

Attention is drawn to an order prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2024] NZERA 781
3248639

BETWEEN VSL
Applicant

AND ZSM LIMITED
First Respondent

Member of Authority: David G Beck

Representatives: Ashleigh Fechney, advocate for the Applicant
David Browne, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 2 December 2024 from the Applicant
29 November 2024 from the Respondent

Date of Determination: 24 December 2024

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem (brief history)

[1] By way of a determination of 21 October 2024¹ the Authority found that VSL did not establish an unjustified dismissal claim. VSL did establish they had been unjustifiably disadvantaged by the manner in which they had been suspended prior to their dismissal. In addition, VSL was awarded wages arrears and a penalty award against ZSM Limited for ongoing breaches of VSL's employment agreement.

¹ *VSL v ZSM Limited* [NZERA] 632.

[2] Costs were reserved. The parties were encouraged to seek agreement on costs but have not done so. VSL was in receipt of a Legal Aid grant. The investigation meeting took two days.

Submissions on costs

ZSM Ltd

[3] ZSM Ltd.'s counsel suggested an award of costs should be made in his client's favour of \$22,511.25. In support of this claim, counsel asserts that VSL although legally aided and notionally the subject of protection against a cost award had declined a reasonable and timely Calderbank offer; had delayed in seeking and obtaining a grant of legal aid and that these elements constituted exceptional circumstances that prevented the 'shield' of legal aid being used.

VSL

[4] VSL's advocate has provided a submission that despite having mixed success and not obtaining an order in their favour for the predominant unjustified dismissal claim, \$4,369.51 should be awarded in costs being the recovery of VSL's fixed fee legal aid grant.

[5] As VSL is legally aided, their advocate cited the qualified protection of section 45(2) Legal Services Act 2011 (LSA). Essentially, this protection does not allow a costs award to be made against a legally aided person unless exceptional circumstances are identified.

[6] In considering whether exceptional circumstances exist, s 45(3) LSA guidance suggest the following, but not limited to, conduct matters may be considered:

- (a) any conduct that causes the other party to incur unnecessary cost;
- (b) any failure to comply with the procedural rules and orders of the court;
- (c) any misleading or deceitful conduct;
- (d) any unreasonable pursuit of 1 or more issues on which the aided person fails;
- (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution;

(f) any other conduct that abuses the processes of the court.

Cost Principles

[7] 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*² 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.³

The impact of a settlement offer

[8] The making of a settlement offer, in the form of a 'Calderbank' offer or 'without prejudice except as to costs' approach, is a relevant factor when considering costs where such does not better the award made by the Authority. Whilst generally the Authority has a low-level jurisdiction hence a focus on scale costs, there is some authority to suggest a 'steely' approach is sometimes required in the broader public interest.⁴

[9] Here though, the Calderbank offer made (\$5,000) was in the circumstances just under what was awarded by the Authority, it did not address costs incurred. In the circumstances where VSL was also pursuing wage arrears, the Authority disregards its impact and does not consider declining such was unreasonable in all the circumstances. In addition, the delay in VSL seeking a grant of legal aid is not in these circumstances an extraordinary factor as the advocate involved was engaged for mediation and the Authority investigation meeting.

Assessment

[10] The Authority in applying discretion is also 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 course of the litigation process.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

³ Section 160(2) Employment Relations Act 2000.

⁴ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

[11] Whilst I do have regard to the significant costs ZSM Ltd has incurred in defending the unjustified dismissal claim I find that in applying s 45(3) LSA, no sufficiently extraordinary circumstances have been identified that would allow the Authority to consider awarding costs against a legally aided person.

[12] I have also considered awarding costs in favour of VSL but to assess costs where one party as is here, had only mixed success or very limited success can also be problematic. It is arguable that VSL's success was partial and compensation modest as they failed to establish the predominant claim that they had been unjustifiably dismissed and they were also found to have contributed to the situation giving rise to the personal grievance claims.

Assessment

[13] Taking all the factors identified in submissions into account including that VSL is protected against a costs award in these circumstances and applying the Authority's discretion to balance up the impact of the orders against ZSM Ltd, I consider that equity is best served by ordering that costs lie where they fall.

Conclusion

[14] 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