

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 659  
3199659

|         |   |
|---------|---|
| BETWEEN | BRAD CAPPER<br>Applicant                  |
| AND     | CJS CONSTRUCTION<br>LIMITED<br>Respondent |

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|--------------------------------|---|
| Member of Authority:           | Alastair Dumbleton  |
| Representatives:               | Kirsten Westwood, advocate for the Applicant<br>Kylie Hudson, advocate for the Respondent |
| Costs submissions<br>received: | 29 June and 11 July 2023  |
| Determination:                 | 07 November 2023  |

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] An employment relationship problem brought to the Authority by Brad Capper was resolved by determination given on 16 June 2023<sup>1</sup>.

[2] CJS Construction Ltd (CJS), Mr Capper's employer, was held to have unjustifiably dismissed him.

[3] From a starting point of \$8,000, to remedy his personal grievance Mr Capper was awarded \$4,000 compensation after reduction of 50% for contributory fault on his

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<sup>1</sup> *Brad Capper v CJS Construction Ltd* [2023] NZERA 314

part. He also recovered one weeks' wages in lieu of notice. He was not awarded lost wages for which he had sought reimbursement for a three-month period.

[4] Mr Capper has applied for an award of costs to be made in his favour, under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the ER Act).

[5] In response, for CJS it is submitted costs should lie where they fall or alternatively the Authority's daily tariff, which is usually the basis of costs awards, should be adjusted downwards to reflect the Authority's finding that Mr Capper had to bear some responsibility for the situation that gave rise to his grievance. It is submitted that any award should not exceed 1/3 of the daily tariff of \$4,500, or \$1,500.

[6] The investigation meeting took no more than 2/3rds of a day, for which the tariff would be \$3,000 (2/3rds of \$4,500).

[7] The Authority is satisfied Mr Capper's actual costs of representation were greater than the \$4,500 daily tariff.

### **Principles of costs awards in Authority investigations**

[8] The law to be applied by the Authority in determining costs was reviewed by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup>.

[9] In summary the Court held<sup>3</sup>, the Authority has a discretion in awarding costs and fixing the amount of those. Costs will normally be awarded to the party which is successful in the outcome of an Authority investigation, and the amount of costs will usually be modest.

[10] Costs are not to be awarded as punishment or to express disapproval of a party's conduct. Their purpose is to compensate a party who or which has incurred expense in applying to the Authority to have it investigate and determine claims, or incurred expense in responding to such claims.

[11] It is open to the Authority to question whether all or any costs incurred by a party were necessary or reasonable.

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<sup>2</sup> [2005] ERNZ 808

<sup>3</sup> Above at [44]

[12] The nature of the particular investigation meeting can influence costs. Attempts by parties to resolve matters themselves by compromise, including the making of without prejudice offers may be considered.

[13] The Authority has a discretion to award costs based on a daily tariff.

[14] In taking a tariff-based approach, adjustments up or down can be made where necessary, to reflect the conduct of parties, the preparation required in a particularly complex matter, or any other significant features of the individual investigation meeting.

[15] Currently the Authority's tariff, which is publicised and revised periodically, is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.

### **Should costs be awarded?**

[16] An unjustified dismissal is a serious employment relationship problem. The employer is found not to have acted fairly and reasonably and the employee has lost employment, has lost wages usually, and suffered anxiety and distress usually.

[17] The Authority is satisfied an award of costs should be made to provide some compensation to Mr Capper for the cost incurred of engaging his representative.

[18] The Authority accepts that the contributory fault of Mr Capper should not be visited a second time with a reduction in costs because of it. That would be a punishment and therefore contrary to principle.

### **Order for costs and disbursements**

[19] An award of \$2,250.00 will achieve the purpose of costs in this case, in a modest amount.

[20] CJS is ordered to pay to Mr Capper as costs the amount of \$2,250, pursuant to clause 15 of Schedule 2 of the ER Act. As a disbursement he is to be paid \$71.56 by CJS for the Authority filing fee.

[21] Payment is to be made within 14 days of the date of this determination.

Alastair Dumbleton

Member of the Employment Relations Authority