

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 677
3249659

BETWEEN AD ELECTRICAL LIMITED
Applicant

AND IAN DE LANGE
First Respondent

AND FACILITATE PROPERTY
SERVICES LIMITED
Second Respondent

Member of Authority: Rowan Anderson

Representatives: Beverly Edwards, counsel for the Applicant
Jeremy Sparrow, counsel for the Second Respondent

Investigation Meeting: On the papers

Submissions received: 20 October 2023 from the Applicant
6 October and 27 October 2023 from the Second
Respondent

Determination: 14 November 2023

COSTS DETERMINATION OF THE AUTHORITY

Background and submissions

[1] Facilitate Property Services Limited (Facilitate Property), the Second Respondent, seeks an award of costs against AD Electrical Limited (AD Electrical), the Applicant, following the withdrawal of a claim made by AD Electrical against Facilitate Property and the First Respondent seeking interim relief.

[2] AD Electrical lodged a statement of problem and urgent application for injunction on 6 September 2023. Directions were issued by the Authority on 8 September 2023 at a case management conference, including a direction that the respondents lodge a statement in reply by 15 September 2023.

[3] The parties were also directed to attend mediation. That mediation ultimately took place on 20 September 2023. AD Electrical emailed the Authority the same day advising that the claims against the respondents were withdrawn.

[4] Facilitate Property submitted that it is, given the withdrawal of the claim by AD Electrical, *de facto* a successful party and should be entitled to costs. It submitted that even had AD Electrical pursued its claim, it had no prospect of success. It further submitted that it was not correctly named as party to the proceedings and that AD Electrical provided no evidence that Facilitate Property had aided and abetted any breach by the First Respondent, and further, that AD Electrical declined to provide evidence of the same.

[5] AD Electrical says that its total relevant legal expenses were \$17,597.50 (including GST and disbursements). It submitted, noting the matter did not proceed to investigation meeting and having regard to the circumstances, that an appropriate award of costs would ordinarily be in the vicinity of 25 percent of the Authority's daily tariff. However, it also submitted that AD Electrical's conduct unnecessarily increased its costs and that an uplift is appropriate.

[6] The uplift is sought by Facilitate Property on the basis that AD Electrical must have been aware that its claim was seriously defective based on what it says were observations made by the Authority at an initial case management conference. It says that it reinforced those apparent defects to AD Electrical and provided AD Electrical the opportunity to withdraw its claim prior to Facilitate Property being required to incur further costs in lodging a statement in reply. It says AD Electrical were put on notice that costs would be sought.

[7] Facilitate Property says that on 8 September 2023 AD Electrical advised that it would withdraw its claim once an undertaking sought from the First Respondent was provided. It submitted that AD Electrical then reversed its position and refused to withdraw its claim. It claims that AD Electrical acted unreasonably by declining to withdraw its claim when undertakings were offered by both the First Respondent and Facilitate Property, in circumstances where, following the lodgement of the statement in reply and mediation, it withdrew its claim based on receiving an undertaking from the First Respondent that was identical to that offered earlier.

[8] Facilitate Property seeks an uplift to 50 percent of its actual costs, that being a total of \$8,798.75 (including GST).

[9] AD Electrical submitted that Facilitate Property were named as a respondent based on representations made by the First Respondent. It submitted that its application for interim relief was made in circumstances where AD Electrical had been put on notice as to the basis for its inclusion and had not responded. It submitted that Facilitate Property did not raise any concern about being named in the papers at the case management conference.

[10] AD Electrical referred to the Authority's Practice Note on costs noting that the Authority will not typically award costs until a substantive determination has been made, and that costs associated with mediation will not typically be awarded. It submitted that the circumstances of this matter were such that the tariff based approach should be departed from.

[11] It was submitted by AD Electrical that Facilitate Property's claim for costs was not supported by relevant invoices and specification as to the work associated with the claimed costs. It also submitted that the threshold to establish an arguable case in interim injunction matters is low, and that Facilitate Property did not seek to have the matter struck out as being vexatious or frivolous. AD Electrical deny there having been any agreement on either 8 or 13 September 2023 that the matter would be withdrawn.

[12] So far as undertakings were offered on 14 September 2023, AD Electrical says that the relationship between the respondents had not been explained in writing at that time and that the basis for Facilitate Property's defence was not set out until it lodged its statement in reply on 15 September 2023. In summary terms, AD Electrical also submitted it had reason to proceed with the mediation in the circumstances having regard to the material available at the time.

[13] AD Electrical submitted the settlement offer made by Facilitate Property was unreasonable. It also submitted that its conduct in declining to lodge any additional affidavit material in fact contributed to the interim investigation being shorter than it could have been. AD Electrical submitted that costs should lie where they fall.

Costs principles

[14] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.¹

[15] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.²

[16] The daily tariff is usually taken as a starting point,³ although not used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

Consideration

[17] The Authority may make an order that a party contribute to the costs of another party in circumstances where an application has been withdrawn. This may occur, for example, where a matter is withdrawn at short notice prior to a scheduled investigation meeting, and where costs have been incurred in preparation for the same.

[18] In the present case, the interim application was to be dealt with 'on the papers'. No investigation meeting was scheduled and such as directions were issued, the timing of the withdrawal was such that Facilitate Property was not required to lodge any affidavit material or submissions. Facilitate Property were directed to lodge any statement in reply by 15 September 2023, and it ultimately did so. A direction that the parties attend mediation, requiring that the parties attempt in good faith to reach an agreed settlement of their differences,⁴ was complied with. The matter was withdrawn by AD Electrical on the same day as the mediation.

[19] Having considered all of the material and submissions lodged, I do not consider an award of costs is appropriate. No investigation meeting was held, nor were any

¹ Employment Relations Act 2000, Schedule 2, clause 15.

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

³ Employment Relations Authority Practice Direction, August 2023, <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

⁴ Employment Relations Act 2000, s 159(2).

substantive steps taken in preparation for the Authority's investigation of the matter on the papers.

[20] Whilst Facilitate Property lodged a statement in reply, I do not consider the costs incurred, where in effect no substantive steps were required in preparation for the Authority's investigation, trigger an application of the Authority's tariff. Whilst the application made by AD Electrical was withdrawn, I find that withdrawal was made in a timely manner having regard to the timetabling of the Authority's investigation and that attendance of the parties at mediation in accordance with the Employment Relations Act 2000.

[21] There is no suggestion of a valid Calderbank offer having been made. Such as Facilitate Property proposed the matter be dispensed with on the basis of undertakings being provided, that occurred a relatively short time before the statement in reply was due, and a few days prior to the mediation. Facilitate Property wrote to AD Electrical on 13 September 2023 raising the issue of costs and seeking withdrawal of the proceedings. That correspondence sought confirmation of the same by later the same day. I am not satisfied an award of costs should be made on that basis.

[22] In its reply submissions, Facilitate Property noted that, contrary to the submissions from AD Electrical, it did seek to have the proceedings struck out. That, it says, was a matter included in the statement in reply lodged on 15 September 2023. Whilst that was two days following its correspondence of 13 September 2023, it is also the case that the matter was withdrawn only a few days later. In those circumstances, I do not consider there a proper basis for an award of costs.

[23] I decline to make an award of costs as sought by Facilitate Property.

Orders

[24] I order decline to make an award of costs and costs are to lie where they fall.

Rowan Anderson
Member of the Employment Relations Authority