

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 690

BETWEEN TALENT PROPELLER
LIMITED 3093872
Applicant

AND YJL
Respondent

BETWEEN YJL 3129795
Applicant

AND TALENT PROPELLER
LIMITED
First Respondent

SHARON DAVIES
Second Respondent

LIANNE MASKELL
Third Respondent

BETWEEN YJL 3140141
Applicant

AND Respondent
TALENT PROPELLER
LIMITED

Member of Authority: Marija Urlich

Representatives: Ashleigh Fechney, advocate for the Applicant
Richard Upton, counsel for the Respondents

Investigation Meeting: On the papers

Determination: 16 November 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 18 September 2023 in respect of three applications (3093872, 3129795 and 3140141).¹

[2] In respect of application 3129795, which dealt with YJL's personal grievance and arrears claims the Authority found YJL had suffered an unjustified disadvantage in their employment by way of suspension. An award of compensatory damages was made in their favour in respect of the established personal grievance with a reduction for their found contributory conduct. Their claim for unjustified dismissal was unsuccessful as were claims for arrears of a bonus payment, referral fee and annual and bereavement leave.

[3] In respect of application 3093872, the Authority found YJL had breached their employment agreement with Talent Propeller Limited (Talent) by falsifying that document and producing a further falsified document by way of explanation during the course of a disciplinary investigation. A penalty for those breaches was issued, a portion of which was ordered to be paid to Talent.

[4] In respect of application 3140141, YJL's claims of breach of non-publication orders and breaches of good faith and confidential and private information were unsuccessful.

[5] Costs were reserved. A timetable was set for memoranda to be filed if the parties were unable to resolve the issue of costs themselves. YJL, by email dated 2 October sought an order that costs lie where they fall. Talent, in its memorandum as to costs dated 17 October, seeks a contribution to costs of \$15,000. Further information was provided by the parties as to the sum of actual costs incurred.

[6] For completeness, in addition to the above matters, costs were reserved on preliminary determinations issued by the Authority concerning these parties.² In the substantive determination issued by the Authority on 22 July 2020, costs were determined on a no award basis.³

¹ *Talent Propeller Limited v YJL* [2023] NZERA 534.

² *UXK v Talent Propeller Limited* [2022] NZERA 115, *UXK v Talent Propeller Limited v UXK* [2022] NZERA 314, *Talent Propeller Limited v YJL* [2021] NZERA 491 and *Talent Propeller Limited v YJL* [2023] NZERA 534.

³ *Talent Propeller Limited v YJL* [2020] NZERA 284.

[7] YJL has been in receipt of legal aid throughout the proceedings so in assessing costs incurred and claimed this matter is subject to the Legal Services Act 2011.

YJL's claim in respect of costs

[8] YJL says costs should lie where they fall. They say the preliminary matters in which costs were reserved should factor in the Authority assessment of costs. They have estimated the amount of hearing time involved in matters heard together and, on that basis, accept they would ordinarily owe costs to Talent and Ms Maskell with the caveat that even if their calculations are incorrect, it is likely YJL would 'owe' Talent costs. Information provided to the Authority shows YJL has received, at least up to 3 December 2022 total payments of \$24,205.76 in legal aid payments for these matters.

[9] YJL says this is not a matter which meets the exceptional circumstances test for a costs order to be made against a person in receipt of legal aid because they were partially successful in their personal grievance claim and had no option but to respond to Talent's claim.

Talent's claim for costs

[10] Talent seeks an order of costs against YJL of \$15,000. It is accepted it has incurred actual costs in respect of these matters in excess of that sum. It says on any objective measure, it is the successful party and such an award is warranted because exceptional circumstances exist in this case:

- (i) Talent successfully defended or pursued 9 claims against YJL who was successful in two of their claims, an unjustified disadvantage grievance and a non-publication order;
- (ii) YJL's conduct was misleading and deceitful – they were found to have falsified their employment agreement and emails;⁴ and
- (iii) unreasonably pursued one or more issues on which she failed.⁵

[11] Applying the Authority's usual daily tariff, Talent submits the starting point for a consideration of costs should be \$18,500 given this matter took five hearing days, with a \$3,500 reduction to reflect YJL's limited success.

⁴ Legal Services Act 2011, section 45(3)(c).

⁵ Legal Services Act 2011, section 45(3)(d).

[12] In the alternative, Talent requests the Authority adhere to section 45(5) of the Legal Services Act 2011 (LSA) and specify the amount YJL would have been ordered to pay had they not been legally aided.

Costs principles

[13] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

Costs analysis

[14] While both parties have enjoyed a degree of success in respect of their claims it is accepted Talent has been more successful than YJL in pursuing and defending the range of claims before the Authority. Talent has incurred actual costs in excess of the contribution it seeks in respect of this matter and the usual course of events would be that they receive a contribution to costs incurred. However, as YJL is in receipt of legal aid no order for costs can be made against them unless exceptional circumstances exist under s 45(3) of the LSA.

[15] Section 45(3) generally refers to matters during the course of litigation which may amount to exceptional circumstances though it is not an exhaustive list.

[16] The test for exceptional circumstances under s 45(3) is not met in this matter. Conduct which has been found to meet the exceptional circumstances test is not present

in this matter for example, YJL has not failed to comply with procedural requirements in an orderly and timely manner including timetabling set by the Authority, unreasonably declined a settlement offer, delayed or required adjournments of investigation meeting dates causing Talent to incur additional legal costs.⁶ YJL did pursue unsuccessfully a number of matters but failure or success is not the test for a meritorious claim. Further, while YJL has been found by the Authority to have breached their employment agreement, that occurred during the course of the employment relationship and before the subject proceedings were afoot. A penalty has been ordered against them for those established breaches.

[17] Talent's request that an indication of a costs order be made in the event of a decline of a s 45(3) order is not accepted. Such an indication would follow a finding of exceptional circumstances but the subject party's financial situation is such that they could not meet the award.⁷

Outcome

[18] No order for costs is made.

Marija Urlich
Member of the Employment Relations Authority

⁶ *Bachu v Davie Motors Limited* [2011] NZEmpC 45.

⁷ Above at [16].