

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI Ā TARA ROHE**

[2021] NZERA 391  
3107692

BETWEEN                      CRYSTAL MCCONCHIE  
Applicant

AND                              PARKERS BEVERAGE  
COMPANY LIMITED  
Respondent

Member of Authority:      Sarah Kennedy

Representatives:            Robert Morgan, advocate for the Applicant  
Doug Speedy, in person for the Respondent

Submissions received:      21 July 2021 from Applicant  
5 August 2021 from Respondent

Determination:              6 September 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a preliminary determination dated 6 July 2021,<sup>1</sup> following an investigation on the papers I found that Ms McConchie’s personal grievance claim against Parkers Beverage Company Limited (Parkers Beverage) could not proceed, predominantly because the employment relationship had ended at the time the claimed unjustified disadvantage occurred. In summary the problem to be resolved was whether or not payment of the wage subsidy could affect an employee’s termination date such that a termination decision could be reversed if a wage subsidy was in existence for the terminated employee.

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<sup>1</sup> *McConchie v Parkers Beverage Company Limited* [2021] NZERA 287.

[2] I noted for completeness the wage subsidy issue and recorded my view that it was outside of the Authority's jurisdiction as provided in the Employment Relations Act ("ER Act"). The situation Ms McConchie found herself in after termination was that she was initially unable to obtain a jobseeker support payment from the Ministry of Social Development ("MSD") because the first wage subsidy was recorded as being distributed to Parkers Beverage for her. On the other hand, Parkers Beverage was advised by MSD it could use Ms McConchie's wage subsidy for other employees despite the termination of her employment.

[3] I found and it was accepted by the Applicant that Parkers acted lawfully when it terminated Ms McConchie's employment under a valid 90 day trial clause in the individual employment agreement.

[4] Costs were reserved and Parkers Beverage now seeks costs. The parties lodged submissions.

#### **Application for costs**

[5] Doug Speedy on behalf of Parkers says it has incurred large costs defending the proceedings and seeks between \$12,000 and \$15,000 for reimbursement of costs associated with legal fees, Grow HR, travel booked to Auckland, accountants, time to prepare witness statements (Doug Speedy, Tom Heywood), time to review and respond to new late witness statements, and time to respond and prepare documentation for government agencies in response to fraud allegations. Mr Speedy states that this experience has been gruelling and they feel they have done nothing wrong.

[6] Mr Speedy says that Parkers Beverage offered to settle with the Applicant no fewer than three times on a "walk away" basis meaning if Ms McConchie withdrew the proceedings then Parkers Beverage would not seek costs against her. I have no detail about the offers other than the fact of them.

[7] I note at this point that the fraud allegations are outside the Authority's jurisdiction so cannot be considered in terms of costs. I also have insufficient information to take into account the planned travel expenses.

[8] Robert Morgan, advocate for Ms McConchie, submits there were elements of this matter that were unique and unprecedented because the dismissal took place on 24 March 2020, on the eve of New Zealand moving to alert level 4 and therefore the impact and reality of Covid-19 is relevant to this consideration of costs. He confirms that “without prejudice” discussions were taking place with the assistance of counsel on both sides but that was curtailed when the respondent became self-represented meaning that future opportunities to settle were removed in the Applicant’s view. It was noted that the Applicant filed all documents in a timely manner and complied with all Authority directions so that the matter could proceed without delay.

[9] Mr Morgan also submits that Ms McConchie has suffered as a result of the actions of Parkers Beverage because she was not eligible for any Government assistance due to IRD recording her as receiving the wage subsidy. Specifically this meant she had to withdraw money from her Kiwisaver account to cover her for a period which he says she would otherwise have been able to receive Government assistance.

[10] As above, the issue regarding the wage subsidy is outside the Authority’s jurisdiction meaning that I cannot take into account the consequences of being unable to access a jobseeker payment when considering costs in this matter.

[11] Both parties agreed to have the disadvantage issue determined on the papers which was a cost saving to both parties and Mr Morgan submits that costs should lie where they fall.

## **Analysis**

[12] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the ER 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 manner as it thinks reasonable.

[13] The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.<sup>2</sup> The key principles relevant to this determination are that costs in the Authority are discretionary, generally follow the event, are modest, and that costs are not be used as punishment, although conduct which increased the costs unnecessarily can be taken into account when increasing or decreasing costs award. The nature of the case can also influence costs.

#### *Costs for Parkers Beverage*

[14] The starting point is that costs should follow the event and given that Ms McConchie's claim against Parkers Beverage could not proceed after the preliminary determination was issued, Parkers Beverage was successful in defending the claim against it and is entitled to an award of costs.

[15] Costs are to reimburse a party the cost of professional services of representation at a hearing.<sup>3</sup> This means that a party who is not represented by law practitioners, cannot recover anything for that party's time and trouble in attending litigation.<sup>4</sup> In this case I note Parkers Beverage were initially represented up to the point the evidence was filed but self-represented after that so a costs award will be limited.

[16] Costs in the Authority are generally made in accordance with the daily tariff which is currently set at \$4500.00 for the first day of hearing. This amount can then be adjusted upwards or downwards by the Authority at its discretion having regard to the factors as set out in *Da Cruz*.

[17] Using the daily tariff as a measure, I estimate a half day of hearing time would most likely have been required to hear the unjustified disadvantage claim which would result in a costs award of approximately \$1000 - \$2000.

[18] Calderbank offers<sup>5</sup> to settle are a factor that can be taken into consideration in determining the appropriate level of costs. A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked "without

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<sup>2</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

<sup>3</sup> <https://www.justice.govt.nz/courts/going-to-court/without-a-lawyer/representing-yourself-civil-district-court/costs-and-disbursements/>

<sup>4</sup> *Murphy and Routhan t/a Enzo Pizzas v van Beek* [1998] 2 ERNZ 607

<sup>5</sup> *Scott Wells v Milson Plumbing and Draining Limited* [2021] NZERA 127.

prejudice save as to costs”. The purpose of a Calderbank offer is not only to attempt to settle a claim but using the stated words the offering party is reserving the right to bring the offer to the Court’s (or in this case the Authority’s) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

[19] There is insufficient evidence of a Calderbank offer to be able to take one into account. I have no documents recording any specific offers other than the fact three offers to settle are referenced in general terms in Parkers Beverage’s submissions. The Applicant’s submission refers to one Calderbank “walk away” offer being made before legal counsel was engaged.

[20] I can take into account that the nature of the case can also influence costs. This was a unique set of circumstances caused by an emerging global pandemic. The resulting move by New Zealand into level 4 lock-down was unprecedented and therefore forms the context to this matter. I note also that the employment relationship problem was resolved on the papers without the need for a hearing.

### **Conclusion**

[21] As Parkers Beverage were not legally represented other than initially and the matter was able to be heard and determined on the papers, using estimated hearing time as a measure, I find that costs for preparation time (when legal counsel were engaged) amount to \$1500.00. I can find no basis for which to uplift a costs award on the evidence available to me.

### **Order**

[22] Ms McConchie is to pay \$1500.00 to Parkers Beverage as a contribution to its costs in this matter.

Sarah Kennedy  
Member of the Employment Relations Authority