

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 44
5607093

BETWEEN MAHAMARAKKALAGE
PRIYANJITH INDRAMAL
AUGUSTINE DIAS
Applicant

A N D LOGICAL SYSTEMS LIMITED
t/a YOOBEE
Respondent

Member of Authority: Helen Doyle

Representatives: Leo Wenborn, Advocate for Applicant
Kesar Singh, Counsel for Respondent

Submissions Received: 10 February 2017, from the Applicant
27 February 2017, from the Respondent

Date of Determination: 27 March 2017

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

A Logical Systems Limited t/a Yoobee is ordered to pay to Mahamarakalage Priyanjith Indramal Augustine Dias the sum of \$2,300 being costs together with the filing fee of \$71.56.

The substantive determination

[1] In my determination dated 1 February 2017, I found that the respondent did not breach its employment agreement with the applicant when it reduced his fortnightly pays. I found that personal grievance claims for unjustified actions causing disadvantage were not raised within the statutory timeframe and/or if it could be said they were raised, they were not made out. I ordered that the respondent pay the applicant commission and holiday pay together with interest on those amounts. I

found the counterclaims by the respondent were not made out and these were dismissed.

[2] I reserved the issue of costs and set a timetable for an exchange of submissions. The Authority has now received costs submissions on behalf of the applicant and the respondent.

The applicant's submissions

[3] Mr Wenborn on behalf of the applicant in his submission states that he has undertaken work on the matter for Mr Dias of 56.50 hours and there has also been a lodgement fee paid of \$71.56. The work referred to included that undertaken at mediation. Mr Wenborn said his hourly rate is \$250 plus GST. Mr Wenborn on behalf of the applicant seeks an award of costs and reimbursement of the lodgement fee.

The respondent's submissions

[4] Mr Singh on behalf of the respondent does not accept that the applicant is entitled to costs and says that the proceedings were without foundation and this has increased the costs incurred by the respondent. Mr Singh on behalf of the respondent seeks an award of costs in its favour.

[5] Mr Singh refers to the judgment of the full Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*.¹ The full Court in *PBO* stated that the Authority is able to set its own procedure and has since its inception held to some basic tenets when considering costs.

[6] Mr Singh submits that the applicant advanced claims which he should not have and that if the claim had been restricted to non-payment of commission and holiday pay it could have been resolved earlier. He submits that there was no emphasis in the statement of problem on commission and holiday pay.

[7] Mr Singh on behalf of the respondent suggests in the submissions that there was at least one without prejudice save as to costs offer made by the respondent in the nature of a *Calderbank* offer. There was no such offer attached to the submissions and the Authority Officer asked Mr Singh to provide copies of any *Calderbank* offers

¹ [2005] 1 ERNZ 808

made. These were not forthcoming by the date the Authority Officer asked that they be provided by. Mr Wenborn on behalf of the applicant advised that Authority Officer in an email that in fact no *Calderbank* offers were made along the lines that there be payment of commission and holiday pay as found to be owing in the determination.

[8] Mr Singh submits that the Authority should weigh, during the costs determination, that the respondent genuinely believed the commission payments and holiday pay were an allowable deduction.

[9] Mr Singh attaches somewhat unusually to his costs submission a written submission and affidavit that he states were prepared on 31 January 2016 but he seems to accept were not sent before the determination of the Authority was issued. He asks that this be taken into account in part because the affidavit suggests that the applicant's claim was *dubious* and *supposedly fake* and *deliberately misleading*. Mr Wenborn takes issue with that affidavit on behalf of the applicant. The veracity of the claims in the affidavit were never tested.

[10] I do note, on perusal of the administration file, that an Authority Officer specifically asked the respondent in December 2016 whether there were any further submissions to come from the respondent, noting that a submission had been received from the applicant. No response was received to that email.

[11] Mr Singh claims, on behalf of the respondent, costs in the sum of \$12,000 together with expenses of \$3,984.78. He also seeks reimbursement of an overpayment made to the applicant but that was the subject of the substantive determination.

Determination

[12] Clause 15 of the second schedule to the Employment Relations Act 2000 (the Act) gives the Authority the power to order any party to a matter to pay to the other party such costs and expenses as it thinks reasonable. One of the fundamental principles of costs is that the unsuccessful party pays the costs of the successful party. Mr Singh urges me to depart from that principle but I am not persuaded to do so.

[13] The applicant had some success with his claims. The respondent's counterclaims, which were not insignificant, were entirely unsuccessful. Mr Singh

submits that the statement of problem was not focused on the claims for commission or holiday pay. There is however a full paragraph in the statement of problem dedicated to the commission issue and another addressing the issue of accrued annual leave withheld. Amounts for both those matters are claimed where the applicant sets out how he wanted the problem resolved. There is no evidence of an offer in writing in the nature of a *Calderbank* offer which may have otherwise reversed the principle that a successful party is entitled to costs. The applicant is entitled to have the Authority consider whether an award should be made in his favour.

[14] There is a discretion to be exercised by the Authority as to whether costs are awarded and, if so, in what amount. This discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. Conduct, however, which increases costs unnecessarily can be taken into account in inflating or reducing an award. Frequently costs are assessed in the Authority on a notional daily rate which was at the time this matter was lodged with the Authority \$3,500 a day. Where appropriate the Authority can move up and down from that tariff to address the circumstances of each case.

[15] The appropriate starting point is the daily tariff of \$3,500. This was a matter which occupied a full day of investigation. I note from my minute book that the investigation having commenced at 9.30am concluded at 5.47pm. Mr Dias was not successful in all of his claims. There will need to be an adjustment to reflect that. I do weigh in assessing the amount of that adjustment evidence relating to hours and days of work was necessary to determine both the applicant's claim and the counterclaim by the respondent for reimbursement for hours paid but not worked.

[16] I find that a fair reduction to the daily tariff of \$3500 in the circumstances is the sum of \$1200. Mr Dias is also entitled to reimbursement of his filing fee in the sum of \$71.56.

[17] A fair and reasonable award for costs in this matter is the sum of \$2,300 together with reimbursement of the filing fee in the sum of \$71.56.

Helen Doyle
Member of the Employment Relations Authority