

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 332
3036052
3082496

BETWEEN AHMED ALKAZAZ
Applicant
AND ENTERPRISE IT LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Applicant in person
Robbie Bryant, counsel for the respondent
Investigation Meeting: On the papers
Submissions received: 3 July 2020 from the applicant
29 October 2019 and 22 May 2020 from the respondent
Date of determination: 21 August 2020

COSTS DETERMINATION OF THE AUTHORITY

- A. Ahmed Alkazaz is ordered to pay to Enterprise IT Limited the sum of \$7,000 as a contribution to costs within 28 days of the date of this determination.**

The history of proceedings between the parties

[1] On 22 December 2017 the Authority issued a determination which found that Ahmed Alkazaz was unjustifiably dismissed by Enterprise IT Limited (e-IT or the company).¹ Mr Alkazaz was awarded lost wages and compensation.

¹ *Ahmed Alkazaz v Enterprise IT Limited* [2017] NZERA Auckland 400, file number 3005551.

[2] Mr Alkazaz did not challenge the Authority's determination. However, he did apply to re-open the Authority's investigation. The Authority determined not to re-open the investigation into Mr Alkazaz's claims.² That determination is the subject of a challenge in the Employment Court.

[3] E-IT applied for costs on the re-opening application. Mr Alkazaz objected on the basis that he considered that the costs application was filed out of time. He applied to have the costs matter removed to the Employment Court. The Authority declined his removal application.³

[4] E-IT has filed two submissions on costs; the first concerning the re-opening application and the second about the removal application.

[5] Progression of the costs question was deferred when Mr Alkazaz informed the Authority that he intended to instruct counsel, including to support him with the Authority proceeding. No representative became involved. Mr Alkazaz also indicated that he intended to file a stay application in the Authority but no such application was received. Subsequently Mr Alkazaz lodged in the Authority what was described as a draft special leave application to the Employment Court. On checking the Authority was informed that not such application was filed in the Court.⁴ Mr Alkazaz then lodged submissions on costs in the Authority.

[6] Under s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all of the evidence or submissions received but states findings and expresses conclusions.

Submissions for e-IT

Re-opening

[7] E-IT seeks indemnity costs on the basis that the application for re-opening was hopeless and was commenced and continued for an ulterior motive. Mr Alkazaz's representation of himself in seven Authority and Court proceedings is emphasised. The company asserts that it put Mr Alkazaz on notice before any evidence was filed, of the

² *Ahmed Alkazaz v Enterprise IT Limited* [2019] NZERA 560, file number 3036052.

³ *Ahmed Alkazaz v Enterprise IT Limited* [2020] NZERA 178, file number 3082496.

⁴ Section 178(3) of the Act.

relevant principles, giving him the opportunity to discontinue or refine his claims and evidence.

[8] For the company it is submitted that Mr Alkazaz commenced and continued his claims with the ulterior motives of:

- (a) pressuring it into settlement for a monetary sum; and/or
- (b) disrupting its business; and/or
- (c) forcing it to spend money unnecessarily on legal fees.

[9] The submission was based on a number of factors including:

- (a) The “fresh evidence” being obtainable by him before the investigation meeting which lead to the 2017 determination;
- (b) Not providing any reasonable basis to find unfair or improper practice, especially perjury by the company’s witnesses;
- (c) Mr Alkazaz declining a reasonable offer to resolve the issues;
- (d) The lengthy application of 35 pages, along with over 200 pages of evidence;
- (e) A multitude of claims included over a number of jurisdictions including under the Privacy Act 1993 and the Human Rights Act 1993; and
- (f) Claims which were untenable including claims outside the Authority’s jurisdiction, personal grievances not raised within 90 days and time-barred claims.

[10] E-IT incurred total costs of \$16,500 plus GST (totalling \$19,000 incl GST), in dealing with the re-opening application. Indemnity costs of \$19,000 are sought.

[11] Alternatively an uplift is sought to an order of \$12,000. An appropriate starting point is described as \$8,000 with increases sought for conduct which unnecessarily increased e-IT’s costs, along with refusal to accept a reasonable offer.

[12] Costs of \$3,200 are also sought in relation to the preparation of the company’s application for costs due to Mr Alkazaz’s failure to engage constructively on resolution of the costs question.

Removal

[13] E-IT lodged legal invoices, claiming \$4,616.26 excl GST had been incurred in opposing the removal application. The company's representative submits that the unclear nature of the grounds on which removal was sought necessitated an average (as opposed to minimal or substantial) amount of work.

[14] Given the removal question was considered on the papers, half a day's notional daily tariff, namely \$2,250 is described as the starting point.

[15] E-IT's statement in reply suggested a practical approach, namely that the Authority simply issue its costs determination (as regards the re-opening), in which case if Mr Alkazaz was not satisfied with the determination he could expand the Court challenge he already had to include a challenge to the Authority's costs determination. Mr Alkazaz rejected that possibility. Legal costs of \$2,304.17 excl GST were incurred on drafting legal submissions opposing removal. An uplift of around half that amount, namely \$1,150 is sought.

[16] A further uplift of \$400 is sought on the basis that Mr Alkazaz's application for removal, being based on a procedural matter, was misconceived.⁵ In conclusion a total costs order of \$3,800 is sought regarding the removal application.

Submissions for Mr Alkazaz

[17] Mr Alkazaz seeks to have costs lie where they fall, emphasising that he was unrepresented.

[18] Mr Alkazaz's submissions refer to his view that the re-opening application should have been dealt with by way of an in person investigation meeting. He considers the on the papers investigation meeting, along with e-IT's decision not to file any affidavit evidence, disadvantaged him. Mr Alkazaz goes into some detail about why he should have been successful in the re-opening application.

[19] As regards an appropriate award of costs, if one is to be made, Mr Alkazaz argues that using a half day of the notional daily tariff as the basis for an award is too generous. He considers between \$1,000 and \$2,250 is more than enough.

⁵ Section 178(6) of the Act.

[20] Mr Alkazaz does not accept his claim was without merit and asserts a genuine belief that he suffered reputational damage as a result of the respondent's actions. He emphasises his lack of legal expertise and English not being his first language. Mr Alkazaz opposes indemnity costs.

[21] Mr Alkazaz suggests that the removal application as a mere procedural step for which no costs should be awarded.

Costs principles

[1] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act. In *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not 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.
- Without prejudice offers can be taken into account.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.⁶

[22] I do not agree with Mr Alkazaz that costs should lie where they fall. E-IT has been put to considerable expense over two unsuccessful applications by Mr Alkazaz, involving the filing of extensive submissions by him covering multitudinous claims.

Indemnity costs

[23] I have seriously considered whether this is an appropriate matter for an award of indemnity costs. Indemnity costs are reserved for exceptional cases, with

⁶ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

“exceptionally bad behaviour”.⁷ The importance of access to justice has been recognised by the Court of Appeal in consideration of indemnity costs.⁸

[24] Although this is close to an exceptional case, ultimately I am not satisfied that Mr Alkazaz can be said to be acting with improper motives. Whilst I clearly have not accepted Mr Alkazaz’s arguments and his manner of pursuing them may be open to criticism, he is concerned with his reputation. There is also the fact of him representing himself, albeit now with some experience of litigation. Had he pursued these arguments as a represented party, my conclusion on indemnity costs may well have been different.

Tariff

[25] Both Mr Alkazaz’s applications were heard on the papers and an initial starting point is needed. I conclude, taking into account the applicable daily tariff of \$4,500, that \$3,000 should be the starting point for the re-opening application and \$1,500 for the removal application.

Uplifts

[26] Mr Alkazaz’s conduct of the re-opening application justifies an uplift, even taking into account that he was representing himself. He lodged the voluminous re-opening application, affidavit and documents. As noted above, multitudinous claims were made, including new grievances and some claims outside of the Authority’s jurisdiction, along with reliance on some documents which were clearly within his possession or control prior to the 2017 determination.

[27] In considering the size of the uplift, it is relevant that Mr Alkazaz has rather more litigation experience than many employees who represent themselves in the Authority. He has been involved in several Authority and Court matters. However, I accept that he had to deal with matters of process which he may well not have been familiar with. However, on occasions e-IT’s representative took steps to point out to Mr Alkazaz alternative ways in which the matter could be dealt with. Mr Alkazaz chose not to accept those options. An uplift of \$1,500 is justified.

⁷ *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28].

⁸ *Bradbury* at n 7 above at [10] and *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348 at [12].

[28] A Calderbank offer was made on e-IT's behalf in mid-2019. This involved the re-opening proceeding being discontinued, the parties bearing their own costs and signing a mediated settlement including a non-disparagement clause. The offer was open for a week and "without prejudice save as to costs". Mr Alkazaz was informed that increased or indemnity costs would be sought against him if he rejected the offer and legal advice was recommended.

[29] However, in the somewhat unusual circumstances here I am not persuaded that the Calderbank offer does justify an uplift. There was room for uncertainty by Mr Alkazaz whether the Calderbank offer would have encompassed the Court proceedings or restricted his right speak freely in the course of that proceeding. There is no specific mention of that proceeding being withdrawn but the offer does refer to settlement of "all matters arising from or related to the employment relationship between the parties". I therefore make no uplift for that offer.

[30] Costs are not usually allowed for preparation of a costs application and I can see no basis on which to award them in this case.

[31] As regards the removal application, the Authority put to Mr Alkazaz e-IT's proposal that a costs determination be issued (rather than deal with the removal application) leaving him to expand his challenge in the Court to cover that costs determination, if he did not accept the outcome. Mr Alkazaz rejected that pragmatic approach along with raising several other matters as outlined above, which he then did not pursue, thus increasing e-IT's costs unreasonably. An uplift of \$1,000 is justified on that basis.

Conclusion

[32] I conclude that \$4,500 costs should allowed on the re-opening application and \$2,500 on the removal application. I order Mr Alkazaz to pay Enterprise IT Limited the sum of \$7,000 as a contribution to costs within 28 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority