

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 192
5553787

BETWEEN FALEULU SUFIA
 Applicant

A N D LINCOLN ROAD FOOD
 WAREHOUSE LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Ina Sufia, Representative for Applicant
 Emma Butcher, Counsel for Respondent

Date of Determination: 15 June 2016

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

**A. Mr Faleulu Sufia is ordered to contribute \$1,750.00 towards
Lincoln Road Food Warehouse Limited's costs.**

The substantive determination

[1] In an oral determination of the Authority issued on 13 May 2016, with a written record on 17 May 2016¹, the Authority determined that:

- (a) Mr Faleulu Sufia's dismissal by Lincoln Road Food Warehouse Limited t/a Pak'n'Save (Pak'n'Save) was justified. Accordingly, Mr Sufia did not have an employment relationship problem.

¹ [2016] NZERA Auckland 147

The Authority's power to award costs

[2] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000. This confers a wide discretion on the Authority to award costs on a principled basis.

[3] The Full Employment Court decision in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² sets out the principles that apply to awards of costs in the Authority. The following principles highlighted in *PBO* are particularly relevant to this case, namely:

- There is a discretion as to whether costs should be awarded and as to the amount.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account when inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event.
- "Without prejudice except as to costs" offers can be taken into account.

Costs determination

[4] Counsel for Pak'n'Save filed a memorandum as to costs on 31 May 2016 and Mrs Sufia for Mr Sufia responded on 8 June 2016.

[5] This matter involved an investigation meeting of almost one full day. Mrs Sufia indicated at the outset of the investigation meeting that Mr Sufia would not be able to pay costs, if they were awarded by the Authority.

[6] I spent quite some time at the beginning of the Authority's investigation explaining to Mrs Sufia that in the event Mr Sufia was unsuccessful with his claims,

² [2005] ERNZ 808, para.44

that Pak 'n' Save was able, if it chose to do so, to seek a contribution from Mr Sufia, towards its legal costs.

[7] I also explained that in the event Mr Sufia was successful with his claims and had incurred costs of representation, he too could seek a contribution towards his costs and that the normal daily tariff for costs in the Authority is \$3,500.

[8] In her email to the Authority as to costs, Mrs Sufia has reiterated that Mr Sufia is not able to meet an award of costs.

[9] Counsel for Pak'n'Save has provided details of costs incurred to defend Mr Sufia's claims along with invoices. Pak 'n' Save seeks an award of \$3,500 in costs, in accordance with the Authority's normal daily tariff. Actual costs incurred by Pak'n'Save as demonstrated by the invoices provided to the Authority, significantly exceed costs sought by it against Mr Sufia.

[10] Counsel for Pak'n'Save submits that Mr Sufia's financial position can only be assessed if he provides evidence of his total financial position, including both assets and liabilities, income and necessary expenditure for consideration. In support of this submission, Counsel has referred the Authority to the Employment Court decision in *Bishop v. Bennett*³.

[11] Mr Sufia has provided none of the required information. Mrs Sufia simply states as she did at the investigation meeting that Mr Sufia is unable to pay costs.

[12] This makes it very difficult for the Authority to undertake a proper assessment of Mr Sufia's financial position when considering whether or not costs should be awarded, and if so the quantum.

[13] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, I note the observations of Judge Inglis in *Tomo v. Checkmate Precision Cutting Tools Ltd*⁴:

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

³ [2012] NZEmpC 5

⁴ [2015] NZEmpC 2 at para.[22]

the exercise of the Court's discretion. The interests of both parties, in broader public policy considerations, must also be taken into account.

[14] As submitted by counsel for Pak'n'Save, it incurred its own costs in preparing a detailed witness statement and submissions ahead of the investigation meeting and that Mr Sufia's claim was dismissed outright by the Authority.

[15] Weighing the considerations set out by each of the representatives in their memoranda as to costs, I find that Pak'n'Save, as the successful party, is entitled to some award. This is a case in which it is appropriate for the Authority to use its discretion when considering a costs award.

[16] Mr Sufia is ordered to pay Pak'n'Save the sum of \$1,750 costs pursuant to clause 15 of Schedule 2 of the Act. This sum represents half the Authority's normal daily tariff of costs and takes into account Mr Sufia's stated poor financial situation.

[17] It may be that Pak'n'Save is willing for Mr Sufia to make payment of the costs award by instalments. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Anna Fitzgibbon
Member of the Employment Relations Authority