

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 50
3072152

BETWEEN MICHAEL BURT
Applicant

A N D DRUCE NILSEN
Respondent

Member of Authority: David G Beck

Representatives: Naoimh McAllister, counsel for the Applicant
Respondent in person

Investigation Meeting: On the papers

Submissions Received: 29 January 2021 from the Applicant
4 February 2021 from the Respondent

Date of Determination: 10 February 2021

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] On 10 December 2020 the Authority issued a determination finding that Druce Nilsen employed Michael Burt and that:

- (a) Mr Burt has established an arrear of wages claim, in the amount of \$5,083 (gross) and \$406.64 (gross) outstanding holiday pay on that amount. I order Druce Nilsen to pay these amounts, and:

- (b) Mr Burt has made out grounds for his personal grievance against Druce Nilsen to be heard out of time and pursuant to s 114 (5) of the Act I direct the parties to mediation to seek to mutually resolve the grievance.

[2] The parties were asked to explore resolving costs by agreement but failed to do so.

Submission from Michael Burt

[3] Ms McAllister submitted that having successfully obtained the above remedies her client should be awarded a contribution to costs above the notional daily tariff of \$4,500 for a one day hearing and the filing fee of \$71.56.

[4] The suggested ‘uplift’ for a meeting that took half a day was made on the basis that further submissions had to be prepared to resist an attempt by the respondent to reopen the investigation and on the distinct issue of whether the applicant’s personal grievance had been submitted out of time and the identity of the employer. Ms McAllister claimed the applicant had incurred fees totalling \$22,990.64 plus GST. The uplift was sought on the basis of submissions being required on the latter issues, the respondent’s obstructive non-engagement in the Authority process and that the respondent declined an early Calderbank settlement offer.

Submission from Druce Nilsen

[5] No substantive submission was received from Druce Nilsen other than to communicate that he did not intend to pay any cost award as he did not have sufficient funds to do so and that he had not had a “fair go” afforded to him. However, Mr Nilsen produced no documentary evidence to support his claim of impecuniosity.

Costs principles

[6] The Authority’s discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ including: that costs are not to be used as a punishment or as a reflection on how either party

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

conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.²

The settlement offer

[7] The making of a settlement offer in the form of a ‘Calderbank’ offer or ‘without prejudice except as to costs’ is a relevant factor when considering costs where such does not better the award made by the Authority. Whilst generally the Authority has a low level jurisdiction hence a focus on scale costs there is authority to suggest a ‘steely’ approach is required in the broader public interest.³

[8] Here the description of the Calderbank offer provided by Ms McAllister shows that it was made at an early point in this long running dispute and modest in the circumstances including at the time, the applicant having only incurred minimum costs. I am however, unable to properly assess what comparison the offer made was with any eventual award as the current proceedings are not concluded and to do so would be unnecessarily speculative.

Assessment

[9] A general principle for a successful party is that costs should ‘follow the event’ and here Michael Burt was successful in establishing that he was employed by Druce Nilsen, he recovered wages owed and outstanding holiday pay and persuaded the Authority that he had a good reason to have his outstanding unjustified dismissal claim heard ‘out of time’. In these circumstances, including the early modest settlement offer being rejected by Mr Nilsen, I do consider that an uplifted daily tariff should apply as the comprehensive legal submissions Ms McAllister referred to were essential to the preparation of Mr Burt’s case. I was not wholly convinced that Druce Nilsen’s non-participation required additional costs to the extent and level incurred but I do have to have regard to the overall justice of the situation. In the circumstances, an award above the daily tariff is warranted.

² Section 160(2) Employment Relations Act 2000.

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

Award

[10] I order Druce Nilsen to pay Michael Burt the sum of \$6,000 as a contribution to legal costs incurred and to pay the filing fee of \$71.56.

David Beck
Member of the Employment Relations Authority