

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 542  
3078112

BETWEEN                      JOSHUA MCCLUNG  
   Applicant

AND                              GARCIA CONTRACTING  
   SERVICES LIMITED  
   Respondent

Member of Authority:      Robin Arthur

Representatives:           Applicant in person  
   Shima Grice and Lucy Nolan, counsel for the  
   Respondent

Submissions:                15 October 2021 from the Respondent and 18 October  
   2021 from the Applicant

Determination:              3 December 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] By determination issued on 4 October 2021 the Authority found Garcia Contracting Services Limited (GCSL) had not unjustifiably disadvantaged or unjustifiably dismissed Joshua McClung.<sup>1</sup> Having succeeded in responding to Mr McClung’s personal grievances, GCSL sought an order requiring him to pay \$11,500 as a contribution to its costs for preparing for and taking part in the three-day investigation meeting held by the Authority on this matter.

[2] GCSL sought an award of costs of \$11,500 based on the Authority’s usual daily tariff – that is \$4,500 for the first day and \$3,500 for each subsequent day of the investigation meeting. The company said its actual legal costs for the Authority investigation were more than \$35,000. It said those substantial costs were the result of how Mr McClung had conducted the litigation.

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<sup>1</sup> *McClung v Garcia Contracting Services Limited* [2021] NZERA 429.

[3] Mr McClung opposed any costs being awarded on two grounds – one, that GCSL could have avoided those costs through earlier mediation with him and, two, that he could not afford to pay an order for costs anyway.

### **How costs in the Authority are assessed**

[4] The Authority's exercise of its discretion to award costs is carried out by applying well-established "basic tenets" to the particular circumstances of the case.<sup>2</sup>

[5] Those tenets include exercising the discretion in a principled and not arbitrary way; considering equity and good conscience on a case-by-case basis; inflating or reducing an award to take account of party conduct that unnecessarily increased costs; considering whether any of the parties' costs were unnecessary or unreasonable; applying a discount to a cost award if settlement offers made to the successful party were better than the outcome eventually reached in the Authority's determination; that costs 'follow the event' of success; and that the amount awarded in costs should be modest.

[6] Each case must be considered on its own merits. While a daily tariff is typically taken as a starting point, undue rigidity in its application is avoided by principled adjustments upwards or downwards from the tariff in order to account for particular characteristics of a case, including a liable party's means to pay costs, the preparation required in particularly complex matters and the conduct of the parties.

### **Earlier resolution**

[7] Mr McClung suggested the level of costs incurred by GCSL were unnecessary because it had not done enough to try to resolve the matter with him, including by mediation. A mediation scheduled before Mr McClung lodged his statement of problem had been cancelled due to safety concerns of GCSL's director Luciano Garcia, who had also reported his concerns to the Police.

[8] In his submission on the costs issue Mr McClung suggested he would have been amenable to settling his personal grievance at an early stage but noted that he had also given his opinion at the time that mediation was unlikely to resolve all of the issues. He said he had cautioned the company that it would spend more than it could

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<sup>2</sup> *PBO Limited v Da Cruz* [2005] ERNZ 808 at [44]-[46].

get back from the daily tariff, showing that he understood he may have a liability to costs at that level.

[9] Any realistic prospect of early resolution of his grievance was removed by the position set out in his statement of problem that GCSL “would need to be offering a settlement figure in excess of \$350,000 before I would even consider taking it seriously.” In that statement he said he had “an arsenal of weaponised applications and claims plus other knowledge capable of complete destroying” the company if it offered a lower settlement.

[10] As was apparent from reviewing correspondence from him during the course of the proceeding, Mr McClung was determined to continue with an Authority investigation. He saw it as an opportunity to expose what he considered was a corrupt “cover up” involving GCSL, other commercial entities, the Ministry of Social Development, the Department of Corrections, various public officials and the Employment Relations Authority.

[11] In that light GCSL’s costs resulted from Mr McClung’s approach to the matter rather any reluctance by GCSL to consider resolution.

### **Conduct unnecessarily increasing costs**

[12] There was extensive email correspondence from Mr McClung to the Authority and to GCSL’s legal representative throughout the proceeding about issues, entities and witnesses who he thought should be part of the investigation. It inevitably increased the attendances, and therefore legal fees charged, by GCSL’s representative in at least considering that correspondence and, where appropriate, responding to Mr McClung or to the Authority. If GCSL had sought an uplift in the tariff on that basis, the details of that correspondence would have required more consideration and explanation. However, as the company sought costs at the tariff only, no further detail was needed.

[13] It was, though, a factor that weighed against reducing costs below the tariff level. While costs are not to be used to express disapproval of an unsuccessful party’s conduct, one instance illustrates the point. Shortly before one of the dates scheduled for the investigation meeting, Mr McClung sent correspondence which, at least indirectly, appeared to threaten the physical safety of one of the witnesses. GCSL

was put to the extra cost of its representative attending an urgent case management conference to discuss how that concern should be handled. It was not conduct for which Mr McClung could get credit or a reduction in his costs liability.

### **Financial circumstances**

[14] Mr McClung said he was not in a position to pay “in full or in part” the costs sought by GCSL. He said he could pay off an award if he was full employment but was presently on an MSD/WINZ job seeker benefit and had “no obligation to engage in any employment” due to various health issues. He was also paying weekly instalments of \$20 on arrears of \$1,700 due on a car company finance loan. He said he had disposed of the vehicle for which the loan was made before the car company had been able to repossess it.

[15] While ability to pay may be relevant in assessing costs, a number of factors need to be weighed. The Employment Court has made the following observations in considering this issue in relation to a worker who was unemployed, had no assets, had debts owing and did not presently have the means to meet an award of costs:<sup>3</sup>

[16] The approach to financial circumstances raises a number of issues, including the extent to which the opposing party’s interests can be protected. While the approach to undue financial hardship in this jurisdiction is said to be based on the broad discretion conferred on the Court, supported by the statutory imperative that the Court exercise its powers consistently with equity and good conscience, there is a risk that the countervailing interests of the successful party (who might also be financially stretched) and broader public policy considerations become marginalised. The principles of equity and good conscience must transcend the interests of simply one party. A broader approach is required.

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[21] Finally, there may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party’s personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party’s financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

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<sup>3</sup> *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2.

[22] There may be circumstances in which a reduced, or no, costs order is appropriate. However, the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account. While Mr Tomo asks that the Court's discretion be exercised in his favour having regard to his personal circumstances, there are a number of factors that do not assist him – most particularly the aggravating features of the way in which his claim was pursued and the unnecessary costs incurred by the defendant as a result.

[16] In that case the employer, seeking costs after the worker withdrew extended proceedings, asked for a little over \$4,000. The court ordered the worker to pay \$3,000.

[17] Similar considerations to those identified by the court apply for the Authority considering exercise of its statutory discretion to award costs and expenses.

## **Conclusions**

[18] Mr McClung's application to the Authority was widely cast and canvassed an extensive range of events and alleged unjustified actions by GCSL. The issues were important to him and he sought vindication of his views. It required an extended investigation meeting. It put him to great effort and GCSL to significant expense. As an astute advocate in his own cause, Mr McClung also knew GCSL was being put to those costs in responding to his claim. In the circumstances of having not succeeded, he was liable to contribute to them.

[19] The Authority's tariff, as a relatively modest measure of costs, was the appropriate starting point. GCSL sought no increase on it. Weighing the established basic tenets on costs referred to earlier, Mr McClung's present very limited ability to meet an award of costs favoured a downward adjustment on the tariff. However, as also referred to in the Employment Court judgment cited earlier, public policy considerations also weighed towards imposing a still significant amount, even if GCSL could not enforce it immediately. Balancing those factors, a reduction to the tariff that would apply to a two-day investigation meeting significantly reduced Mr McClung's liability while retaining a substantial contribution to GCSL's costs. Enforcement of payment, if and how GCSL chose to do so, is a matter for GCSL. For that purpose it is also necessary to set a date by which payment should be made. In

the relatively unusual circumstances of this case, an extended period of 90 days from the date of this determination is an appropriate period.

**Order**

[20] Accordingly, by order made under clause 15 of Schedule 2 of the Employment Relations Act 2000, Joshua McClung must pay GCSL \$8,000 as a contribution to its costs within 90 days of the date of this determination.

Robin Arthur  
Member of the Employment Relations Authority