

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 350
3082333

BETWEEN LEO WATERS
 Applicant

AND S.T.L LINEHAUL LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Lawrence Anderson, advocate for the applicant
 Alwyn O'Connor, counsel for the respondent

Investigation Meeting: On the papers

Submissions received: 28 July 2021 from the applicant
 Nothing received from the respondent

Date of determination: 6 August 2021

COSTS DETERMINATION OF THE AUTHORITY

A. S.T.L Linehaul is to pay Leo Waters \$9,000 as a contribution to his costs, along with \$71.56 for the filing fee, within 21 days of the date of this determination.

[1] The Authority found that Leo Waters was unjustifiably dismissed by S.T.L Linehaul Limited (STL or the company).¹ STL was ordered to pay Mr Waters compensation of \$17,000 for that grievance.

[2] Mr Waters has applied for costs. The Authority's determination gave STL seven days to lodge a memorandum of costs. Towards the end of that time expiring the company's representative advised the Authority he had been sick but would work on the submissions. When nothing was received over the next two days the Authority gave

¹ *Leo Waters v S.T.L Linehaul Limited* [2021] NZERA 304.

STL until the end of the day to file submissions, advising that the costs determination would then be issued. Nothing was received.

Mr Waters' costs claim

[3] Mr Waters seeks a contribution to his costs based on the Authority's daily tariff plus uplifts.

[4] Uplifts are sought due to unnecessary applications by STL which increased Mr Waters' costs and other behaviour which caused delays and further hearing time. Invoices are provided.

Costs discussion and conclusion

[5] The Authority's discretionary power to order costs is found in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[6] The principles which govern the Authority's discretion are described by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.² These include that costs will usually follow the event as well as that the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Also, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct. However, conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[7] Mr Waters was successful in his claim for unjustified dismissal. He had concerns regarding his time at STL which were covered in some of the evidence but did not culminate in a specific claim. These did not take a significant amount of time to explore.

[8] The starting point for the Authority's assessment of the amount of costs is usually the daily tariff. This sets \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.

[9] Here the investigation meeting began on 15 March 2021, taking most of a full day. An attempt to continue the meeting on 19 March was unsuccessful due to STL's

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

representative's commitment to court matters. The meeting continued on 19 April 2021 when about two thirds of a day was required to complete the matter.

[10] I conclude that the starting point should be \$7,000.

[11] I accept the submission that STL's conduct of the process caused additional cost to be incurred unnecessarily:

- (a) An unsuccessful application to prohibit Mr Waters' representative from acting in that capacity;³
- (b) An informal application made on the last working day before the 15 March investigation meeting to remove the matter to the Court based on an STL adjournment request being declined. STL was informed that a particular form and application fee for removal were required, as well as reference being made to s 178(6) of the Act which provides in summary that the removal section does not apply to matters about the Authority's procedure.⁴ The application was not further pursued by STL;
- (c) Timetable directions were not complied with, such as for the filing of witness statements;
- (d) Difficulties with obtaining a witness statement from the signatory of the termination letter Robert Pearson. This is outlined in the earlier determination;⁵ and
- (e) Both Annie Vasau and Cherie Peterson's evidence departed substantially and significantly from their witness statements making the hearing time longer than would otherwise have been required.

[12] I have considered awarding indemnity costs. However, the tests for such an award are high, requiring exceptional conduct.⁶ Although there are clearly grounds for saying that STL's conduct increased the amount of time and costs required unnecessarily, I conclude that the tests for indemnity costs are not met.

³ The Act, s 236.

⁴ Employment Relations Authority Regulations 2000, Schedule 1, Form 7 and Schedule 2 on fees.

⁵ Above at n 1, at [3] - [4].

⁶ *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28].

[13] There are grounds for an uplift however.

[14] STL is ordered to pay Leo Waters the sum of \$9,000 as a contribution to his costs, along with \$71.56 for the Authority's filing fee, within 21 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority