



New Zealand Employment Relations Authority Decisions

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Vij v Nelson-Marlborough Institute of Technology (Christchurch) [2017] NZERA 1165; [2017] NZERA Christchurch 165 (28 September 2017)

Last Updated: 8 October 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 165
3014452

BETWEEN VIRAT VIJ Applicant

A N D NELSON-MARLBOROUGH INSTITUTE OF TECHNOLOGY Respondent

Member of Authority: David Appleton

Representatives: Applicant in person

K Chapman, Advocate for Respondent

Submissions Received: 21 September 2017 from Respondent

28 September 2017 from Applicant

Date of Determination: 28 September 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 7 September 2017¹ the Authority dismissed Mr Vij's application for damages which he says arose out of an alleged breach of a record of settlement by the respondent. The Authority reserved costs and directed that the parties try to agree how they would be dealt with between them. The parties have evidently been unable to agree, and have each lodged memoranda.

[2] The respondent seeks full repayment of its costs, in the sum of \$2,830.15. This includes GST. The basis of this application is that the respondent was wholly successful in its defence, and that the Authority's preliminary opinion was that the claim was frivolous, but that Mr Vij proceeded with it nonetheless. Ms Chapman also submitted that Mr Vij included significant personal detail which was irrelevant, and

that he initially made "an astronomical monetary claim of \$500,000".

1 [2017] NZERA Christchurch 147

[3] Mr Vij resists the claim for costs and argues that no costs should be ordered to be paid by him. This is on the basis that the Authority is "just [a] forum of discussion, not a court of law". He also states that he has had no job for 16 months and that his wife supports him and his family. Mr Vij also states that he lodged his claim in order to try to get another meeting with his former manager at the respondent, and that it was the respondent's choice to hire a lawyer².

[4] Finally, Mr Vij says that he based his claim on good faith principles, which he did not realise ceased when employment came to an end.

Discussion

[5] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party

such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[6] As Ms Chapman submits, the Authority has to follow the principles set out in

*PBO Limited v Da Cruz*³ when setting costs awards. These include:

- a. There is discretion as to whether costs would 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 are to be considered on a case by case basis.

² Ms Chapman is not a lawyer, but an advocate, but I understand Mr Vij to mean a representative.

³ [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#).

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 increased 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'

costs were unnecessary or unreasonable. g. That costs generally follow the event.

h. That without prejudice offers can be taken into account. i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

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.

[7] The starting point is that costs should normally follow the event. In other words, that the successful party should normally receive a contribution to the costs incurred by the unsuccessful party in defending the claim. I see no reason why this should not be the case here. Mr Vij chose to bring a claim against the respondent. This was his right, but he had to bear the risk of doing so, as all applicants do. I therefore accept that Mr Vij should make a contribution towards the respondent's costs.

[8] Mr Vij states that the Authority is just a forum for discussion. However, this is not correct. It is an investigative body which has the statutory power to make binding determinations. It also has the statutory power to make orders for costs, as noted above. Furthermore, the Authority's website gives access to the Authority's Practice Note "Costs in the Employment Relations Authority" which explains the Authority's power to award costs, and the principles it follows in doing so. Mr Vij is an intelligent and articulate man who should have been well aware of the risk of having a costs award made against him if he were unsuccessful.

[9] Furthermore, all parties in the Authority have the right to engage professional representation. The respondent cannot be criticised for having done so. Mr Vij's claim was misconceived in law, and the respondent had a right to defend itself.

[10] Turning to how much Mr Vij should be ordered to pay, first, I do not accept that he should have to pay the GST element of the costs sought. The respondent is presumably GST registered and so should be able to receive a GST credit in respect of the GST inclusive costs it incurred in defending the claim. Deducting GST from its costs leaves the sum of \$2,461.

[11] Next, should Mr Vij pay the respondent's costs in their entirety? I believe not. Whilst his claim was misconceived in law, it was not obviously so to a layperson. I believe he was bringing his claim in good faith. Mr Vij did not behave in pursuing his claim in a way that justifies ordering him to pay costs on an indemnity basis.

[12] In addition, costs awards should be modest, and not an expression of disapproval. Whilst I do not find Ms Chapman's costs to be unreasonable, it is not just to expect Mr Vij to bear them all.

[13] Mr Vij says he has had no permanent job for 16 months. However, he does not set out his financial position in detail, and there is no indication that he could not meet a modest costs award. On balance, taking all these factors into account, I believe that it is just to order Mr Vij to pay a contribution of \$1,000 towards the respondent's costs.

Order

[14] I order Mr Vij to pay the sum of \$1,000 to the respondent, as a contribution towards its costs, within 14 days of the date of this determination.

David Appleton

Member of the Employment Relations Authority

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