

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 373  
3098692

BETWEEN **TROY CAMERON**  
Applicant

A N D **ASHTON WHEELANS LIMITED**  
Respondent

Member of Authority: David G Beck

Representatives: Kevin Murray, advocate for the Applicant  
Claire McCool, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 September from the Applicant  
11 September from the Respondent

Date of Determination: 16 September 2020

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**COST DETERMINATION OF THE AUTHORITY**

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**The Determination**

[1] On 23 July 2020 the Authority issued a determination on a preliminary matter finding that:

**Ashton Wheelans' claim to have Mr Cameron's claim dismissed on the grounds that it is frivolous and vexatious under s 12A, Schedule 2 of the Act, does not succeed**

[2] The parties were asked to explore resolving costs by agreement but failed to do so.

### **Submission for Troy Cameron**

[3] Mr Murray submitted that, having successfully resisted Ashton Wheelans Limited's claim to have his application dismissed, his client seeks a contribution to costs of \$2,587.50 and \$966 for preparing a costs submission in accord with the principles set out in *PBO Limited (formerly Rush Security ltd) v Da Cruz*<sup>1</sup> and on the basis that although the matter was heard at a short investigation meeting it involved the preparation and presentation of relatively complex written and oral legal submissions. Mr Murray further suggested that his client in withdrawing his claim "should be credited with following the sound wisdom of the Authority and not to cause further costs to either party". In the alternative Mr Murray suggested costs should lie where they fall.

### **Submissions for Ashton Wheelans Limited**

[4] Ms McCool pointed to the history of proceedings being prolonged by Mr Murray initially pursuing a number of futile claims despite being placed on notice that costs would be at issue. Ashton Wheelans Limited incurred costs of \$13,500 plus GST and Ms McCool provided invoices itemising work undertaken that included responding to the initial claim, Authority directions, legal submissions and attending to unsuccessful interim proceedings on the preliminary matter cited above.

[5] Ms McCool claims adverse costs on behalf of her client against Mr Cameron suggesting that his claim was unlikely to succeed if it had proceeded. Ashton Wheelans Limited claimed \$4,500 as being appropriate in all of the circumstances

### **Costs principles**

[6] The Authority discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 ("the Act"). The discretion it is accepted is guided by principles set out in *Da Cruz*, one being that costs are not to be used as a punishment or as reflection of how either party conducted

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<sup>1</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

proceedings, and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.<sup>2</sup>

### **Assessment**

[7] A general principle for a successful party is that costs should ‘follow the event’ and here Mr Cameron was partially successful on a preliminary issue in that he successfully resisted an application that part of his claim be dismissed. Mr Cameron is therefore entitled to consideration of a contribution to costs of representation that had to be incurred.

[8] I however, found the preliminary matter at issue was very finely balanced and I made an observation that I had substantive reservations about the merits of the claim raised and that if Mr Cameron was to proceed I suggested that he could only pursue a narrow remedy and that he faced risks and further litigation costs. Mr Murray on 19 August 2020 then signalled that his client had decided to not proceed further with his application on the substantive matter that had been filed on 1 April 2020. Mr Cameron is entitled to some credit for this decision.

[9] To recap, Mr Cameron had filed a statement of problem alleging a settlement agreement under s 149 of the Act had generally been breached by an Ashton Wheelans Limited director and member of NZ Institute of Chartered Accountants referring a complaint to their ethics committee. This is alleged to be in breach of the good faith obligations owed. The remedies Mr Cameron sought were:

- (i) That the Authority absolves Mr Cameron from his duty to abide by the settlement agreement’s confidentiality clause.
- (ii) That costs be awarded to Mr Cameron in order to allow him to defend his reputation with his professional body.
- (iii) A penalty for breach of confidentiality in the amount of \$20,000.
- (iv) A penalty for breach of good faith in the same amount as above.
- (v) Reimbursement of the filing fee.

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<sup>2</sup> Section 160(2) Employment Relations Act 2000.

(vi) Costs of representation.

[10] As a result of the application being withdrawn, Ashton Wheelans Limited is entitled to raise an issue of costs incurred in providing responses to an action that was not pursued and whilst it was not struck out, the application to the Authority did contain a number of legal claims that were unsustainable on both statutory and case law grounds including claiming that he had been disparaged in the absence of a clause in a s 149 settlement agreement covering such eventuality. Ashton Wheelans can with some justification, claim to have had to unnecessarily incur costs to defend claims that may have had no legal basis if they had then proceeded to a substantive hearing.

[11] In these circumstances, I think it is appropriate in exercising discretion on an equitable basis to balance the parties' interests whilst not punishing Mr Cameron for the conduct of his advocate's pursuit of his claim but by recognising that Ashton Wheelans overall bore a disproportionate share of the cost of resolving this matter.

[12] In the circumstances I consider that Mr Cameron should meet a modest costs contribution in the amount of \$2,000 and make the point had he not been partially successful on the preliminary matter then this award would have been significantly higher.

### **Award**

[13] **I order Troy Cameron to pay Ashton Wheelans Limited the sum of \$2000 as a contribution to their legal costs incurred.**

David G Beck  
Member of the Employment Relations Authority