

**NOTE: This matter is subject
to an order prohibiting
publication of some
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 541
3162981

BETWEEN RDJ
 Applicant

AND SGF
 Respondent

Member of Authority: Robin Arthur

Representatives: Jessica Heinstman, counsel for the Applicant
 Rachel Webster, counsel for the Respondent

Submissions: From the Applicant on 5 September 2023 and from the
 Respondent on 19 September 2023

Determination: 20 September 2023

COSTS DETERMINATION OF THE AUTHORITY

Order prohibiting publication of names

[1] The names of the parties and some witnesses are prohibited from publication under an order made in the Authority's determination about the employment relationship problem in this matter.¹

Application for costs

[2] A preliminary determination found RDJ had, contrary to SGF's assertion, raised his personal grievance within the required statutory period and the Authority could continue to investigate and determine his application about his grievance.² The

¹ *RDJ v SGF* [2023] NZERA 462.

² *RDJ v SGF* [2022] NZERA 484.

subsequent determination about that grievance found RDJ was not constructively dismissed but he was unjustifiably disadvantaged by how he was treated during the notice period. He was awarded ten days' lost wages for leave he should have been paid in that notice period and \$7,000 distress compensation.

[3] The determination encouraged the parties to agree any issue of costs and indicated how the Authority's usual daily tariff would likely be applied. Unless there were other factors to consider, such as prior settlement offers, costs for the investigation meeting held over two days were likely to total \$7,000. This comprised the one-day tariff of \$4,500 for the first day and five-sevenths of the second day tariff of \$3,500 (being \$2,500). Costs for the preliminary issue, which was determined on the papers, had been reserved and the initial indication said they would likely be set at \$1,500. Subject to further information or submissions, this suggested a likely total award of \$8,500 as costs, plus reimbursement of the \$71.55 fee to lodge an application.

[4] The parties failed to resolve the issue of costs between themselves and RDJ applied for an award of costs. His counsel's memorandum on costs disclosed RDJ was in receipt of legal aid and his actual costs had totalled \$5,370 plus the \$71.55 application. He sought an order for those costs.

[5] The memorandum also disclosed that RDJ had made an offer to settle his grievance prior to the Authority investigation if SGF paid him \$15,000 compensation. This was submitted to be close to the amount later awarded by the Authority. It was not. The amount awarded was less than \$10,000. His settlement offer, for a greater amount than the remedies later awarded, was of no relevance to his claim for costs.

[6] SGF said it, rather than RDJ, should be awarded costs because the preliminary investigation was unnecessary and RDJ was unsuccessful in his constructive dismissal claim that SGF's memorandum on costs described as having taken up three-quarters of the investigation meeting time.

Factors

[7] The Authority's jurisdiction to order a party to contribute to costs incurred by another party is exercised by applying well-established basic tenets to the particular

circumstances of the case.³ Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional ‘daily rate’ as a starting point to assess costs.

[8] Undue rigidity in applying the daily rates is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

Assessment

[9] The starting point for the assessment in this case is that an award of costs follows from “the event” of who succeeded.

[10] A preliminary determination on the question of whether RDJ had raised his grievance within the required statutory period was only necessary because SGF had questioned that point in its statement in reply. The determination found RDJ had raised his grievance in time. An award of costs for that part of the investigation followed that success.

[11] SGF submitted it was effectively more successful than RDJ in the determination on his personal grievance because he did not establish his resignation was a constructive dismissal and, in its estimate, only about a quarter of the investigation meeting time was spent on his disadvantage claims which were upheld. Weighing the course of the investigation in that way does not, however, properly account for the fact that RDJ could not have achieved that outcome without lodging his claim in the Authority. He succeeded in established that he was disadvantaged and costs follow that event.

[12] The assessment of an outcome on the broad basis that would have resulted from simply applying the tariff must be put aside given RDJ’s actual costs are limited to his legal aid grant. Those actual costs were significantly below what would have been

³ Employment Relations Act 2000, Schedule 2 clause 15(1) and www.era.govt.nz/determinations/awarding-costs-remedies.

awarded on a tariff-based assessment. It was the appropriate amount to award in this case as a contribution to the costs reasonably incurred by RDJ in pursuing his claim.

Order

[13] SGF must pay RDJ the sum of \$5,370 as costs and \$71.55 for reimbursement of the expense of the Authority fee. These sums must be paid within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority