

engaged for 'ad-hoc' hours with no expectation of ongoing work and that her employment agreement reflected this position.

[3] After a case management conference on 26 April 2023, I issued a Directions Notice setting out a timeline for an exchange of briefs of evidence and that an investigation meeting (IM) would occur on 17 October 2023. An amended statement of problem (but not an amended statement of reply) and briefs of evidence were subsequently provided in a timely fashion. However, on 28 September 2023, Ms Stevens' advocate indicated to Node Limited's advocate that the application was to be withdrawn (confirmed to the Authority on 10 October 2023).

Submissions on costs

Node Limited

[4] Ms Tudor filed submissions on behalf of Node Limited with copies of invoices, seeking a contribution to their legal costs in the amount of \$3,200 + GST. The basis of the claimed legal costs was an assertion that Ms Stevens' claims were unrealistic, vexatious, and frivolous in that Ms Stevens' employment engagement was demonstrably casual and over less than four weeks, she had worked fifteen days.

[5] The costs of representation sought were those incurred after mediation and broken down as preparation steps for the abandoned IM. Ms Tudor, without providing confirming documentation, suggested she had unsuccessfully attempted to contact Ms Stevens' advocate on 3 and 11 September, to confirm if they intended to proceed with the IM as witness travel (flights and accommodation) was needing to be booked. Ms Tudor then says the timing of the withdrawal of the action including when it was notified to the Authority, forced a witness (impliedly the sole business owner) to book flights from overseas to return to New Zealand and she had to end a contract position early and incurred a lost business opportunity (no documentation confirming this was provided).

[6] Ms Tudor suggested the late withdrawal and the claims made, caused the business owner undue costs and personal stress.

[7] Mr Kersjes suggested that a costs award normally follows an event for a successful party and that none is due and, that an equitable approach of the Authority's discretion is to let costs lie where they fall. In addition, Mr Kersjes says his client's claim was not frivolous and that Node Limited had not identified any compelling negative issues around the conduct of the matter that would warrant what were effectively, indemnity costs being sought. Mr Kersjes noted that his client was a young retail worker with limited means (although no detail was provided to support this assertion). Mr Kersjes suggested that any costs award be modest or nominal.

[8] Neither party provided evidence of settlement negotiations having occurred.

Cost Principles

[9] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Act. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ including those costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.² These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited* and include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case-by-case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties'

¹ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

² Section 160(2) Employment Relations Act 2000.

- costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
 - h) Without prejudice offers can be taken into account.
 - i) Awards will be modest.
 - j) Frequently costs are judged against notional daily rates.
 - k) 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.³

Assessment

[10] The Authority in applying its discretion is mindful that costs cannot be awarded as a punishment or disapproval of an unsuccessful parties conduct unless conduct is identified that led to a significant increase in wasted time and costs during the litigation. Here, no unusual or extraordinary expenses, reasonably incurred by the respondent, have been identified other than the costs of attending a teleconference, filing a statement in reply, and filing short briefs of evidence. I accept the respondent's frustration as real but as the investigation did not proceed, I am unable to fairly assess any level of alleged vexatious conduct or whether the claims made were frivolous.

[11] Taking all the factors identified in submissions into account and applying the Authority's discretion I consider that no extraordinary circumstances exist or evidence has been provided, that would enable the Authority to award costs in favour of Node Limited.

Conclusion

[12] I find in all the circumstances that no cost award is applicable and that costs should lie where they fall between the parties.

David G Beck
Member of the Employment Relations Authority

³ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].