two substantive claims, both of which were dismissed. C&W made a counter claim, which was also dismissed.

This is a case therefore where literally *none* of the claims raised by the parties were successful.

[9] Submissions for Mr Flannigan pointed to a number of findings I had made in relation to C&W's employees' conduct, claiming that these represented a "litany of malfeasance" that made it "difficult for counsel to understand the *obiter* comment at paragraph [85] that C&W were "substantially the successful party".

[10] Pointing in addition to my finding that C&W had breached Mr Flannigan's employment agreement and s 39 of the HA2003, submissions for Mr Flannigan are that he should be entitled to at the very least costs in the amount of \$4,500.

Payment of holiday pay

[11] As noted at paragraph [2] above I ordered that C&W calculate and pay Mr Flannigan an amount of equal to the value of annual holidays that were used in breach of his employment agreement and s 39 of the HA2003.

[12] C&W's submissions, supported by copies of payslips, were that:

Since the Authority's determination, the Respondent ascertained that that part of the employment relationship problem had in fact already been remedied prior to the commencement of the proceedings. Unfortunately, this was not fully understood at the time of the investigation meeting, otherwise no remedies would have been ordered at all.

⁷ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1>.

⁸ *Flannigan v Cushman & Wakefield New Zealand Limited* [2023] NZERA 257 at [85].

[13] Submissions for Mr Flannigan were that “on the information supplied he is unable to work out what the position is. He requests that [C&W] supply, in a clear and simple statement for, the annual leave deducted, then paid.”

[14] I requested the Authority Officer seek an update from the parties and they were advised that Mr Flannigan’s counsel was “Still awaiting a breakdown from the Respondent re the issue of annual leave repayments, but that is a side issue”.

[15] If the parties are unable to agree on whether the amount I ordered be paid has been paid, then leave is granted for Mr Flannigan to return to the Authority for a further determination on that issue.

Conclusion and orders

[16] The submissions summarised above have not convinced me to change my preliminary view that while this may be viewed as a case of mixed success, C&W were substantially the successful party, with Mr Flannigan successful only with a minor element of his employment relationship problem.

[17] In *Coomer v J A McCallum and Son* the Court observed that in these cases of mixed success, the Authority must: “stand back and look at things in the round”.⁹

[18] Standing back and considering the matter in the round, I have had regard to the following in reaching a costs decision in this matter:

- i. The principles set out in *Da Cruz*;
- ii. C&W was found to have not unjustifiably disadvantaged or unjustifiably constructively dismissed Mr Flannigan – these were the most substantial of Mr Flannigan’s claims and he was not successful in relation to these, notwithstanding the findings I made in relation to C&W’s employees’ conduct, which were related to these claims. I weight these findings most significantly in determining that C&W were substantially the successful party, as they defended the key claims against them, notwithstanding the findings I made in relation to C&W’s employees’ conduct;
- iii. The matter that Mr Flannigan was successful in, relation to was only “a minor element of his employment relationship problem” – it did not take up a significant amount of time at the investigation meeting and therefore generated

⁹ *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156 at [43].

little cost. I have also taken into account the response to the Authority Officer's request for an update from the parties noted at paragraph [14] above. My preliminary view placed less weight on this element of Mr Flannigan's employment relationship problem, which is supported by the advice provided on behalf of Mr Flannigan;

- iv. C&W's counter-claim which was unsuccessful did not take up a significant amount of time at the investigation meeting – I consider limited weight should be placed on this issue amongst the matters that were before me for investigation and determination in assessing the overall outcome for the purposes of determining costs; and
- v. the time taken for the Investigation Meeting, which was one full day.

[19] On the basis that the Court has stated that mixed success is nevertheless success for the purposes of awarding costs, I consider that C&W were substantially the successful party and are entitled to receive a costs award.

[20] Based on the submissions summarised above, I consider a reduction of \$1,000 from the notional daily tariff is appropriate in this case to reflect the success that Mr Flannigan had in relation to the payment of annual holidays. While a reduction was not sought by Mr Flannigan, this was because he was claiming a contribution to his own costs and I consider this is equitable in the circumstances.

[21] I order that Richard Flannigan must pay Cushman & Wakefield New Zealand Limited \$3,500 as a contribution towards the costs it incurred in responding to his claims.

Shane Kinley
Member of the Employment Relations Authority