IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE

[2022] NZERA 413
3133437

	BETWEEN	MICHAEL JOHN ENGLAND Applicant
	AND	R W PATCHING First Respondent
Member of Authority:	David G Beck	
Representatives:	Simon England, counsel for the Applicant Tuangane Matangi, advocate Nick Mason, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	8 August 2022 from Tuangane Matangi 9 August 2022 from the Applicant 13 June 2022 from the Respondent	
Date of Determination:	25 August 2022	

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem (brief history)

[1] By way of an application of 1 March 2021 on Michael England's behalf, Tuangane Matangi an advocate, filed a Statement of Problem with the Authority alleging Mr England had been unjustifiably 'constructively' dismissed from the employ of RW Patching Limited after he resigned on 5 February 2021 and various other claims were advanced.

[2] Without any explanation or application seeking joinder and despite it being clear from the employment agreement that Mr England was employed by a company (RW Patching Limited), Ms Matangi cited two additional respondents (both directors of the company) and

then confusingly on 19 April 2021, Ms Matangi filed an application to join "a controlling Third Party to Personal Grievance" being an accounting firm engaged by RW Patching (Abel Tasman Accounting Limited). At the same time, Ms Matangi filed a memorandum citing only RW Patching Limited as the respondent, seeking urgency of the matter being set down for an investigation meeting. The cited respondents, utilising counsel, filed responses to the applications.

[3] The parties then attended mediation by direction that did not resolve matters. On 4 October 2021, Ms Matangi withdrew from representing Mr England and indicated she was unsure if Mr England wished to pursue the matter further.

[4] Mr England after asking to be contacted directly then obtained an alternative advocate, Kevin Murray, and communicated this to the Authority on 16 December 2021. The matter was then set down for a case management conference that took place on 26 April 2022 and was attended by Mr Murray and Mr Mason, counsel for RH Patching Limited.

[5] Mr Murray sensibly amended Mr England's application to confine it to RH Patching Limited as the sole respondent and he signalled Mr England was now solely pursuing an unjustified dismissal claim. Mr Murray was directed to lodge an amended statement of problem before 6 May 2022. The matter was also timetabled for an exchange of briefs of evidence and an investigation meeting on 28 and 29 July in Nelson.

[6] Without filing any briefs of evidence as directed, Mr England in an email of 23 May 2022 to the Authority, indicated he was representing himself and was now withdrawing his application on the basis he was unable to afford to pursue further litigation.

Submissions on costs

RW Patching and ors

[7] Mr Mason file submissions on behalf of RW Patching Limited, their two directors and Abel Tasman Accounting Limited asking that the Authority hold both Mr England and Ms Matangi joint and severally liable for costs incurred across the four respondents in the amount of $12,685.65. Mr Mason says the respondents' total costs including mediation and pre-litigation costs exceeded $29,000 inclusive of GST.

[8] Mr Mason acknowledged that the Authority rarely orders costs for mediation (so none were sought) and normally a daily tariff-based approach is adopted following an investigation meeting. Mr Mason however, suggested the daily tariff could still be used here as the applicant had rejected two settlement offers that would have placed him in a better position and he had (and by implication his advocate had supported such) adopted a vexatious approach to litigation. Further, Mr Mason suggested that if such an approach was adapted an uplift on the tariff was sought. As aggravating factors increasing the respondents' costs, Mr Mason cited his belief that the applicant through his advocate, had unreasonably sought to add further respondents and sought urgency with no legal basis.

[9] Whilst acknowledging a lack of case law precedence in joining counsel for the purposes of cost awards [1] Mr Mason sought to join Ms Matangi to the proceedings pursuant to s 221 of the Employment Relations Act 2000 (the Act) in order that I could consider any liability on her part for a costs award.

Michael England

[10] Simon England for the applicant, has provided a submission that as his client is legal aided, the qualified protection of section 45(2) Legal Services Act 2011 (LSA) applies. Essentially, this protection does not allow a costs award to be made against a legally aided person unless exceptional circumstances are identified. Although the applicant has only latterly obtained the legal aid grant to defend the costs proceedings against him, Simon England asserted that that s 45 LSA applies to all steps in the proceedings irrespective of when the application for the grant was made and he provided three High Court authorities that support this proposition. [2]

[11] In considering whether exceptional circumstances exist s 45(3) LSA guidance the following, but not limited to, conduct matters may be considered:

(a) any conduct that causes the other party to incur unnecessary cost:

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[1] Citing both *NZ Medical Laboratory Workers Union Inc v Capital Coast Health Ltd* [1998] 2 ERNZ and *Aaarts v Barnardos New Zealand* [2013] NZEmpC 145 that neither found the court having a supervisory role of the conduct of enrolled barristers and solicitors.
[2] *Gill v Lethlean* [2021] NZHC 296, *Southland Building Society v Price* [2015] NZHC 1164 and *RMJ v BJG* [2017] NZHC 2470.

(b) any failure to comply with the procedural rules and orders of the court:

(c) any misleading or deceitful conduct;

(d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

(e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:

(f) any other conduct that abuses the processes of the court.

Tuangane Matangi

[12] Ms Matangi opposed the joiner application; agreed that legal precedent did not favour the applicant's position on joinder and noted Colgan CJ, in *Aaarts v Barnardos New Zealand* discussed a hypothetical scenario where joinder may occur only involving "…. some extraordinary feature of the litigation which elevates the representatives role beyond that which is played by an effective, even passionate, advocate for a party". [3] Ms Matangi asserted no such threshold was met here as litigation did not proceed to an investigation meeting level. Ms Matangi also noted that the disclosure of without prejudice correspondence was inappropriate and that any Calderbank offer was not applicable as the investigation meeting did not proceed to identify any successful party. Ms Matangi also always asserted that she, was acting on her client's instructions but I also note Mr England expressed dissatisfaction about not being apprised of cost implications.

Cost Principles

[13] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Act. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [4] including those costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority. [5] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited.* The principles include:

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[3] Above n 1 at [31].
[4] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.
[5] Section 160(2) Employment Relations Act 2000.

a) There is a discretion as to whether costs will be awarded and in what amount.

b) The discretion is to be exercised in accordance with principle and not arbitrarily.

c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d) Equity and good conscience is to be considered on a case by case basis.

e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g) Costs generally follow the event.

h) Without prejudice offers can be taken into account.

i) Awards will be modest.

j) Frequently costs are judged against notional daily rates.

k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances. [6]

The settlement offers

[14] The making of a settlement offer, in the form of a 'Calderbank' offer or 'without prejudice except as to costs' approach, is a relevant factor when considering costs where such does not better the award made by the Authority. Whilst generally the Authority has a low-level jurisdiction hence a focus on scale costs, there is authority to suggest a 'steely' approach is sometimes required in the broader public interest. [7]

[15] Here though, no determination of the parties' positions was made as the investigation meeting did not proceed so, any assessment on the likely outcome is speculative and a Calderbank offer can not be assessed. I also observe that the Authority cannot consider bare without prejudice offers when assessing costs.

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[6] *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].
[7] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

Assessment

[16] Taking all the factors identified in submissions into account and applying the Authority's discretion I consider that no extraordinary circumstances exist that would enable the Authority to join Ms Matangi as a party to the proceedings. In doing so I do not condone Ms Matangi's approach to seeking joinder of additional respondents as the employer party was clearly identified. Other than this, the stage of litigation reached was premature and not a case where I could assess that Ms Matangi was pursuing a hopeless case and wasting public resources.

[17] The Authority in applying discretion is also mindful that costs cannot be awarded as a punishment or disapproval of an unsuccessful parties conduct unless conduct is identified that led to a significant increase in wasted time and costs during the course of the litigation process. Here I could not detect in the early stages of litigation any unusual or extraordinary expenses, reasonably incurred by the respondents other than filing a statement in reply, attending mediation and a case management conference. I accept the respondents' frustration as real but as the investigation did not proceed I am unable to fairly assess any level of alleged vexatious conduct.

[18] Whilst Ms Matangi, disclosed she has practiced law and is an admitted barrister and solicitor, I was not apprised of her experience as a specialist employment practitioner and the extent of her previous legal practice in this area. If I had joined Ms Matangi and assessed her approach (and I note joinder can occur at any stage of proceedings), I would have been cautious in holding her to the more exacting standard of a lawyer with a current practicing certificate. As the Authority's Member Arthur has in the past noted, when considering costs against a representative in a case that had proceeded to an investigation meeting:

> The relatively informal and low-level nature of the Authority's procedures under the *Employment Relations Act 2000* (the Act) — where parties may be represented by a person who is neither a professional advocate nor legally-trained practitioner — sometimes requires a level of tolerance which, quite properly, would not be accorded to counsel in the civil courts. [8]

[8] *Zhang v Hollywood Bakery (Holdings) Ltd* AA258/B/09, 14/9/2009.

[19] Whilst I do have regard to the seemingly unnecessary costs the respondents have incurred and the level of such and I have found Ms Matangi's attempts to join additional parties inexplicable, I find that in applying s 45(3) LSA, no sufficiently extraordinary circumstances have been identified in Michael England's conduct of his case (the threshold of vexation was not reached) that would allow the Authority to consider awarding costs against a legally aided person.

Conclusion

[20] I find in all the circumstances that no cost award is applicable and that costs should lie where they fall between the parties.

David G Beck
Member of the Employment Relations Authority