

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 390
3175002

BETWEEN TRACEY MCCORMICK
Applicant

AND INFRAMAX
CONSTRUCTION
LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: Simon Greening and Kylie Hudson, counsel for the applicant
Blair Scotland, counsel for the respondent

Investigation meeting: On the papers

Information received: 3 July 2023 from the respondent

Determination: 24 July 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] On 20 June 2023 the applicant Tracey McCormick withdrew this application to the Authority. The investigation meeting was set to take place in Hamilton on 5 July 2023. The respondent Inframax Construction Limited (Inframax) says there was no agreement between the parties as to costs. On 3 July 2023 it applied for an award of costs, seeking a contribution of \$2,000.

[2] By email of 3 July 2023, the Authority invited Ms McCormick's counsel to provide a response to the costs application within 14 days, by 17 July 2023. Ms McCormick's counsel confirmed she has been made aware of Inframax's application and the timeframe for a response. Counsel confirmed they had no instructions to respond to the application.

Costs principles

[4] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000. The power is discretionary with its use governed by principles.¹ These include that costs will usually follow the event and the discretion is exercised in accordance with principle and not arbitrarily, considering equity and good conscience, and that costs awards will be modest. When considering costs, the starting point is the Authority's daily tariff of \$4,500 for the first day of an investigation meeting.

[5] In relation to costs and the withdrawal of proceedings, former Chief Judge Colgan stated in *Eden v Rutherford & Bond Toyota Ltd* (not disturbed on appeal):²

There is no time limit for withdrawing proceedings that will affect precisely the question of costs. As a matter of commonsense, however, the closer in time that proceedings are withdrawn before a hearing, the greater will probably have been the time put into their preparation by the other party and, therefore, the costs which the other party will have incurred reasonably and which may be the subject of an order.

Discussion

[6] The investigation meeting was originally scheduled to take place on 2 May 2023. On 24 April 2023 Ms McCormick applied for an adjournment of the investigation meeting, citing health reasons. That application was granted, and the investigation meeting was rescheduled to 5 July 2023.

[7] On 20 June 2023, Ms McCormick's counsel advised they had instructions to withdraw the application, stating Ms McCormick was still unwell and no longer felt able to pursue her claim. The withdrawal occurred just over two weeks prior to the scheduled investigation meeting.

[8] Inframax has incurred costs in preparing for the investigation meeting, including the preparation and lodging of a statement in reply and two witness statements. It says it had also prepared cross examination questions and legal submissions. Inframax has provided invoices for legal services rendered by counsel totalling \$14,169.81.

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

² *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43 at [8].

[9] I accept Inframax's preparations for the investigation meeting were well advanced, particularly when the shorter proximity of time between the earlier adjournment and the previously scheduled investigation meeting is taken into account. An award of costs is appropriate.

[10] The Authority has not been provided with any information about Ms McCormick's personal circumstances, other than counsel's short email correspondence citing health reasons for the withdrawal. Absent further information, I am not satisfied a reduction to the contribution sought is appropriate in the circumstances.

[11] Having considered the submissions and information received and guided by the principles applicable to a consideration of costs, I find Inframax is entitled to a costs award of \$2,000.

Conclusion

[12] Tracey McCormick is ordered to pay \$2,000 in costs Inframax Construction Limited within 21 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority