# New Zealand Employment Relations Authority Decisions



## TUV v WXY (Christchurch) [2018] NZERA 1061; [2018] NZERA Christchurch 61 (8 May 2018)

Last Updated: 18 May 2018

**IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH**

**ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION**

[2018] NZERA Christchurch 61

3007591

BETWEEN TUV Applicant

AND WXY Respondent

Member of Authority: Helen Doyle

Representatives: Applicant's son, Advocate for Applicant

Jordan Boyle, Counsel for Respondent

Submissions received: 3 April 2018 from Applicant

1 February 2018 from Respondent

Determination: 8 May 2018

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

A. **I order TUV to pay to WXY the sum of $6000 being costs together with disbursements in the sum of $218.52.**

**Prohibition from publication**

[1] The substantive determination contained an order prohibiting from publication the names of the applicant, her advocate who is her son, and the name of the respondent. The order prohibiting publication continues for the purpose of this cost determination. As I am not going to use the advocate's name I shall refer to the applicant when I make reference to the advocate's submission.

**The substantive determination**

[2] The applicant was unsuccessful in an application to set aside a record of settlement on the basis of mental incapacity or duress. The issue of costs was reserved and a timetable set for an exchange of submissions if agreement could not be reached.

[3] The Authority has now received submissions from both parties. For reasons set out in a memorandum to the parties dated 13 February 2018, costs are to be determined by a different member to the member who heard the substantive matter.

**The issues**

[4] These are the issues for determination:

(a) Should a determination as to costs be stayed until the outcome of the challenge of the determination to the Employment Court and/or until complaints are finally resolved?

(b) Is the Authority able to deal with costs where the applicant says that the respondent lodged its costs outside of the timetable?

(c) If the Authority is able to deal with costs, should there be an award made, and in what amount?

**Should a determination as to costs be stayed?**

[5]

The usual practice of the Authority where there is a challenge is to determine costs.

The Employment Court will then have before it all matters for determination. I consider a determination as to costs is appropriate in this case and there will be no stay ordered on the

basis that there is a challenge to the determination.

[6]

The Authority is also not persuaded that the determination should be stayed until

complaints are finally resolved. The respondent was the successful party at the Authority. It incurred costs and is entitled to some finality to the Authority's investigation and determination.

**Is the Authority able to deal with costs where the applicant says that the respondent**

**lodged its costs outside of the timetable set in the determination?**

[7]

Costs were reserved in the determination. The parties were to seek to agree how costs

should be dealt with between them. If at the end of 14 working days from the date of the determination they were unable to agree, then it was set out that the respondent should lodge a memorandum within a further 14 working days, setting out what contribution it seeks and the

basis for it. The applicant was to have a further 14 working days within which to respond.

[8]

The applicant submits that 14 working days after the determination ended on

9 January 2018 and the applicant did not hear from the respondent before that date. The applicant further submits that the respondent had 14 days after 9 January to submit the costs submissions which ended on 25 January, but that on 19 January the respondent made a request for an extension of time. This was to take instructions from their client in an attempt to resolve the matter with the applicant before going to the Authority. The applicant said that this was an error on behalf of the respondent and the Authority because the time for resolving

the issue between the parties had passed on 9 January 2018.

[9]

The applicant submits the Authority incorrectly gave an extension to resolve matters

until 31 January 2018. It was noted that the respondent submitted costs on 1 February 2018 which was six working days late. On this basis the applicant says cost awards are therefore

prohibited.

[10]

I have considered the applicant's submission. In calculating 14 working days from

19 December 2017 it would seem usual to discount the statutory holidays of 25 and

26 December and 1 and 2 January. That would take the period within which to attempt to resolve costs out until 15 January 2018. 14 days then takes the parties through to 29 January

2018 and a request for an extension of time was made by the respondent within that period, on

19 January 2018. The Authority granted that request. It is not an uncommon request because it is sensible to allow time to see

if agreement as to costs can be reached and the time frame was over the Christmas/New Year holiday period. Submissions were then lodged by the respondent on 1 February 2018. I am not persuaded therefore the Authority was in error so as to deprive the respondent of an opportunity to seek costs. Whilst the applicant appears unhappy with the timeframe given for her cost submissions the submissions were provided and nothing turns on that.

[11]

The Authority is able to proceed to determine costs.

**Should costs be awarded and, if so, in what amount?**

*Respondent's submission*

[12]

The respondent submits that costs should be awarded in accordance with the

Authority's usual principles based on the daily tariff, with uplift in the circumstances of the case, together with an award for disbursements.

[13]

The respondent refers to the power of the Authority to award costs arising from clause

15 of the Second Schedule to the Employment Relations Act 2000 (the Act).

[14]

The submissions recognise that costs are at the discretion of the Authority and that the

principles relating to costs are well settled, as outlined in *PPO Limited (formerly Rush Security Limited) v Da Cruz.*1 The submissions recognise that these principles have been recently confirmed by the full Court in *Fagotti v Acme & Co. Limited.*2 The respondent submits that costs should follow the event in that it was wholly successful in defending the application to have the record of settlement set aside. The submissions provide that one full

day was required for the hearing of evidence and written submissions were timetabled.

[15]

Mr Boyle submits that had submissions been given at the end of the investigation

meeting as the respondent was in a position to do, then it would have taken an extra third of a day. He submits that the starting point should be a day and an additional one third of a day

being $4,500 plus $1,167 which is $5,667.

[16]

The respondent then submits that there should be significant uplift from the daily tariff

to $10,000 based on a range of factors. These include that submissions were prepared and arguments addressed that were ultimately not pursued and that the applicant's case had no prospect of success and was commenced in wilful disregard of known facts and clearly established law. Further that the case involved a level of complexity and there were lengthy submissions and documents that were filed above those usually encountered in a matter of this

nature.

[17]

Mr Boyle submits that the fact the respondent was required to spend time and

resources to address arguments that were not pursued should result in an uplift.

1 *PPO Limited (formerly Rush Security Limited) v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808

2 *Fagotti v Acme & Co. Limited* [2015] NZEmpC 135

[18]

Mr Boyle says had the applicant obtained legal advice at any time throughout

proceedings then she would have received advice that her case had no prospect of success. In short he refers to it as a "hopeless case".

[19]

Mr Boyle contrasted this case with another case in the Authority of *Sawyer v The Vice*

*Chancellor of Victoria University of Wellington.3* He states that due to the complex nature of issues arising in that case, even though the matter was heard on the papers, the respondent

was still awarded $5,000.

[20]

Mr Boyle seeks disbursements in the combined sum of $775.75. The first

disbursement is the cost of the flight of one of the witnesses in the sum of $218.52 being a witness whose attendance was requested by the applicant but paid for by the respondent. Further, the cost of counsel's travel to the investigation meeting being flights and insurance at

$266.09, taxis at $58.82 and accommodation at $215.36 and a meal at $16.96. Counsel notes that both he and the respondent are located in Wellington. Finally, the respondent prepared a bundle of documents which involved the cost of photocopying stationery, although did not

claim this as a disbursement. Total disbursements claimed are $775.75.

[21]

In conclusion Mr Boyle submits actual costs are $19,279.99 plus GST and

disbursements and that the Authority should award $10,000 costs.

*The applicant's submissions*

[22]

I note at the outset that a number of the applicant's submissions were directed to the

Authority pre-investigation directions, the conduct of the investigation meeting, the ability of the applicant to provide evidence, and the weighing and consideration of evidence. The applicant has challenged the Authority's determination and that is an opportunity to have the case heard anew by way of de novo hearing in the Employment Court. As a result with due respect to the applicant many of the submissions of that nature are not strictly relevant to costs and perhaps were more directed toward supporting a stay. If a submission does appear to be relevant then I have considered it in the determination of costs. Primarily I have focussed on the principles for exercising the discretion as to costs and weighed the nature of the case and

its conduct. The applicant has helpfully also addressed these principles in submissions.

3 *Sawyer v Vice Chancellor of Victoria University of Wellington* [2017] NZERA Wellington 5 at [13] to

[14]

[23]

The applicant submits that the Authority must consider the circumstances with a very

large employer which has a human resource department and legal department and an applicant who is represented by a family member.

[24]

It is submitted that the uplift is an aggressive attempt to silence, intimidate and bully

the applicant into silence, and is not promoting equity and good conscience.

[25]

The applicant submits that there was an offer of mediation which the respondent

declined.

[26]

Further, the applicant submits that there was disadvantage because of the Authority

process and that the applicant should not therefore be punished for a lack of legal knowledge.

[27]

The applicant submits that no costs incurred by the respondent were caused

unnecessarily by the applicant, and that it is known that awards in the Authority will be modest and that the amount claimed by the respondent of $10,000 is not modest.

[28]

The applicant refers to the daily tariff. The applicant submits that a direction was

given by the Authority Member prior to the investigation meeting that submissions be provided following the meeting. Further, that the meeting started one hour late and finished

before 4:30pm, which is not a full day.

[29]

The applicant does not accept blame for not providing submissions about some claims

because the Authority did not permit evidence to be given about the claim or it was already decided that the claim under a particular head would not be pursued. Further that the determination does not support that the claim was hopeless and there is reference made to a

direction from the Member that there is clearly an arguable case to investigate.

[30]

The applicant submits she was entitled to provide documents for the case and should

not incur an increase in costs for doing so. The applicant does not agree she is responsible for the cost of flights and taxi/accommodation expenses. It is submitted that the applicant had to pay for another witness and should not pay additional costs for counsel, meals and

accommodation for a one day meeting.

[31]

The applicant submits that there should be no costs awarded to the respondent.

**Determination**

[32]

The respondent was completely successful in this matter and is entitled to

consideration of a contribution towards an award of costs in accordance with the usual principle that costs follow the event.

[33]

The Authority must exercise its discretion as to whether costs are awarded and in

what amount in a principled and not in an arbitrary manner. Awards in the Authority will be modest and are frequently assessed on the basis of a notional daily rate.

[34]

There was some dispute as to the length of the investigation meeting. The applicant

submits that the investigation meeting commenced an hour after the normal start time which would be an hour after 9.30 am. The applicant further submits that the finish time was

4.30 pm. I conclude that the notional daily tariff should be assessed on the basis of a full day which is $4,500. Even allowing for the possibility of an hour break for lunch that is still a

five hour sitting day.

[35]

I am not minded to, as Mr Boyle submits I should, assess costs at a higher starting

point on the basis that submissions were timetabled rather than delivered at the end of the investigation meeting. I simply note at this point without determining the matter the applicant submits that that was understood to be the method of delivery of submissions before the investigation meeting. I find the correct course is to assess whether there should be an increase or decrease to the starting tariff of $4,500 and that will include consideration as to whether the nature of the submissions should result in an increase.

*Arguments not pursued but prepared for by the respondent*

[36]

Mr Boyle submits that the respondent addressed three arguments in its submission that

were not pursued in the applicant's submission. I turn to these.

*Duress argument*

[37]

The applicant submits she was not permitted to provide evidence in support of the

duress aspect of her case and therefore could not make submissions about it. Although there is specific mention in the substantive determination that the applicant failed to address this issue in submissions the Authority nevertheless considered possible arguments under that head. The Authority has an investigation role and often has before it unrepresented parties or as in this case a party represented by a family member. In such circumstances all legal

matters may not be addressed in submissions but nevertheless remain an issue for determination. I do not increase the tariff on that basis because the respondent's submissions about duress were nevertheless relevant and could not be said to be a waste of costs.

*Contract and Commercial Law Act 2017* – *Contractual Remedies Act 1979*

[38]

The applicant submits that the Authority Member gave directions before the

investigation meeting and did not allow this argument to be pursued. I can find no mention of this claim in the substantive determination which I would have expected if it was an issue before the Authority for determination even if not one addressed in submissions. I am not satisfied that an increase to tariff should follow on this basis.

*Setting the record aside as an unfair bargain.*

[39]

The applicant's submission is that the majority of evidence about this head of claim

was not allowed to be given. Although the Member stated that there was no need to consider whether the bargain was unconscionable that is nevertheless addressed in two paragraphs in the determination. It did not appear to me that that would have been a complex matter to address in submissions for the respondent that would justify a significant increase to the tariff.

*Hopeless case*

[40]

Mr Boyle submits that the case was commenced and continued in wilful disregard of

known facts or established law and was in short a hopeless case. I accept that the law about setting aside a contract on the basis of incapacity, unconscionable bargain and duress is relatively well settled in New Zealand. To pursue such a claim in such circumstances will have a costs implication but in the exercise of my discretion I am not minded to find that a basis for a significant increase. There was nothing to support the case was brought by the applicant for other than genuine reasons even if as submitted by the respondent it was misguided to do so. It is a fine line between Mr Boyle's submission and the principle that costs are not to be used as a punishment.

*Complex case*

[41]

The respondent submitted that this was a legally complex case and that significant

documentation was provided by the applicant which bore no relevance to the proceeding but nevertheless had to be considered. The applicant submits that there should not be a "drastic increase" for documents it provided as it was entitled to produce such documents and that it

was not the fault of the applicant that there was complexity.

[42]

The respondent is on stronger grounds I find with this submission for an uplift to costs.

I accept that this was a moderately complex legal case. The respondent was required to address a wide range of legal arguments in submissions on a comprehensive basis as to why the settlement agreement should not be set aside. I accept that the applicant was entitled to provide documents that it considered relevant but the provision of many which were not relevant would have also increased costs. I note that the respondent also prepared a bundle of

documents.

[43]

The legal complexity and presentation of the case I accept would have caused increase

to costs incurred by the respondent. I consider an uplift of $1500 fair and reasonable to reflect that.

*Should the failure to attend mediation result in a decrease to costs*

[44]

The applicant submits that the respondent failed to attend mediation. The respondent

believed that it had reached a binding settlement agreement with the applicant. There are cases where a refusal to mediate about an employment relationship problem would be taken into account. In this case whether or not the settlement agreement should be set aside is largely a legal issue. I am not satisfied in those circumstances that there should be a reduction of costs in this matter because the respondent was not agreeable to attend

mediation.

[45]

In conclusion therefore I consider a fair and reasonable contribution towards costs to

be the sum of $6,000 reflecting the daily tariff with an uplift for complexity.

*Disbursements*

[46]

The respondent seeks $775.75 for disbursements for which invoices have been

provided.

*Cost of witness flight - $218.52*

[47]

I accept that it is reasonable for the respondent to be reimbursed for the costs of this

flight. The applicant said that it also had to bear similar expenses. That submission fails to recognise however that the respondent was the successful party.

*Mr Boyle's flight and insurance, taxis and accommodation*

[48]

The respondent is entitled to choose its own counsel. It is not usual though for the cost

of travel and accommodation for out of town counsel to be awarded. This is not a situation where it would have been impracticable to have arranged local representation. There are very able and experienced employment lawyers in the area where the investigation meeting was

held.

[49]

I decline the claim for disbursements with respect to Mr Boyle's travel and

accommodation.

**Orders made**

[50]

I order TUV to pay to WXY the sum of $6000 being costs together with

disbursements in the sum of $218.52.

**Stay as to enforcement**

[51]

It is somewhat unclear but it may be that the applicant's submission suggests that the

Authority should stay enforcement of the cost award before the challenge is determined. This is not automatic and a party may seek to enforce an order for costs before the outcome of the

challenge. Whether that will occur in this matter is unknown. The applicant does have an option of seeking an order for a stay and the Employment Court has dealt with these in previous cases.

Helen Doyle

Member of the Employment Relations Authority

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