

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 585  
3131437

BETWEEN                      DARREN CROMBIE  
   Applicant  
  
AND                                MOSSCAR SERVICES  
   LIMITED  
   Respondent

Member of Authority:        Peter Fuiava  
  
Representatives:              Kylie Hudson and Simon Greening, counsel for the  
   Applicant  
   Aishleen Sluiters and William Buckley, counsel for the  
   Respondent  
  
Submissions received:        23 November 2021 from Applicant  
   6 December 2021 from Respondent  
  
Determination:                24 December 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     On 16 November 2021, the Authority issued a determination in favour of Darren Crombie who was found to have been unjustifiably dismissed by his former employer, Moss-car Services Limited (MSL).<sup>1</sup> For not advising him of the selection criteria by which he was selected for redundancy, the Authority awarded Mr Crombie lost wages of \$576.92 gross, reimbursement of the filing fee of \$71.56, and \$4,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). The issue of costs was reserved and a timetable set for the filing of memoranda if the parties were unable to resolve costs themselves.<sup>2</sup>

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<sup>1</sup> *Crombie v Moss-car Services Limited* [2021] NZERA 518.

<sup>2</sup> At [60].

## **Mr Crombie's claim for costs**

[2] In a memorandum of 23 November 2021, Ms Hudson advised that the issue of costs could not be resolved between the parties and that there were no factors that required an upward or downward adjustment of the notional daily tariff. The matter was set down for a one day investigation meeting and was completed within that time. No Calderbank offers were made by either party.

## **MSL's response**

[3] Ms Sluiters in her memorandum of 6 December 2021 submitted that the investigation meeting could have been concluded much earlier than it was had Mr Crombie not included as an issue for investigation, the genuineness behind MSL's decision to make him redundant. It was submitted that the issue took up approximately half of the investigation meeting which was reflected in the fact that 11 paragraphs of the Authority's determination related to this point as opposed to the nine paragraphs that related to the procedural challenge which was successful. It was further submitted that Mr Crombie had failed to provide the Authority with any supporting material to justify his claim for costs. For these reasons, it was submitted that the notional daily tariff of \$4,500 be reduced by 50 percent to \$2,250.

## **Costs principles**

[4] The power of the Authority to award costs arises from clause 15 of Schedule 2 of 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.

[5] In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, a full bench of the Employment Court set out principles guiding the Authority's approach to costs:<sup>3</sup>

- There is a discretion as to whether costs would be awarded and what amount.

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<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 at [44].

- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case-by-case basis.
- Costs are not to be used to punish or express disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event (that is the unsuccessful party will normally be required to contribute to the costs of the successful party).
- Without prejudice offers – Calderbank offers – can be taken into account when setting costs.
- Awards will be modest.
- Frequently, costs will be judged against a notional daily rate.
- The nature of the case can influence costs, which means the Authority may order that costs should lie where they fall.

### **Costs analysis**

[6] Mr Crombie was the successful party. It is usual that costs follow the event namely that the unsuccessful party be required to make a contribution towards the successful party's costs. In assessing an appropriate costs award, the notional daily tariff is a starting point. In the present case, the investigation meeting took one full day. The applicable daily tariff for a first day of hearing is \$4,500.

[7] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff. I note that there were no Calderbank offers made by either party. It was submitted that the investigation meeting could have been concluded much earlier than it did had Mr Crombie not pursued a line of inquiry which he was ultimately unsuccessful. The submission is misconceived for two reasons. First, this was an investigation meeting in which a total of five witnesses gave evidence.

Given the number of witnesses involved, a full day investigation meeting was inevitable. Second, although not pleaded, investigating the genuineness of Mr Crombie's redundancy was appropriate as the Authority is not a forum for strict pleadings or technicalities.

[8] It was further submitted that as supporting documents from Mr Crombie were not provided to the Authority, his claim for costs should be reduced. Ms Sluiters makes reference to the Authority's Practice Note 2 which says that it is important that an award of costs be supported by material such as copies of invoices showing fees and other expenses. However, Mr Crombie seeks the daily tariff only. Had he sought an uplift from the daily tariff, I would have expected from his counsel supporting documents such as invoices and other expenses.

[9] It is accepted that Mr Crombie will have incurred costs in respect of this matter. Ms Hudson and Mr Greening were actively involved in the investigation meeting which took a full day. Prior to the investigation meeting, Ms Hudson was involved in the case management conference and she and Mr Greening would have had to prepare written statements and submissions in preparation for a contested investigation meeting. I therefore consider it appropriate that Mr Crombie, the successful party, be awarded a *contribution* towards his legal costs.

[10] Weighing all the relevant factors, I find no basis to depart from the notional daily tariff of \$4,500 for a one-day investigation meeting.

### **Outcome**

[11] Mossca Services Limited is ordered to pay Darren Crombie \$4,500 as a contribution to his costs no later than Friday 21 January 2022.

**Peter Fuiava**  
**Member of the Employment Relations Authority**