

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 118
3032773

BETWEEN ELIYA IKUNDABOSE
 Applicant

AND MCWATT GROUP LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Philip Howard-Smith, Counsel for the Respondent

Submissions received: 27 February 2019 from the Respondent
 1 March 2019 from the Applicant

Determination: 4 March 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination issued on 19 February 2019 the Authority declined an application from Eliya Ikundabose for findings that he was unjustifiably dismissed by McWatt Group Limited (MGL).¹ The parties were encouraged to resolve any issue of costs between themselves. A timetable was set for lodging memoranda if they were not able to do so and an Authority determination of costs was required.

[2] MGL lodged a memorandum advising costs were not resolved. It sought an order for \$7,500 as a contribution to \$11,000 of legal costs said to have been incurred in responding to Mr Ikundabose's claim. MGL sought this uplift from the Authority usual daily tariff of \$4,500 for two reasons.

[3] Firstly, MGL submitted Mr Ikundabose had unnecessarily increased its costs by raising a number of concerns about his dismissal for redundancy that he had not raised at the time of the company considering that decision in May 2018. Secondly,

¹ *Ikundabose v McWatt Group Limited* [2019] NZERA 85.

MGL submitted its costs were further increased because more witnesses and more detailed responses were then needed to respond to those concerns and allegations. Both of those factors were, however, part of the ordinary incidence of responding to a personal grievance. Mr Ikundabose's application, and the one day investigation meeting needed to deal with it, did go significantly beyond the normal range of detail or complexity for cases of this type. While the outcome on all his detailed allegations was not in his favour, costs could not be used to punish him or to express disapproval of him having raised those issues.

[4] The daily tariff, and no higher, was therefore the appropriate starting point in assessing costs due to MGL for its success in responding to Mr Ikundabose's application.

[5] Mr Ikundabose submitted the Authority should award no costs to MGL or at least not make any award until the Employment Court decided a challenge he had filed against the Authority's determination.

[6] His first argument, for no award of costs, was based on the notion that the Authority's 19 February determination was wrong because the company had "lied to win this case". The Authority's determination on costs had to be based on its finding in its earlier determination that accepted and preferred the evidence of company witnesses, however much Mr Ikundabose might still disagree with that outcome.

[7] His second argument referred to whether he could afford to pay a costs award:

As for me, I don't want to pay them anything. They made my life so difficult, am earning less, working few hours. I hardly save anything. I have big family, too much expense, very little income.

[8] This was insufficient to reduce or remove a costs award on the grounds of ability to pay. Mr Ikundabose began a new job soon after his work for MGL ended and he was still in work. He could be assumed to have some ability to pay a costs award, even if that was only eventually or over a period of time.

[9] His third argument was that the Authority should "at least hold or stop costs" until the Court had decided his challenge. There are now two challenges before the Court – one relating to the substantive determination and a second about a subsequent

determination declining to make non-publication orders about some information referred to in the substantive determination.²

[10] In those circumstances the Authority's usual practice is to determine costs for its determinations, even when under challenge. A plaintiff dissatisfied with the Authority's costs award may amend its challenge to include that determination for consideration by the Court. A defendant, if dissatisfied with the Authority's determination on costs, may file its own fresh challenge on costs.³

[11] As Mr Ikundabose's submissions had not established any sound reason for reducing the daily tariff, an order he pay that amount was appropriate.

Order for costs

[12] Mr Ikundabose must pay \$4,500 to MGL as a contribution to the costs the company incurred in responding to his claim.

Suspension of publication

[13] An Authority direction was put in place postponing publication of the first two determinations on the Employment Law Database, the online database maintained by the Ministry of Business and providing public access to Authority determinations.⁴ The postponement was to provide Mr Ikundabose with an effective opportunity to challenge a decision not to grant a non-publication order about some evidence. The Court has now extended that direction prohibiting publication of the determinations until further order of the Court.⁵ The present determination is also logically subject to the same restriction, awaiting outcome of the challenges already filed.

Robin Arthur
Member of the Employment Relations Authority

² *Ikundabose v McWatt Group Limited* [2019] NZERA 96.

³ Employment Court Practice Directions (14 December 2018), part 11.

⁴ <https://www.employment.govt.nz/elaw-search>

⁵ Minute to the Parties of Judge Perkins, 28 February 2019 in matter EmpC 50/2019.