

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 66
3020957

BETWEEN IAN WIKAIRA
Applicant
AND NORTH SAWN LUMBER
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman
Representatives: No appearance for the Applicant
Max Whitehead, Advocate for the Respondent
Investigation Meeting: 26 February 2018 at Whangarei
Oral Determination: 26 February 2018
Record of Determination: 27 February 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. Mr Wikaira's claim is dismissed.**
- B. Mr Wikaira is ordered to pay North Sawn Lumber Limited costs in the sum of \$3,000 within 14 days of the date of this determination.**

Employment Relationship Problem

[1] North Sawn Lumber Limited operates a timber mill in Ruakaka, Northland. Mr Wikaira was employed by North Sawn Lumber as a timber hand on a permanent basis from 6 February 2017.

[2] On 15 June 2017 Mr Wikaira wrote the phrase "Killabee" on a worktable alongside the gang emblem. It covered an area of approximately 15 x 20 cm. Mr Wikaira claims that when his employer viewed this he was summarily dismissed. He claims his dismissal was both procedurally and substantively unjustified. He claims

lost wages and compensation under s 123(1)(c) of the Employment Relations Act 2000 (the Act). North Sawn Lumber denies it unjustifiably dismissed Mr Wikaira.

[3] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Failure of Applicant to attend or be represented

[4] The Investigation Meeting was set down for 26 February 2018. This date was set during a telephone conference where Mr Wikaira was represented by an Advocate. Following the Advocate's withdrawal a copy of my minute, and the Notice of Investigation Meeting (the Notice), were personally served on Mr Wikaira.

[5] The Notice was issued pursuant to Regulation 21 of the Employment Relations Authority Regulations 2000 (the Regulations). It provided, inter alia:

If the Applicant does not attend the investigation meeting, the matter can be dismissed and costs may be awarded against the Applicant.

[6] On 19 February 2018 the Authority Officer attempted to make contact with Mr Wikaira. The email that was sent, and the phone message left, reminded him of the investigation meeting date and time. It also reiterated that if he failed to attend then his case maybe dismissed and he may be ordered to make payment of the Respondent's legal costs.

[7] This morning, the Authority Officer again unsuccessfully tried to contact Mr Wikaira.

[8] Mr Wikaira has failed to make contact with the Authority to explain his non-attendance. North Sawn Lumber applies to dismiss Mr Wikaira's claim.

[9] For the reasons set out above I am satisfied Mr Wikaira had notice of the date of the Investigation Meeting and that he chose, without reasonable excuse, not to attend or to be represented.

[10] Accordingly I am dismissing the matter and awarding costs against Mr Wikaira pursuant to Regulation 21 of the Regulations.

Costs

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

[12] The principles to be applied by the Authority are well settled. They are outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.¹ These principles were affirmed by the Employment Court in *Fagotti v Acme & Co Limited*.²

[13] Costs principles include:

- a) A discretion on whether to award costs and if so what amount.
- b) The discretion must be exercised in accordance with principle and not arbitrarily.
- c) The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d) Equity and good conscience must be considered on a case-by-case basis.
- e) Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct that 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) Without prejudice' offers can be taken into account.
- h) Awards of costs will be modest, and must be reasonable.
- i) Frequently costs are judged against a notional daily rate.
- j) Costs generally follow the event; that is, the successful party's costs are likely to be ordered to be paid by the unsuccessful party.

¹ [2005] ERNZ 808 at page 819

² [2015] NZEmpC 135

k) The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[14] Recently in *Booth v Big Kahuna Holdings Limited* Judge Inglis wrote:³

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

[15] For matters filed in the Authority from 1 August 2016, the Authority's normal daily tariff increased from \$3,500 to \$4,500 for the first day of an investigation meeting. For each subsequent day of an investigation meeting the Authority's normal daily tariff remains at \$3,500.⁴

[16] Mr Wikaira lodged a Statement of Problem with the Authority on 9 October 2017. The new costs regime therefore applies.

Respondent's Submissions

[17] North Sawn Lumber applies for an uplift to the daily tariff from \$1,125, representing the quarter day this investigation meeting took, to its actual costs of \$5,175 (including GST).

[18] In support of its application, it has detailed the steps it has been required to take as a result of Mr Wikaira's claim. It also submits additional time was required due to it making multiple attempts to contact Mr Wikaira and his former representative.

Findings on costs

[19] I have taken into account the applicable law as well as the oral submissions made by Mr Whitehead. I am satisfied North Sawn Lumber has incurred unnecessary and additional costs.

³ [2015] NZEmpC

⁴ Practice Note 2, Costs in the Employment Relations Authority

[20] The time spent in the investigation meeting today was only one quarter day. However, I recognise that North Sawn Lumber has been put to the unnecessary expense of preparing a Statement in Reply, attending a telephone conference with the Authority, preparing two witness statements, and preparing for today's investigation meeting. Mr Whitehead was also required to travel to and from Auckland for the investigation meeting. North Sawn Lumber's witnesses and its managing director also attended the investigation meeting.

[21] For this reason I order Mr Wikaira to pay to North Sawn Lumber the sum of \$2,250. This is a reasonable contribution towards its costs. This sum must be paid within 14 days of the date of this determination.

Certificate of Determination

[22] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 that North Sawn Lumber be provided with a certificate of determination, sealed with the seal of the Authority, recording that Mr Wikaira is ordered to pay North Sawn Lumber costs in the sum of \$2,250 within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority