

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 376
3218659

BETWEEN EOIN MILES
 Applicant

AND CITADEL CAPITAL
 LIMITED
 First Respondent

 FORTLAND CAPITAL
 LIMITED
 Second Respondent

Member of Authority: Eleanor Robinson

Costs Submissions: 7 June 2024 from the Applicant
 21 June 2024 from the Respondent

Determination: 25 June 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 14 May 2024 ([2024] NZERA 285) it was determined that the Applicant, Eoin Miles, had not been constructively dismissed by the First Respondent, Citadel Capital Limited (Citadel). It was determined that Mr Miles had been unjustifiably disadvantaged by Citadel.

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately, they have been unable to do so, and the Applicant is seeking a contribution to costs.

[3] The investigation meeting involved a two-day investigation meeting.

[4] Ms Wensley, on behalf of Mr Miles, cites actual costs of \$17,395.20 including disbursements and plus GST.

[5] Mr Moore and Mr Ginrick, on behalf of Citadel and Fortland Capital Limited (the Respondents), submit that this is a case of mixed success in which Mr Miles had only minor

success. In particular, Mr Miles was wholly unsuccessful in relation to the major claim of constructive dismissal and had minor success in relation to two disadvantage claims. It is also submitted that Mr Miles was represented by a family member and therefore no costs should be awarded to him.

[6] The Respondents are seeking a contribution to its costs in the amount of \$8,000.00.

[7] Both parties have made submissions in regard to costs. Whilst I have full considered them in reaching my determination, I do not include all the submissions made.

Submissions on behalf of the Applicant

[8] It is submitted for Mr Miles that he was successful on significant issues.

[9] As grounds for an uplift in costs above the notional daily tariff rate in the Authority, it is submitted that the Respondents repeatedly failed to adhere to timetabling, resulting in multiple case management conferences, and necessitating the filing of multiple memoranda.

[10] Further that the Respondents failed to file its evidence and documents for inclusion in the common bundle of documents (CBD) in a timely manner, thereby hampering the Applicant's ability to prepare his case adequately.

[11] It is submitted that Mr Miles and his representative had to take unpaid leave to attend the investigation meeting and prepare for it.

[12] It is also submitted that an uplifted costs award is justified because of the numerous breaches by the Respondents of the timetable and the failure to file written witness statements by all the Respondents witnesses.

Submissions on behalf of the Respondents

[13] It is submitted for the Respondents that Ms Wensley is Mr Miles' sister and that therefore only disbursements may be claimed in respect of his representation by a family member; citing *Gyenge v Clifford Lamar Ltd* in which the Employment Court extended the principle of disallowing costs to a litigant-in-person to a family member.¹

¹ *Gyenge v Clifford Lamar Ltd* [2011] NZEmpC 10 at [7].

[14] It is submitted that the amount being claimed as costs by Mr Miles is in effect a claim for indemnity costs. It is submitted that these are only awarded in respect of cases in which there has been exceptionally bad behaviour.

[15] It is further submitted that conduct by Mr Miles representative should be taken into account by the Authority including:

- The making of complaints to the New Zealand Law Society about the previous representative of the Respondents which have not been upheld. These resulted in the withdrawal of the representative who was an inhouse employee and therefore would not have incurred legal costs for the Respondents;
- Asking repetitive and irrelevant questions of witnesses at the investigation meeting which delayed matters;
- Making inappropriate comments to the Representatives counsel during the investigation meeting which had to be addressed by the Authority; and
- Not providing the CBD to the Respondents until the day of the investigation meeting.

[16] It is also submitted that Mr Miles's representative had presented a Calderbank Offer, that is a without prejudice save as to costs offer to the Respondents on 19 December 2023.²

[17] That was in the sum of \$259,086.00 being the difference between Mr Miles's income during employment and his earnings after the employment relationship ended.

[18] Mr Miles was awarded \$15,000.00 in the Authority.

[19] is submitted that these factors warrant a significant reduction in the level of costs being sought by Mr Miles.

Costs Award

[20] 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.

² *Calderbank v Calderbank* [1976] Fam 93 (CA).

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

[21] This was a two-day investigation so the starting point for costs assessed at the notional daily tariff in the Authority is \$8,000.00. In determination ([2024] NZERA 285) both parties have, as observed, had some degree of success, although the Respondents were successful in defending the major claim of constructive dismissal.

[22] In *Coomer v J A McCallum and Son Ltd* the Employment Court observed that in these cases of mixed success, the Authority must: “stand back and look at things in the round”.⁴ It is also important to note that Mr Miles’s, albeit limited, success could not have been achieved without filing a case in the Authority.

[23] On the basis that the Employment Court has stated that mixed success is nevertheless success for the purposes of awarding costs, I consider that Mr Miles should receive a costs award.

[24] In determination ([2024] NZERA 285) I noted the relationship between Mr Miles and his representative and that he may not have incurred costs as a result. Mr Miles has submitted an invoice in respect of Ms Wensley’s costs for this matter.

[25] In the recent Employment court case of *Citadel Capital Limited and Fortland Capital Limited v Eoin Miles* the Court considered this same issue and allowed costs on the basis that Ms Wensley was acting in a capacity as a lay advocate.⁵

[26] Standing back and looking at matters in the round I consider that there was delay on the part of the Respondent in adhering to the timetable agreed with the parties. This did involve additional case management conferences and memoranda having to be filed by the Applicant.

[27] I also note that the complaints by Ms Wensley caused the withdrawal of the employee representative for the Respondents thereby increasing the Respondents costs by the engagement of professional counsel. Also noted is that the CBD was not provided to the Respondents in a timely manner which hindered the presentation of its case in the investigation.

[28] The Calderbank Offer was for a significant sum of money. It was far in excess of what Mr Miles was awarded in the determination, and I do not attach weight to it as a factor for increasing costs.

⁴ *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156 at [43].

⁵ *Citadel Capital Limited and Fortland Capital Limited v Eoin miles* [2024] NZEmpC 111 at [14].

[29] It is a well-settled principle that costs are not intended to punish or express disapproval of an unsuccessful party's conduct. But where the unsuccessful party has acted unreasonably, thereby also unnecessarily increasing costs, an uplift can be considered.

[30] I observe that both parties engaged in some degree of unreasonable conduct which had the effect of contributing to costs.

[31] Mr Miles has claimed reimbursement of travel expenses, being flights from Queenstown and Dunedin to the investigation venue at Auckland for himself and Ms Wensley, his representative.

[32] It is not normal practice in the Authority for disbursements to be awarded in respect of travel costs incurred by either the Applicant, the investigation being held at the location of an applicant's employment at the time the issues arose; or of the Applicant's representative attending an investigation meeting, since it is a prerogative of parties to choose the representation of their choice.

[33] I see no basis for departing from the usual practice in this case.

[34] In all the circumstances I consider a small uplift in costs to be appropriate.

[35] **Accordingly, the Respondents are ordered to pay Mr Miles the sum of \$9,000.00 towards his legal costs, pursuant to clause 15 of Schedule 2 of the Act.**

[36] **The Respondents are also ordered to pay Mr Miles the Authority filing fee in the sum of \$71.55.**

Eleanor Robinson
Member of the Employment Relations Authority