

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 713
3230199

BETWEEN JAMES CASWELL
 Applicant

AND KAMO LANDSCAPE &
 QUARRY SUPPLIES LIMITED
 First Respondent

AND JOHN CLIFFORD WALTER
 ROBINSON
 Second Respondent

Member of Authority: Rachel Larmer

Representatives: Bradley McDonald, counsel for the Applicant
 John Robinson for the Respondents

Investigation: On the papers

Submissions and Other 5 November 2024 from the Applicant
Information Received: 6 November 2024 from the Respondents

Date of the Determination: 29 November 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Costs application

[1] The applicant, Mr James Caswell, was the successful party regarding claims he made against the first respondent, Kamo Landscape & Quarry Supplies Limited (KLQS), and the second respondent Mr John Robinson, who is the sole director and a 51 percent shareholder of the first respondent.

[2] Mr Caswell has sought an award of costs in his favour in the amount of \$20,620.17. The respondents informed the Authority they would not be lodging costs

submissions and that whatever award was made by the Authority would be challenged to the Employment Court.

The substantive determination

[3] The following findings and orders were made by the Authority in its substantive determination dated 16 October 2024, which the respondents have challenged:¹

- (a) Mr Caswell was a more credible witness than Mr Robinson;
- (b) KLQS employed Mr Caswell from 24 January 2021 until 28 February 2023;
- (c) KLQS failed to keep wage and time records, and holiday and leave records, for Mr Caswell in breach of s 130 of the Employment Relations Act (the Act) and s 81 of the Holidays Act 2003 (the HA03);
- (d) KLQS was ordered to pay total penalties of \$4,000.00 for its breaches of the Act regarding its failure to keep and produce wage and time records, and of the HA03 for its failure to keep holiday and leave records, for Mr Caswell;
- (e) KLQS was ordered to pay Mr Caswell \$3,000 of the total penalties imposed, with the \$1,000 balance of the penalty imposed to be paid by KLQS to the Crown bank account;
- (f) KLQS was ordered to pay Mr Caswell wage arrears of \$31,963.97;
- (g) KLQS was ordered to pay interest on Mr Caswell's wage arrears of \$31,963.97 from 28 February 2023 until that amount had been paid in full;
- (h) KLQS engaged in multiple breaches of employment standards;
- (i) Mr Robinson was 'a person involved in the breaches of employment standards' that occurred, as defined by s 142W of the Act;
- (j) Mr Caswell was granted leave by the Authority pursuant to s 142Y(2) of the Act to personally recover from Mr Robinson any wage arrears or other money KLQS owed Mr Caswell, but was unable to pay him;

¹ *Caswell v Kamo Landscape & Quarry Supplies Ltd and Robinson* [2024] NZERA 621.

- (k) KLQS breached its good faith obligations to Mr Caswell;
- (l) Mr Caswell's personal grievance claims were raised within the 90-day time limit required by s 114(1) of the Act;
- (m) KLQS unjustifiably disadvantaged Mr Caswell by failing to deduct and to remit to IRD all of the correct legal deductions that had been made, or were legally required to have been made, from Mr Caswell's wages, such as PAYE, ACC levy and KiwiSaver contributions (being both the compulsory employer contribution and the employee KiwiSaver contribution);
- (n) Mr Robinson, in his capacity as KLQS's sole director, was ordered to take all necessary steps to ensure all of the correct legal deductions that had been and/or were required to have been made from Mr Caswell's wages were remitted in full to IRD, with KQLS/Mr Robinson not retaining any of those deductions from Mr Caswell's wages for itself/himself;
- (o) KLQS was ordered to pay Mr Caswell \$4,000.00 distress compensation for his successful unjustified disadvantage grievance claim;
- (p) KLQS unjustifiably dismissed Mr Caswell on 28 February 2023, without notice.
- (q) KLQS was ordered to pay Mr Caswell \$51,876.0 remedies for his successful unjustified dismissal grievance;
- (r) Mr Caswell did not contribute to the situation that gave rise to his successful personal grievance claims, so his remedies were not reduced under s 124 of the Act.

Legal position

[4] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Act. Costs are discretionary, with the discretion to be exercised by the Authority on a principled basis. Costs must not be used to punish a party, or to express disapproval of a party's conduct unless the conduct had increased the other party's actual legal costs unnecessarily.

[5] Conduct by one party that has unreasonably increased the other party's costs may be reflected in the amount of costs awarded.²

[6] The Authority usually adopts a 'notional daily tariff' based approach to costs. The current tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case.

[7] When assessing costs in this matter the Authority has had regard to the costs assessment principles identified by the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* and *Fagotti v Acme & Co. Limited*.³

Issues

[8] The following issues are to be determined:

- (a) Should Mr Caswell be awarded costs?
- (b) What costs and disbursements did Mr Caswell actually incur?
- (c) What is the notional starting tariff for assessing costs in this matter?
- (d) Should the notional starting tariff for assessing costs in this matter be decreased?
- (e) Should the notional starting tariff for assessing costs in this matter be increased?
- (f) What legal costs has the Authority awarded Mr Caswell?
- (g) What disbursements can Mr Caswell be reimbursed for?
- (h) How should costs be apportioned between the respondents?
- (i) What have the respondents been ordered to pay Mr Caswell?

Should Mr Caswell be awarded costs?

[9] Mr Caswell was wholly successful in his claims against each respondent. There was no reason to depart from the usual principle that a successful party is entitled to a contribution towards their actual legal costs.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz*, [2005] ERNZ 808.

³ *PBO Ltd* above n2; and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

What costs and disbursements has Mr Caswell incurred?

[10] Mr Caswell incurred actual costs of \$20,620.17 comprising of \$18,791.58 legal fees inclusive of GST plus disbursements totalling \$1,828.59. Mr Caswell has therefore sought full reimbursement of his solicitor/client costs.

What is the notional starting tariff for assessing costs?

[11] This matter involved a two-day investigation meeting, so the notional starting tariff for assessing costs was \$8,000 (being \$4,500 for the first day plus \$3,500 for the second day of the investigation meeting).

Should the notional starting tariff be decreased?

[12] The notional starting tariff needed to be decreased to recognise that half a day of investigation meeting time was taken up investigating KLQS's unsuccessful counterclaims against Mr Caswell.

[13] The Authority has already addressed costs on the counterclaims in the *KLQS v Caswell* substantive counterclaim determination dated 3 May 2024.⁴

[14] Accordingly, the notional starting point for assessing costs in this matter should be decreased to \$6,250, being \$4,500 for the first day plus \$1,750 for half of the second day of the investigation meeting time which reflects that actual time that was used by the Authority to investigate Mr Caswell's successful substantive claims against the two respondents.

Should the notional starting tariff be increased?

[15] Mr Caswell submitted that the respondents conducted themselves in a manner that unnecessarily increased his actual legal costs. That submission was accepted.

[16] The manner in which the respondents elected to conduct their defence of Mr Caswell's claims unnecessarily and unreasonably increased his legal costs. The respondents also unreasonably rejected a generous Calderbank offer, which was made at such an early stage in these proceedings that, if accepted, it would have avoided almost all of Mr Caswell's legal costs in this matter.

⁴ *Kamo Landscape & Quarry Ltd v Caswell* [2024] NZERA 261 at [16]-[25].

Conduct that unnecessarily increased Mr Caswell's actual costs

[17] The respondents failed to comply with timetable directions, repeatedly breached the Authority's directions, did not provide relevant information, and were non-responsive to Mr Caswell's counsel regarding the preparation of an agreed bundle of documents to use at the investigation meeting.

[18] Some of the key documents the respondents provided to the Authority were unclear and ambiguous. Mr Robinson did not adequately explain these ambiguities in the documents in his minimal six-page witness statement. The Authority therefore used more investigation time than would otherwise have been required had he done so, trying to clarify these ambiguities with firstly Mr Robinson, and then with KLQS's accountant, during the course of the investigation meeting.

[19] The respondents were also often non-responsive to the Authority's and Mr Caswell's counsel's attempts to contact them about this matter.

[20] Mr Caswell therefore incurred unnecessary additional legal costs as a result of the respondents' breaches, even though they belatedly lodged their evidence with the Authority.

[21] The respondents' failure to brief KLQS's accountant meant he had to be summonsed to appear at the investigation meeting with relevant documents. That meant when the accountant attended the investigation meeting it took longer than would otherwise have been the case to go through all of the relevant documents with him, as the Authority and Mr Caswell were hearing the accountant's response to relevant evidence for the first time.

[22] This also meant the accountant did not have all of the relevant information with him at the investigation meeting, so he had to provide additional information after it had ended, which the parties were given an opportunity to comment on.

Refusal of reasonable Calderbank offer

[23] The respondents' refusal of a reasonable Calderbank offer also unnecessarily increased Mr Caswell's actual legal costs. The Calderbank offer was made on 5 October 2023, which was more than six months prior to the investigation meeting that was held on 18 and 19 April 2024.

[24] Because the Authority's substantive determination has been challenged, the actual terms of Mr Caswell's without prejudice except as to costs settlement offer is not recorded in this determination. It was however on the face of it an obviously generous offer by Mr Caswell, that had been made in order to bring an early conclusion to the issues between the parties so everyone could "move on".

[25] The offer was also stated to be intended to avoid the burden on the parties of preparing for an investigation meeting, and to dispense with the need for an investigation meeting by the Authority, so it was made well in advance of that occurring. Ms Caswell would have avoided almost all of his actual legal costs had his Calderbank offer been accepted.

[26] Mr Caswell's Calderbank offer was timely. It had been made less than one month after the Authority's case management conference that was held with the parties on 8 September 2024. The Authority Member had therefore spoken to the parties about what evidence would be required for the investigation meeting, and a timetable had been set for the parties to provide the required evidence.

[27] The Calderbank offer was made one month and 27 days before Mr Caswell was required to lodge any of his evidence in this matter. Mr Robinson's response to the Calderbank offer was "Tell James he is not getting one cent."

[28] The Calderbank offer had remained open for three weeks, which was a reasonable period of time for the respondents to have properly assessed and considered it. The offer had also addressed all relevant issues between the parties including legal costs and the Inland Revenue problems, that ended up being addressed by the Authority in the substantive determination.⁵

[29] While the respondents were legally entitled to put Mr Caswell to the formal proof of each of his claims, doing so unreasonably increased his actual costs in light of the clear problems the respondents faced with their defence of his claims, based on their own evidence.

⁵ *Caswell v KLQS and Robinson* above n1.

Amount of increase

[30] The notional starting tariff should be doubled, from \$6,250 to \$12,500 to appropriately reflect the additional unnecessary costs Mr Caswell was required to incur as a direct result of the respondents' conduct in these proceedings. This amount is still significantly less than the actual legal fees Mr Caswell has incurred, which is consistent with the principle that costs in the Authority can be expected to be modest.

What legal costs has the Authority awarded Mr Caswell?

[31] Mr Caswell is awarded total costs of \$12,500 plus GST for his one-and-a-half-day investigation meeting for his successful substantive claims.

What disbursements can Mr Caswell be reimbursed for?

Disbursements claimed

[32] Mr Caswell sought reimbursement of \$1,828.59 for the total disbursements he incurred in connection with these proceedings. However, not all of the disbursements he claimed were recoverable.

Disbursements awarded

[33] Mr Caswell is entitled to be reimbursed \$71.55 for his filing fee.

[34] Mr Caswell was not able to recover his lawyer's flights from Christchurch to Whangarei, his lawyer's car hire or the cost of the two nights' accommodation in Whangarei that his lawyer incurred. It was Mr Caswell's choice to instruct out of town counsel, so it was appropriate that he bear his own costs associated with that decision.

[35] Nor can Mr Caswell recover the service costs he claimed in his costs submissions for this matter. These have already been awarded to him as a disbursement that was to be reimbursed to him in the costs order that was made in the Authority's substantive determination in *KLQS v Caswell*, relating to KLQS's counterclaims.⁶ That award has been challenged by KLQS, which has also sought a stay of that costs order from the Employment Court.

⁶ *KLQS v Caswell* above n4.

[36] Mr Caswell's claim of \$75.00 office expenses charged by his counsel was also declined, on the basis it was not actually incurred, but was instead a normal business cost associated with running a legal practice.

Apportionment of costs and disbursements

[37] In normal circumstances the Authority would have apportioned the costs and disbursements as \$9,000 legal costs plus \$35.77 (being half of the filing fee) to KLQS as the first respondent and employer party and \$3,500 plus \$35.77 to Mr Robinson personally, as the second respondent.

[38] However, on 4 November 2024 Mr Robinson affirmed an affidavit that he lodged with the Employment Court in support of a stay application of the orders made in the Authority's counterclaim determination that KLQS pay Mr Caswell \$2,500.70.⁷ Mr Robinson deposed in his affidavit that if KLQS was required to pay that amount it would experience "extreme financial hardship".

[39] Mr Robinson also deposed that KLQS was unable to pay outstanding rates, GST and employment tax issues and that it had an outstanding account to its accountant, relating to the investigation meeting in April 2024.

[40] The Authority in its substantive determination dated 16 October 2024 granted Mr Caswell leave under s 142Y of the Act to recover from Mr Robinson personally any wage arrears or other money KLQS owed him but was unable to pay.

[41] Leave was granted to Mr Caswell based on the Authority's factual finding that pursuant to s 142W of the Act, Mr Robinson was a person who was directly involved in the multiple breaches of employment standards that had occurred regarding Mr Caswell's employment by KLQS. Accordingly, it was appropriate to award costs in this matter on a joint and several liability basis.

What have the respondents been ordered to pay Mr Caswell?

[42] Within 28 days of the date of this determination the respondents, KLQS and Mr Robinson personally, are ordered on a joint and several liability basis to pay Mr Caswell

⁷ *KLQS v Caswell* above n4.

\$12,571.55 as their contribution towards the actual costs and disbursements he has incurred in respect of this matter.

Rachel Larmer
Member of the Employment Relations Authority