

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 283  
5548000

BETWEEN                      GRAEME LEE  
   Applicant  
  
A N D                              FRESHFOOD MANAGEMENT  
   SERVICES (NZ) PTY LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:              Applicant in person  
   Anthony Drake, Counsel for Respondent  
  
Investigation Meeting:      On the papers  
  
Submissions Received:      2 August 2018 from Applicant  
   26 July 2018 from Respondent  
  
Date of Determination:      6 September 2018

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**A. Mr Graeme Lee is ordered to pay Freshfood Management Services (NZ)  
Pty Limited \$9,500 by way of contribution towards its costs.**

**Employment Relationship Problem**

[1] The Authority in its substantive determination dated 12 July 2018<sup>1</sup> dismissed Mr Graeme Lee's claims that he had raised issues which amounted to personal grievance claims, with Freshfood Management Services (NZ) Pty Limited (Freshfood) during his employment. The Authority further found that, even if the issues raised by Mr Lee amounted to personal grievance claims, they were not raised

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<sup>1</sup> [2018] NZERA Auckland 212.

by him with Freshfood within 90 days, beginning with the date on which the actions alleged to amount to a personal grievance occurred or came to the notice of Mr Lee as required by s.114 of the Employment Relations Act 2000 (the Act).

[2] Mr Lee was not unjustifiably constructively dismissed.

[3] Mr Lee decided at the investigation meeting not to pursue his claim that his company, Storeworks Limited (Storeworks), a company of which he is a director and shareholder, was owed approximately \$800,000 pursuant to a contract which he claimed existed between it and Freshfood.

[4] Overall, Mr Lee had no employment relationship problems in respect of his employment by Freshfood.

### **Costs**

[5] Costs were reserved. Freshfood now applies for costs.

### **Authority's Power to award Costs**

[6] The Authority's power to award costs is discretionary and is set out in clause 15 of Schedule 2 of the Act, as follows:

#### **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 a manner as it thinks reasonable.

[7] When setting costs awards, the Authority is bound by the principles set out in *PBO Limited v Da Cruz*<sup>2</sup>. These principles are:

- (a) The discretion is to be exercised in accordance with principle and not arbitrarily.

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<sup>2</sup> [2005] 1 ERNZ 808.

- (b) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- (c) Equity and good conscience is to be considered on a case by case basis.
- (d) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- (e) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- (f) That costs generally follow the event.
- (g) That without prejudice except as to costs offers can be taken into account.
- (h) That awards will be modest.
- (i) That frequently costs are judged against a notional daily rate.
- (j) 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.

[8] This approach has been affirmed by the Employment Court in *Fagotti v. Acme & Co.*<sup>3</sup>.

[9] Taking into account the above factors, the Authority may look at the following three considerations in determining a costs award (but does not always do so, depending on the situation):

- (a) Consideration of the actual legal costs and associated expenses of the party entitled to an award of costs.
- (b) Consideration of whether all those costs were reasonably incurred and if not what proportion was reasonable.
- (c) Consideration of what amount would represent a fair contribution to the actual costs reasonably incurred.

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<sup>3</sup> [2015] NZEmpC 135

## **Freshfood's submissions**

### **Indemnity costs**

[10] Total legal costs incurred by Freshfood amount to \$126,035.77 including GST and disbursements. Freshfood has provided a schedule of invoices in respect of costs incurred by it in responding to Mr Lee's claims brought in the Authority.

[11] Counsel for Freshfood referred in its submissions to the ability of the Authority to consider whether indemnity costs may be appropriate in certain cases. In support of the application by Freshfood for indemnity costs, the Authority was referred by Counsel to the Court of Appeal decision in *Bradbury v Westpac Banking Corp.*<sup>4</sup>

[12] One of the categories cited in *Bradbury* in support of awarding indemnity costs included a situation in which allegations were made by a party which ought never to have been made and to conduct which unduly prolonged a case by the making of groundless contentions.

[13] Freshfood says Mr Lee conducted himself in a manner which caused it undue cost. Mr Lee filed a huge volume of documentation including correspondence, documents and information in support of his claim. Freshfood's legal advisers were required to spend a significant amount of time to sift through and respond to this information. Freshfood says the manner in which the documents were filed was not logical and information provided often incomprehensible.

[14] The other issue raised by Freshfood in support of its claim for indemnity costs is that on the day of the investigation meeting Mr Lee abandoned a key plank of his claim. Mr Lee's claim was that there was a legally binding contract between Freshfood and his company Storeworks. Mr Lee claimed that pursuant to that contract, Freshfood owed Storeworks the sum of almost \$800,000. These costs were claimed to be for office expenses associated with the home office he operated in order to carry out his role for Freshfood. Mr Lee's claim in relation to Storeworks has been pursued by Mr Lee as part of his claims against Freshfood for over two years and was a major plank of his claim. Freshfood was required to spend a considerable amount of time investigating and responding to this claim by Mr Lee.

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<sup>4</sup> [2009] 3 NZLR 400.

[15] While accepting that *Bradbury* was commercial litigation in the High Court, Counsel for Freshfood considers the Authority may find the categories of indemnity costs recognised in *Bradbury* as highly persuasive.

[16] Alternatively, Freshfood is seeking an uplift in the Authority's daily notional rate for costs from \$4,500 to \$67,993.76 including GST and disbursements.

[17] The investigation meeting lasted for one full day. The Authority's usual daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each day that follows.

[18] The uplift is sought on the basis that Mr Lee's conduct, as described, unnecessarily added to the costs incurred by it.

### **Mr Lee's submissions**

[19] Mr Lee in his submissions as to costs in reply, re-litigated his claims against Freshfood, despite the Authority's determination. Mr Lee presented the same arguments as those raised by him in the substantive investigation meeting. Mr Lee did not deal with Freshfood's costs application other than stating he did not accept its costs.

[20] I conclude that Mr Lee's conduct added unnecessarily to Freshfood's costs. There was a considerable amount of information which Mr Lee filed in the Authority, much of which was repeated and was very difficult to follow or comprehend. The Authority directed the parties to agree a bundle of documents which they did. Despite this agreement, Mr Lee attached to his witness statement a further 325 pages, some of which were already contained in the agreed bundle but with different reference numbers. Shortly before the Authority's investigation meeting, Mr Lee provided a further 400 pages of documents to the Authority. It was very difficult to follow the documents which were filed by Mr Lee and this unnecessarily increased Freshfood's costs in my view.

[21] I consider the abandoning by Mr Lee of his claim in respect of Storeworks at the investigation meeting was conduct which unnecessarily caused cost to Freshfood. It is a category of conduct which could be regarded as one entitling Freshfood to

indemnity costs in accordance with *Bradbury*<sup>5</sup>. Chief Judge Inglis in *Johnston v The Fletcher Construction Company Limited*<sup>6</sup> stated that “indemnity costs generally require exceptionally bad behaviour. Increased costs may be appropriate in cases where, for example, a party has pursued an argument without merit.”

[22] I do not consider Mr Lee’s conduct to have been exceptionally bad behaviour, but it was behaviour which considerably increased Freshfood’s costs. I do not consider that indemnity costs are appropriate in this case.

### **Authority’s Notional Daily Tariff**

[23] I consider that the Authority’s usual notional daily tariff based approach to costs is appropriate in this case.

[24] I accept that it is appropriate for Mr Lee to make a contribution towards Freshfood’s costs on the basis that costs follow the event. Mr Lee failed in his claims against Freshfood.

[25] The starting point in awarding costs in the Authority when an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day of an investigation meeting. The investigation meeting took one full day. For the reasons already given in this determination, I consider an uplift in the notional daily tariff to be warranted.

[26] While it is important that the Authority recognise that Mr Lee was not represented and should not be penalised for that, the manner in which he conducted himself unnecessarily increased costs for Freshfood. It is appropriate to reflect this in an uplift. I consider an uplift of \$5,000 is appropriate.

[27] Mr Lee is ordered to pay Freshfood the sum of \$9,500 by way of contribution to its costs.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**

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<sup>5</sup> Supra [2009] 3 NZLR 400.

<sup>6</sup> [2018] NZEmpC 18 at para [5].