IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 104
3203759

	BETWEEN	AARON KEMBLE Applicant
	AND	BEN CABLE ELECTRICAL LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Javana Schiphorst, counsel for the Applicant Stephen Langton and Laura Briffett, counsel for the Respondent
Investigation:	On the papers
Submissions and other information received:	18 January 2024 from the Applicant 7 and 8 February 2024 from the Respondent
Date of Determination:	23 February 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority issued its substantive determination involving these parties on 12 January 2024.[1]

[2] The applicant, Mr Aaron Kemble, had some limited success regarding his substantive claims, so he is to be treated as the successful party for the purposes of assessing costs.

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[1] *Kemble v Ben Cable Electrical Limited* [2024] NZERA 15.

[3] Although the parties were encouraged to resolve costs by agreement, that has not been possible. Each party has a vastly different view on the amount of costs that are appropriate in this matter.

[4] The applicant, Mr Aaron Kemble, sought costs of $35,000. The respondent, Ben Cable Electrical Limited (BCE), considered that its contribution towards Mr Kemble's costs should be $4,500. Mr Kemble has therefore asked the Authority to determine costs.

The Authority's investigation

[5] Costs have been determined 'on the papers'. Both parties lodged costs submissions.

Relevant law

[6] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Act. Although costs are discretionary, an unsuccessful party will normally be required to contribute to the successful party's actual legal costs.

[7] The Authority usually adopts a notional daily tariff based approach to assessing costs. The tariff for the first day of an investigation meeting is $4,500, and then $3,500 for each subsequent day of investigation meeting time. The notional starting tariff may then be adjusted to reflect the particular circumstances of this case.

[8] The Employment Court in the leading cases of *PBO Limited (formerly Rush Security Limited) v Da Cruz* and *Fagotti v Acme & Co Limited* set out the cost principles that the Authority must have regard to when assessing costs.[2]

[9] These cost principles are so well known that there is no need to set them out again here. The Authority confirms it has been guided by these well-established principles when assessing the amount of costs that should be awarded to Mr Kemble.

Issues

[10] The following issues are to be determined:

(a) What legal costs did Mr Kemble actually incur?

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[2] *PBO Limited* [2005] ERNZ 808; and *Fagotti* [2015] NZEmpC 135.

(b) What is the notional starting point for assessing costs?

(c) Should the notional starting tariff be increased?

(d) Should the notional starting tariff be reduced?

(e) What costs and disbursements should Mr Kemble be awarded?

What legal costs did Mr Kemble actually incur?

[11] The maximum costs that could potentially be awarded to a successful party is equal to the amount of legal costs they have actually incurred.

[12] Mr Kemble's actual legal costs were $54,458.15 for his substantive claims. His counsel also estimated he would incur another $1,164 plus GST for this costs application.

What is the notional starting point for assessing costs?

[13] This matter involved a three-day investigation meeting. The notional starting point for assessing costs is therefore $11,500, being $4,500 for the first day and $7,000 for the two subsequent days of investigation meeting time.

[14] The Authority then needed to consider whether that notional starting tariff should be adjusted to reflect the particular circumstances of this case.

Should the notional starting tariff be increased?

[15] Mr Kemble submitted that the notional starting tariff should be multiplied by three. That would result in an award of $34,500 (being 3 x $11,500), which is less than the $35,000 costs he sought.

[16] Mr Kemble's submission that BCE's conduct inflated his legal costs was not accepted. Mr Kemble pointed to the fact that BCE's counsel was not available to stay late on the first day or start early or finish later on the second day of the investigation meeting, so a third day of investigation meeting time was required the following week in order to complete the investigation.

[17] While counsel often do make themselves available earlier or later during the course of an investigation meeting, so the Authority's investigation can be completed within the scheduled time, there is no requirement on them to do so. BCE's counsel was available during the agreed investigation meeting times. His inability to sit late is not a factor that should result in Mr Kemble's costs award being increased.

[18] Mr Kemble's submission that he was required to file 22 pages of submissions in reply to address what he described as "numerous corrections and clarifications to various alleged facts within the respondent's closing submissions" was not accepted. He was not "required" to do so, but instead elected to do so.

[19] The Authority was well aware of the significant material conflicts in the evidence in this matter and that each party had entirely different versions of key events, so he did not need to exercise a right of reply.

[20] However, Mr Kemble elected to lodge reply submissions that went beyond merely responding to new matters that had arisen in the respondent's submissions. That was his own choice, so BCE should not bear any additional costs liability for that.

[21] The submission that Mr Kemble's costs were unnecessarily increased by unreasonable communications from BCE regarding the joint chronology that was lodged after the investigation meeting was not accepted.

[22] Issues arose because Mr Kemble included disputed facts in the chronology. BCE's reasonable and appropriate suggestion of simply noting the parties' different views in the joint chronology was rejected by Mr Kemble. However, that commonsense approach was what the Authority directed the parties to adopt, so the chronology could be finalised.

[23] Mr Kemble's submission that the attitude displayed by BCE's previous advocate (who was not involved in the Authority's investigation) demonstrated an arrogant and contemptuous attitude towards him, so costs award should be increased was not accepted.

[24] BCE's former advocate was involved in pre-litigation matters, so her conduct was therefore irrelevant to the assessment of costs in respect of the Authority's investigation of Mr Kemble's claims. The issues that Mr Kemble criticised the advocate for during the investigation meeting were not considered to be inappropriate conduct by the Authority.

[25] Mr Kemble claimed he had suffered "significant financial hardship" by having to assert his rights and the only way for him to seek recompense for that was to pursue these Authority proceedings. The Authority considered that it was the number of claims and volume of evidence produced in support of his claims that has inflated

Mr Kemble's costs beyond what would normally be expected for a constructive dismissal claim.

[26] Mr Kemble's financial situation is not relevant to an assessment of costs. Nor does it not constitute conduct by BCE which unnecessarily increased Mr Kemble's actual legal costs.

[27] If Mr Kemble was under financial pressure then he should have undertaken a realistic 'risk versus reward" assessment of the likely costs of proceeding with all of his multitude of standalone claims. Had he pursued a leaner, more focused case that put the attention solely on the strongest aspects of his constructive dismissal claim, then his costs would have been far more modest.

[28] The Authority finds that BCE did not conduct itself in a manner that unnecessarily or unreasonably increased Mr Kemble's actual legal costs. It ran a focused defence that responded to Mr Kemble's evidence and claims. It was Mr Kemble who elected to expand the investigation beyond what was needed, by making a multitude of additional claims, which he did not succeed on.

[29] Mr Kemble's submission that the Authority should exercise its "equity and good conscience" jurisdiction to uplift costs to ensure that he was not "out of pocket" as a result of winning was not accepted. The Authority's approach to costs is well known, long established and widely understood. So is the principle that costs in the Authority are modest.

[30] An applicant such as Mr Kemble, who is represented by counsel, should have understood that by adopting an approach that involved arguing about every single little point (no matter how minor or irrelevant) he was extending the duration of the investigation meeting and increasing both parties' costs. That was entirely within his control, so could have been managed in a more cost effective way, had he wished to do so.

[31] Mr Kemble's reliance on an unsuccessful Calderbank offer was not a factor that should result in the notional starting tariff being increased. Mr Kemble did not better the 'without prejudice save as to costs' settlement offer he made on 28 September 2022, because he ended up receiving over $10,000 less from the Authority then he had offered to settle for with BCE. He therefore did not 'beat' his Calderbank offer.

[32] Likewise, BCE's Calderbank offers were also not relevant, because Mr Kemble was awarded more by the Authority than BCE had offered to settle for.

[33] Accordingly, there are no factors that would warrant increasing the notional starting tariff.

Should the notional starting tariff be reduced?

[34] BCE submitted that the notional daily tariff should be reduced from $11,500 to $4,500, being the equivalent to the notional daily tariff for a one-day investigation meeting.

[35] It is appropriate to reduce the notional starting tariff to reflect that Mr Kemble had mixed success. He succeeded with:

(a) His constructive unjustified dismissal personal grievance claim, for which remedies were reduced on the grounds of contribution; and

(b) One minor breach of good faith claim, which was not serious enough to warrant the imposition of a penalty.

[36] Mr Kemble's success was very limited in comparison with the large number of claims he made. Most of his claims were unsuccessful and at least half of the investigation meeting time was taken up with claims Mr Kemble did not succeed on.

[37] For example, Mr Kemble did not succeed on 35 of the claims he made or on many of the other allegations he made about disputed matters. In particular, he did not succeed on:

(a) Any of his three breach of employment agreement claims;

(b) Any of the three penalty claims he made for alleged breaches of his employment agreement;

(c) Ten out of the eleven breach of good faith claims he made;

(d) Eleven of the penalty claims he made for breaches of good faith;

(e) Any of his claims that he had been bullied, intimidated and/or harassed by BCE;

(f) Any of his six unjustified disadvantage claims;

(g) Any of the remedies claims associated with his disadvantage grievance claims;

(h) His wage arrears claim;

(i) His interest claim;

[38] Mr Kemble was also more unsuccessful than BCE was in terms of an overall assessment of the findings the Authority made about disputed material facts.

[39] A reduction in the notional starting tariff is appropriate to recognise Kemble's mixed success, and that the manner in which he elected to pursue his claims unreasonably extended the time required for the Authority's investigation, and BCE's legal costs.

[40] The one breach of good faith claim Mr Kemble succeeded was so minor that there was no real need for it to have been pursued as a discrete claim. This was the allegation that Mr Kemble said he had received more complaints about Mr Kemble than were formally tabled at the meeting the parties had on 19 July 2022.

[41] The Authority was already considering that evidence as part of the constructive dismissal grievance, so adding it as an additional stand alone was unnecessary. No penalty was imposed for that breach, although Mr Kemble had sought one.

[42] This matter was set down for a two-day investigation meeting. However, a third day was required because:

(a) Mr Kemble introduced new claims that were not in his statement of problem during the investigation meeting. He also added more new claims in his submissions;

(b) His evidence was not appropriately organised or logically presented, causing confusion over timing of events which had to be explored with the witnesses when they gave their evidence;

(c) His evidence on the unsuccessful claims and new claims was extensive;

(d) He failed to cover material evidence in his witness statements, meaning it had to be obtained from him during the course of the investigation meeting.

[43] BCE should not be required to contribute toward any of the costs Mr Kemble incurred for the third day of the investigation meeting, when it was his actions that caused that situation to occur.

[44] The evidence on Mr Kemble's successful claims at most took a day and a half to hear. So the notional starting tariff should be reduced to reflect that.

[45] Mr Kemble adopted a scatter gun approach to an extensively over-pleaded case, in which evidence that should not have been pursued by him was strongly disputed. Some (but not all) examples of that included:

(a) Complaints about BCE's previous advocate;

(b) Taking issue with legitimate questions BCE raised about the inadequacy of his medical certificate;

(c) Alleging the multiple complaints that were made to BCE by different people were all falsified;

(d) Justifying his bullying of the apprentice as "tough love" and " workplace banter" in a way that lacked insight and credibility;

(e) Claiming BCE should not have investigated the complaints, when they raised serious issues that potentially involved health and safety issues;

(f) Claiming the complaints had been resolved on the afternoon of 15 July 2022, when they clearly had not;

(g) Claiming BCE's investigation of the complaint, which had only been informal and investigative, but never got to the status of disciplinary allegations, was a sham;

(h) Making an issue regarding the fact that BCE had called its advocate a lawyer;

(i) Making unfounded but serious allegations he had been bullied, harassed and intimidated by BCE, because it attempted to investigate the numerous complaints it had received about him.

[46] While parties are entitled to bring their claims to the Authority to be investigated and determined, there may be adverse costs consequences if unrealistic claims and allegations are pursued that unreasonably increase the other party's costs.

[47] That was the case here. BCE was put to the expense of responding to all of the multitude of claims and allegations Mr Kemble made, including those that should not have been made because they realistically did not have a reasonable prospect of success or if successful would not have attracted a remedy or penalty.

[48] The Authority notes that the extent of the claims and allegations Mr Kemble pursued is not apparent from the substantive determination because, due to the length of the determination these were dismissed in a truncated form by the Authority stating they had not been proven.[3]

[49] However, despite these matters being dismissed by the Authority in a short paragraph, they all had to be the subject of evidence, submissions and consideration by the Authority before they could be discounted in that way.

[50] The Authority find that the notional starting tariff should be reduced by one and a half days, meaning that the costs allocated for the subsequent days of investigation time was reduced from $7,000 (being 2 x $3,500) to $1,750 (being half of $3,500).

What costs and disbursements should Mr Kemble be awarded?

[51] BCE is ordered to contribute $6,250.00 to Mr Kemble's actual legal costs. This reflects 1.5 days of notional daily tariff time. The other 1.5 days of investigation meeting time was not recoverable by Mr Kemble, for the reasons set out in this costs determination.

[52] Mr Kemble is also entitled to be reimbursed $71.55 for his filing fee.

Outcome

[53] Within 28 days of the date of this determination, BCE is ordered to pay Mr Kemble $6,321.55, being $6,250.00 towards his actual legal costs plus $71.55 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority

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[3] Above n1, at [180].