

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 33
3001408

BETWEEN WRIGHT TANKS LIMITED
Applicant

AND JOSH IRWIN
Respondent

Member of Authority: Shane Kinley

Representatives: Glenn Mason, counsel for the Applicant
Josh Irwin, in person

Investigation Meeting: On the papers

Submissions received: 30 November 2022 and 6 December 2022 from the
Applicant
6 December 2022 from the Respondent

Determination: 25 January 2023

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] On 30 April 2018 the Authority issued a determination in relation to an employment relationship problem that found Josh Irwin had breached the non-competition provisions of his employment agreement with Wright Tanks Limited (Wright Tanks) after he left his employment with that company.¹ That determination modified the non-competition provisions from a period of three years to one year.

[2] A subsequent determination on 27 October 2022 from the Authority found Mr Irwin liable for payment of damages to Wright Tanks in respect of five instances where

¹ *Wright Tanks Limited v Josh Irwin* [2018] NZERA 31.

he accepted he had undertaken work in breach of the modified non-competition provisions of his employment agreement.² Mr Irwin was also found to be liable for damages in one other case where he disputed the modified non-competition provisions applied.

[3] Wright Tanks were, however, unable to establish that Mr Irwin should be found liable for damages in relation to a number of other cases (across categories 2 to 6 in the Authority's determination of 27 October 2022). In totality, Wright Tanks was awarded \$43,351.07 of the \$231,055.28 in damages that it had sought. A penalty was also imposed on Mr Irwin for obstructing the Authority's investigation.

[4] Both parties therefore had a degree of success in the matter.

[5] Costs were reserved and the parties were encouraged to resolve this matter between themselves. They have been unable to do this and Wright Tanks as the successful party now seeks a contribution to its costs. Leave was sought to apply for costs, as the application was filed out of time.

[6] The discretion to award costs, whilst broad, is to be exercised in a principled way. The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*.³

[7] The primary principle is that costs 'follow the event'. The Authority has power to award any party to pay to any other party such costs and expenses as the Authority thinks reasonable.⁴ Costs are awarded in the Authority generally starting from the daily tariff, currently \$4,500 for the first day and \$3,500 for each subsequent day, with upward and downward adjustments made if appropriate to the circumstances of the case.⁵

The parties' submissions

[8] Wright Tanks claims a total of \$12,571.56, being \$12,500 for three hearing days (16 August 2018, and 12 and 13 June 2019) and reimbursement of filing fee of \$71.56.

² *Wright Tanks Limited v Josh Irwin* [2022] NZERA 552.

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁴ Employment Relations Act 2000, schedule 2, clause 15.

⁵ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1>.

[9] Wright Tanks calculated costs based on the daily tariff of \$4,500 for the first day of an investigation applying to the hearing days of 6 August 2018 and 12 June 2019, and the daily tariff of \$3,500 for the additional day of an investigation applying to the hearing day of 13 June 2019. Wright Tanks submits that this approach is appropriate as the investigation meeting on 16 August 2018 related to liability only whereas the investigation meeting on 12 and 13 June 2019 related to quantum only.

[10] In relation to the application for leave to apply for costs, Wright Tanks noted that the delay was minor, in the context of a matter where the Statement of Problem was filed in 2016.

[11] Mr Irwin did not substantively engage on Wright Tanks' application for costs or seeking leave to apply for costs. His response simply proposed that "the cost should be split 50/50 between parties and at the approved allowance set by the ERA". He further noted that the "amount set by the ERA for damages plus 50% of court costs is going to be a struggle for me to pay off as it is."

Conclusion and orders

[12] I consider the minor delay in applying for costs from Wright Tanks, when viewed against the overall timeframes for proceedings in this matter, mean it is appropriate to grant leave to apply for costs.

[13] In this matter Wright Tanks was successful but obtained relatively modest damages in comparison to the quantum it sought and was not successful on the majority of categories of damages sought. Both parties have, as observed at paragraphs [2] and [3], had some degree of success. Nevertheless, as Wright Tanks was a successful party it is entitled to a contribution towards its costs and Mr Irwin is liable to pay them.

[14] In *Coomer v J A McCallum and Son* the Court observed that in these cases of mixed success, the Authority must: "stand back and look at things in the round".⁶ It is also important to note that Wright Tank's, albeit limited, success could not have been achieved without filing a case in the Authority.

⁶ *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156 at [43].

[15] Standing back and considering the matter in the round, I have had regard to the following in reaching a costs decision in this matter:

- i. principles set out in *Da Cruz*;
- ii. the partial nature of Wright Tanks' success;
- iii. the fact that Mr Irwin was not found liable for damages on the majority of categories where these were sought by Wright Tanks; and
- iv. the time taken for the Investigation Meeting.

[16] On the basis that the Court has stated that mixed success is nevertheless success for the purposes of awarding costs, I consider that Wright Tanks should receive a costs award.

[17] As a starting point, I consider the approach to calculating costs based on the daily tariff proposed by Wright Tanks is reasonable, reflecting the different matters considered in the investigation meeting on 16 August 2018, compared to the investigation meeting on 12 and 13 June 2019.

[18] Having reviewed the Authority's determination of 27 October 2022 and taking into account the factors noted at paragraph [15], I consider that it is appropriate to depart from the notional daily tariff in this case. While I do not have clear submissions on how the categories of damages claims where Wright Tanks were unsuccessful impacted on the costs of proceedings, I consider that this warrants a downward adjustment to the daily tariff. In the circumstances, I consider the sum of \$9,000 to be an appropriate award.

[19] Mr Irwin must pay Wright Tanks costs in the sum of \$9,000, together with a filing fee of \$71.56, as a contribution towards the costs it incurred in pursuing its claims.

Shane Kinley
Member of the Employment Relations Authority