

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 238  
3010251

BETWEEN BRUNO NASCIMENTO  
Applicant

A N D ASAJ LIMITED  
Respondent

Member of Authority: Nicola Craig  
Representatives: Nathan Santesso for Applicant  
Anthony Drake for Respondent  
Submissions Received: 25 July 2017 from Applicant  
21 July 2017 from Respondent  
Date of Determination: 14 August 2017

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**The proceeding**

[1] The respondent ASAJ Limited (ASAJ) seeks an order for the applicant Bruno Nascimento, to pay it \$2,437.50 plus GST and disbursements as a contribution to the costs it incurred in this case. No disbursements were particularised.

[2] Mr Nascimento lodged a statement of problem in the Authority on 26 June 2017. At that stage Mr Nascimento was representing himself.

[3] In the statement of problem Mr Nascimento claimed that after he handed in his notice of resignation, actions by the employer made it impossible for him to work out his notice period and thus he was not paid for his notice period. There was also a claim that ASAJ did not allow Mr Nascimento to take proper breaks.

[4] ASAJ filed a statement in reply, denying all of Mr Nascimento's claims. The case was then referred to mediation on 10 July 2017.

[5] On 17 July 2017 Nathan Santesso on behalf of Mr Nascimento advised the Authority that Mr Nascimento wished to withdraw his claim from the Authority. Mr Santesso had represented Mr Nascimento previously but was not representing him with the Authority up until 17 July 2017.

[6] The parties have been unable to agree on costs. On 21 July 2017 the respondent applied for costs. Mr Nascimento opposed that application.

### **ASAJ submissions**

[7] I now summarise the respondent's submissions:

- ASAJ's legal costs on a time and attendance basis for preparing its statement in reply are \$2,437.50 plus GST and disbursements.
- Reliance is placed on the Court of Appeal decision in *Binnie v Pacific Health Limited*<sup>1</sup> where the Court stated that "*the losing party's conduct will be relevant overall*".
- This case should never have been brought by the applicant as there was no valid basis for a claim and that has been made clear to the applicant in correspondence with him and his advocate.
- ASAJ has been put to unnecessary costs as a result of the applicant's actions and vexatious claim.
- Full payment is sought of the respondent's costs for preparing its statement in reply.

### **Mr Nascimento's submission**

[8] On behalf of Mr Nascimento the following submissions were made:

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<sup>1</sup> [2002] 1 ERNZ 438

- The leading case for consideration of costs where an applicant withdraws the matter is *RHB Chartered Accountants Limited v Rawcliffe*<sup>2</sup>. There the Employment Court pointed out that the practice of the Authority was not to award costs where a grievance is subsequently withdrawn or settled. *RHB* was an unusual case as the applicant had named the wrong respondent in the Authority and therefore had no prospect of success from the start. That matter was brought to the attention of the applicant but he proceeded despite that.
- Mr Nascimento's claim was not vexatious and there was no unusual feature in the nature of *RHB*. Mr Nascimento says that it was at least arguable that it was untenable for him to work out his notice period.
- One of the factors in *RHB* was that the applicant was put on notice that if he were to continue the respondent would seek costs against him whereas that did not occur in the present case.
- The principles in *Binnie* were not applicable in the Authority's cost setting.
- The applicant did not "lose". A decision was made on the basis of it not being economical to attend mediation, which the respondent had previously declined to attend, and then likely return for a subsequent investigation meeting of the Authority.
- Mr Nascimento attempted to get his former manager Mr Basra to agree to attend mediation. Neither Mr Basra nor his representative responded to that request. In order to get a response Mr Nascimento filed his claim in the Authority. If Mr Basra or his representative had responded to the request to attend mediation, then Mr Nascimento would not have had to submit his claims to the Authority. It is the respondent who is therefore responsible for the increased costs rather than Mr Nascimento.

## Determination

[9] The Authority's jurisdiction to deal with the costs matters is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000.

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<sup>2</sup> [2012] ERNZ 51

[10] The principles which guide the Authority's approach to costs have been outlined by the Full Employment Court in *PBO Ltd (formally Rush Security Ltd) v Da Cruz*<sup>3</sup> and more recently confirmed in *Fagotti v Acme & Co Ltd*<sup>4</sup>. The principles include:

- The discretion regarding costs is to be exercised in accordance with principle and not arbitrarily.
- Costs should be considered consistently with the Authority's equity and good conscience jurisdiction.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increase costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event and will be modest.
- In the Authority costs are frequently judged against a notional daily tariff.

[11] At the time that this case was filed the notional daily tariff was \$4,500 for a one day investigation meeting. That amount is to cover filing of the initial documentation, subsequent preparation and attendance at a one day investigation meeting.

[12] Although Mr Nascimento did not lose in the sense of having an Authority determination reject his claims, he did chose to withdraw his claim, even before attending the mediation which the Authority referred the parties to.

[13] In the *RHB* case the Court referred to a general principle that a plaintiff who discontinues a proceeding against a defendant is liable for costs of and incidental to and including the discontinuance<sup>5</sup>. However, the Authority must consider whether in equity and good conscience an award should be made in the present case.

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<sup>3</sup> [2005] 1 ERNZ 808

<sup>4</sup> [2015] NZEmpC 135

<sup>5</sup> *RHB Chartered Accountants Ltd v Rawcliffe* [2012] ERNZ 51

[14] ASAJ is effectively claiming indemnity costs, rather than a contribution towards its costs. In *Bradbury v Westpac Banking Corporation*<sup>6</sup> the Court of Appeal stated:

...indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[15] I do not accept that Mr Nascimento's behaviour can be said to come within any of the circumstances endorsed in *Bradbury* as being those where indemnity costs have been ordered. Indemnity costs are therefore not justified. I turn now to consider whether there should be any award of costs.

[16] I cannot say on the basis of the material before me that Mr Nascimento's claim could be described as frivolous or vexatious. There has been no failure by Mr Nascimento to comply with any Authority directions. There is no evidence of Mr Nascimento being warned that costs would be sought against him. He was unrepresented at the time that he filed this proceeding. There was no case management conference where the issue of costs could have been raised.

[17] Mr Nascimento attempted to get ASAJ's approval to attend mediation before filing in the Authority. The dispute resolution procedure in Schedule B of the parties' employment agreement refers to the Mediation Service and the mediator trying to help the parties resolve the problem. However, Mr Nascimento's attempt to activate the involvement of the Mediation Service was unsuccessful as, on the basis of the information before me, ASAJ did not respond to his request for agreement to mediation. Thus filing in the Authority became the only option if he wanted to pursue his claim.

[18] Taking into account all of these circumstances I have decided that costs should lie where they fall in this matter.

**Nicola Craig**  
**Member of the Employment Relations Authority**

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<sup>6</sup> (2009) 19 PRNZ 234 at [27]