

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 430
3163843

BETWEEN

NEIL BLISSETT
Applicant

AND

ABSOLUTE SCAFFOLDING
(2019) LIMITED
Respondent

Member of Authority: Davinnia Tan

Representatives: Amy Campbell, counsel for the Applicant
Douglas Mitchell, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 20 July 2023 from Applicant
29 June 2023 from Respondent

Determination: 10 August 2023

COSTS DETERMINATION OF THE AUTHORITY

Substantive Determination

[1] On 13 June 2023, the Authority issued a determination in this matter, dismissing Neil Blissett's claim of unjustifiable dismissal, but upholding his claim for holiday pay. Absolute Scaffolding (2019) Limited (Absolute Scaffolding) was ordered to pay Mr Blissett four weeks annual holiday and 8% of his gross earnings.¹

¹ Footnote the substantive determination

[2] The parties were encouraged to resolve any issue of costs between them, and the Authority made reference to its usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve costs between themselves and have filed memoranda accordingly.

[4] Absolute Scaffolding seeks an order for costs against Mr Blissett. In the alternative, Absolute Scaffolding seeks a declaration as to the amount of costs it would have been awarded had Mr Blissett not received legal aid.

[5] Mr Blissett seeks an order for costs against Absolute Scaffolding.

Submissions

Absolute Scaffolding

[6] Absolute Scaffolding submits that the unjustifiable dismissal claim took up most of the proceeding and the holiday pay claim was “only a small component”, and as such it is appropriate for the Authority to award costs of at least \$4,000 in its favour, and none to Mr Blissett.

[7] Absolute Scaffolding submits that in the alternative, it seeks a declaration from the Authority, pursuant to section 45 to 46 of the Legal Services Act 2011 (“LSA 2011”), as to the amount of costs that would have been awarded in the event of a grant of legal aid.

Mr Blissett

[8] Mr Blissett disagrees that he should pay the respondent’s costs. Mr Blissett submits he was legally aided for proceedings and is required to repay all of his costs. Section 45(2) of the LSA 2011 prohibits any order for costs to be made against him unless the Court is satisfied that there are exceptional circumstances. Mr Blissett submits that Absolute Scaffolding has not identified any exceptional circumstances.

[9] Mr Blissett further submits that he was successful in his claim for holiday pay which was a substantial issue requiring evidence to be heard. Absolute Scaffolding had paid Mr Blissett \$33.70 in holiday pay, but the Authority had found the correct amount was \$4,391.30. Mr Blissett therefore submits that Absolute Scaffolding was incorrect to describe the holiday pay claim as “only a small component” of the proceeding. Mr Blissett further submits that his successful holiday claim could not have been achieved without lodging the claim with the Authority because Absolute Scaffolding did not attend a prior meeting to discuss his personal grievance.

[10] On that basis, Mr Blissett seeks actual costs of \$4,391.30. In the alternative, Mr Blissett seeks half of the usual tariff being a sum of \$2,250 if the Authority determines there should be an adjustment for partial success with reference to *William Coomer v JA McCallum and Son Ltd*² where it was determined that even when there is “mixed success” a party is entitled to costs.³

Principles

[11] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁴ as confirmed

² *William Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156.

³ Above n 2 at [43].

⁴ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

in *Fagotti v Acme and Co Limited*.⁵ The principles set out in the above cases are that costs are to be modest, not to be used as a punishment, and that costs usually follow the event.

[12] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.⁶ The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[13] The daily tariff is usually taken as a starting point, although this is not to be used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.⁷

Analysis

[14] The investigation meeting in this matter was one day and was held in person. Both parties attended together with their respective counsel, together with three witnesses.

[15] There has been mixed success. While I acknowledge that Mr Blissett was unsuccessful in his claim for unjustifiable dismissal claim which took up most of the time at the investigation meeting, I am not convinced that the holiday pay claim was only a “small component” of the proceeding.

[16] In *Best Health Products Ltd v Cherie Nee*⁸ where parties also had mixed success, Judge Corkill referred to the Court of Appeal judgment of *Health Waikato Limited v Elmsly*⁹ which stated:

It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical

⁵ *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 114.

⁶ For further information about the factors considered in assessing costs, see:

www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁷ Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

⁸ *Best Health Products Ltd v Cherie Nee* [2016] NZEmpC 16 at [20].

⁹ *Health Waikato Limited v Elmsly* [2004] 1 ERNZ (CA) at [39].

to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[17] In determining costs, the Authority is required to exercise discretion, and the issue is whether there is a principled and rational basis for determining one's entitlement to costs.

[18] In these circumstances, I consider Mr Blissett is entitled to costs as the successful party. While Mr Blissett was not completely successful in his substantive claim I accept Mr Blissett's submission that the investigation meeting was needed to address the issue of holiday pay (and indeed the unjustifiable dismissal claim) because Absolute Scaffolding did not attend the meeting prior to discuss and attempt to resolve the dispute.

[19] As Mr Blissett was only partially successful, he cannot expect to receive the entitlement he would have received if he was completely successful. For reasons above and reflecting the outcome of the substantive proceedings, I consider it appropriate to order Absolute Scaffolding to contribute to Mr Blissett's costs the sum of \$2,250.00.

[20] As I have found Mr Blissett successful in his claim for costs, I do not consider it necessary or appropriate to make an order specifying what order for costs would have been made against Mr Blissett under section 45(5) of the LSA 2011.

Orders

[21] I order Absolute Scaffolding to pay Mr Blissett the sum of \$2,250.00 as a contribution towards his costs.

Davinnia Tan
Member of the Employment Relations Authority