

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 127
5448996

BETWEEN MOHAMMED IRFAN ALI
Applicant

A N D ABHISEK QUALITY FOODS
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Robert M Thompson, Advocate for the applicant
Paul McBride, Counsel for the respondent

Investigation Meeting: Determined on the papers

Submissions Received: 27 July 2015 and 10 August 2015 from Mr Thompson
7 August 2015 from Mr McBride

Date of Determination: 7 September 2015

COSTS DETERMINATION OF THE AUTHORITY NO. 2

A. I order that costs should lie where they fall in respect of representatives' fees but that the respondent is to pay to Mr Ali the GST inclusive sum of \$2,717.71 in respect of disbursements incurred by Mr Ali.

[1] By way of a determination on a preliminary matter dated 19 August 2014¹ the Authority found that Mr Ali's annual remuneration was intended to cover all work carried out by him, contrary to his assertions. I reserved costs until the conclusion of the substantive investigation into Mr Ali's claims and the respondent's counterclaim.

¹ [2014] NZERA Christchurch 126

[2] The determination of the Authority in respect of its substantive investigation into Mr Ali's claims and the respondent's counterclaim was issued on 15 June 2015² and it found in favour of Mr Ali and rejected the respondent's counterclaim. Costs were reserved, and the parties invited to seek to agree how costs would be dealt with. No such agreement having been reached, this determination addresses the costs incurred by the parties in respect of the preliminary and substantive matters. Costs in relation to a second investigation into a preliminary matter (as a result of which the Authority declined to join the directors of the respondent company to the proceedings³) have already been determined by the Authority in its determination dated 15 June 2015.⁴

The statutory provision and legal principles applicable to assessing costs in the Authority

[3] 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.

[4] It is well established that the Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁵ when setting costs awards.⁶ 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.

² [2015] NZERA Christchurch 80

³ [2015] NZERA Christchurch 61

⁴ [2015] NZERA Christchurch 81

⁵ [2005] ERNZ 808

⁶ Recently confirmed as still applicable law by the full Employment Court in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

- 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.
- 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.

The preliminary matter

[5] Mr McBride is only instructed in relation to costs incurred in the first preliminary matter, but made some observations about Mr Thompson's application for costs in relation to the substantive matter, which I have considered. In relation to the first preliminary matter Mr McBride asserts that the respondent is entitled to a contribution towards its costs. The matter was determined on the papers but involved significant written submissions. Mr McBride submits that the time taken should be equated to one day's hearing and that an uplift should be applied on the Authority's daily tariff to \$5,000, plus disbursements (although Mr McBride does not detail what those disbursements are, either in terms of their amount or their nature).

[6] Mr McBride states that solicitor/client costs in the order of \$8,500 were incurred in relation to the preliminary matter. This amounts to around 24 hours of work, at what I understand is Mr McBride's hourly rate of \$350. The substance of Mr McBride's submissions ran to just over 12 pages and he lodged an affidavit from one of his client's directors which ran to nine paragraphs.

[7] However, Mr McBride asserts that an uplift is justified because significant time was spent on Mr Thompson's *repeated requests for general discovery, despite being informed that the documents sought did not exist or were otherwise outside of scope of the Authority's jurisdiction, and interrogatories*. However, the majority of the information sought by Mr Thompson (and resisted by Mr McBride) related to the respondent's counterclaim, which was not part of the investigation into the preliminary issue of whether Mr Ali's annual remuneration was intended to cover all work carried out by him.

[8] Mr Thompson submits that costs should lie where they fall in respect of the preliminary matter as it was a contract interpretation issue, but was not separate from the substantive matter, and did not negate Mr Ali's claims for unpaid wages and compensation.

[9] Whilst the preliminary matter was interconnected with the substantive matter, its determination did delimit the scope of the substantive investigation. It is just that costs should follow the event in such a case. Therefore I agree with the respondent that a contribution towards its costs should be made by Mr Ali.

[10] However, Mr McBride has presented no breakdown of the \$8,500 he cites and it is therefore hard to assess whether that sum (or even \$5,000) is reasonable or not. I am more sympathetic to his argument that the work done by the parties in the preliminary matter was broadly equivalent to a one day investigation in the Authority. As for his request that the daily tariff of \$3,500 be uplifted to \$5,000 I am not so sympathetic, as I do not consider that Mr Thompson or Mr Ali's conduct of the preliminary matter justifies such an uplift.

[11] In conclusion, I assess an appropriate level of contribution by Mr Ali to the respondent's costs as \$3,500.

The substantive matter

[12] Mr Ali seeks cost on an indemnity basis, amounting to advocacy fees of \$8,000 and disbursements in the sum of \$2,717.71 (including GST). It is understood that he seeks costs on an indemnity basis because of a letter sent by Mr Thompson to Mr McBride dated 10 September 2014, marked *without prejudice save as to costs*. The purpose of Mr Thompson making such an offer was to seek to persuade the Authority to increase the costs contribution that the respondent has to make to Mr Ali on the basis that, if the offer had been accepted at the point when it was made, his costs would have been less. Obviously, Mr Ali must show that he won more than (or substantially the same amount as) he offered to settle for.

[13] As Mr Thompson points out in his submission, offers which are made on an *without prejudice save as to costs* basis must satisfy two basic requirements in order for the maker of the offer to benefit:⁷

- a. First, there must have been *a modicum of time for calm reflection and the taking of advice* before a decision has to be made to accept the offer or reject it;
- b. Second, the offer must be transparent.

[14] Whilst sufficient time was given to the respondent to consider it (24 days) I am not persuaded that it was sufficiently transparent. First, it does not state how costs incurred to date were to be dealt with, an important point given that the proceedings had been on foot since April 2014. The reference to *a one off global payment of \$25,000 paid...pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000* cannot said to clearly include costs given that more than one category of remedy was being sought. Furthermore, it is assumed that the payment was to be made pursuant to s.123(1)(c)(i) in order to enable Mr Ali to receive it tax free. The recovery of costs, however, is clearly not a payment for humiliation, loss of dignity and injury to feelings.

[15] Second, the letter of offer refers to the following condition of settlement:

The employer and the employer's directors agree to not pursue any action or claim for any reason against Mr Ali. This includes the

⁷ *Ogilvy & Mather (NZ) Limited v Darroch* [1993] 2 ERNZ 943

counterclaim (baseless as it is) and the employer's director must see to it that the "complaint" under the Police file #140618/9601 has been expunged and Mr Ali's good name remains unscathed;

[16] I do believe that it was unreasonable for the respondent to have declined to accept that offer given that it required, inter alia, the respondent's director, who was not a party to the proceedings, to ensure that the police (another third party) expunge its records (when the director may well have had no power to require that) and that the requirement to ensure that Mr Ali's name *remains unscathed* is by no means clear or transparent.

[17] A final problem is that, whilst the *without prejudice save as to costs* letter was dated 10 September 2014, Mr Thompson has submitted a global invoice which is not broken down in any way, and which straddles the period January 2014 to June 2015. A fundamental principle of a *without prejudice save as to costs* offer is that it cannot be effective in increasing a costs contribution in respect of costs incurred before the offer was made, as its force lies in the unreasonable rejection of the offer by the recipient and the costs subsequently incurred unnecessarily. The Authority has been given no information as to how much had been incurred in costs prior to the making of the offer.

[18] In conclusion, I do not accept that Mr Thompson's *without prejudice save as to costs* offer can be relied upon to persuade me to award costs to Mr Ali on an indemnity basis.

[19] I also do not believe that there is any other reason to award costs on an indemnity basis. Indemnity costs are still rarely awarded and generally reserved for cases where a party's conduct has been especially egregious.⁸

[20] I do accept though that costs should follow the event, and that Mr Ali is entitled to a contribution to his costs. I see no cogent reason to depart from the usual daily tariff approach, which has recently been confirmed as appropriate in the Authority, in *Fagotti*.⁹ The question is, whether it should be uplifted.

[21] The respondent did not submit any briefs of evidence and did not turn up for the investigation meeting. This, however, reduced the duration of the investigation meeting drastically, so that it lasted only two and a half hours.

⁸ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94].

⁹ See note 6.

[22] I accept, however, that the respondent put Mr Ali to extra costs in defending a counterclaim which it did not withdraw, but which it also did not support with any cogent evidence. This merits an uplift in the daily tariff.

[23] A two and a half hour investigation meeting would normally attract a costs award no greater than \$1,750. In this case, there is merit in increasing it to \$3,500, due to the extra work which was presumably carried out by Mr Thompson in respect of the counterclaim, albeit not quantified.

Disbursements

[24] Mr Ali is entitled to be reimbursed for the Authority's lodgement fee of \$71.56.

[25] Mr Thompson and Mr Ali also incurred travel and accommodation costs of \$923.75 (including GST) in relation to attending the investigation meeting in Christchurch. Although the employment was in Wanaka, and Mr Thompson and Mr Ali both resided in Wanaka, the meeting was held in Christchurch because the interpreter that was necessary to assist Mr Ali give evidence was not available in Wanaka and could not travel. Mr McBride accepted this when it was discussed during a case management telephone conference. I therefore believe that it is appropriate to allow this disbursement.

[26] Mr Thompson also seeks reimbursement of an agent's fee and property search fees totalling \$82.50, including GST. This was to verify whether accommodation was owned by the respondent. This was relevant to the issue of Mr Ali being allowed to stay in property owned by one of the directors of the respondent company, and any effect that could have on his entitlements, and so I allow this disbursement.

[27] Mr Thompson also claims reimbursement of accountancy fees totalling \$1,639.90, including GST. This was to assist Mr Thompson in the calculation of monthly earnings and tax information. This information was not particularly helpful to the Authority, but I acknowledge that it was prepared in good faith, and was certainly not obviously irrelevant. On balance, I accept that it is appropriate for the respondent to reimburse this sum.

Orders

[28] As I have determined that both Mr Ali and the respondent should make a contribution of \$3,500 to each other, I order that costs relating to representatives' fees should fall where they lie.

[29] However, the respondent is to pay to Mr Ali the GST inclusive sum of \$2,717.71 in respect of disbursements incurred by Mr Ali.

David Appleton
Member of the Employment Relations Authority