

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 53
3007231

BETWEEN ALAN DUNSTAN
 Applicant

A N D SOUTH PACIFIC MEATS
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: David Beck, Counsel for Applicant
 Max Williams, Counsel for Respondent

Submissions Received: Written submissions for Applicant on 9 March 2018 and
 9 April 2018
 Written submissions for Respondent on 14 February
 2018 and 19 April 2018

Date of Determination: 30 April 2018

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 18 January 2018, I determined that South Pacific Meats had not unjustifiably dismissed Mr Dunstan nor had it acted in an unjustifiable way causing disadvantage to Mr Dunstan's employment. Further, I determined that South Pacific Meats had not breached the duty of good faith and there was no basis to impose a penalty against it. I did however determine that South Pacific Meats had breached s 63A of the Employment Relations Act 2000 (the Act) but I did not award any remedy for that.

[2] In my determination, I reserved costs in order to give the parties an opportunity to try and resolve the question of costs. The parties have been unable to agree costs and Mr Williams now seeks costs on behalf of South Pacific Meats.

Application for costs

[3] Mr Williams says:

- a. South Pacific Meats was the successful party as it defended the pleaded claims (personal grievances and breach of good faith). The claim that Mr Dunstan succeeded on, the breach of s 63A of the Act, was not pleaded and, in any event, he was not awarded any remedies and based on my findings regarding the effect of the breach having no impact, this was not a success for Mr Dunstan.
- b. I should start with the daily tariff, applying that to the half-day investigation meeting giving a starting point of \$2,250.00.
- c. I should then increase the daily tariff by \$2,000.00 because Mr Dunstan failed to better a Calderbank offer that he had refused and because of Mr Dunstan's conduct of this matter – essentially his failure to base his claim on the correct employment agreement.

[4] Mr Beck, on behalf of Mr Dunstan says that “costs should lie where they fall”. This is because Mr Dunstan's case was not frivolous nor vexatious, in fact Mr Dunstan was successful in part of his claim (although he was not awarded any remedies for that success) and that both parties chose to take principled rather than a pragmatic approach, which reflected the failure to settle the claim. He also says Mr Dunstan's financial situation will mean any award of costs against him will cause undue hardship whereas, in contrast South Pacific Meats is not under resourced and surely has the means to bear the modest in-house counsel cost it has incurred in this claim.

Preliminary matter

[5] In the course of reviewing the submissions of the parties on costs, I decided I needed further information from both parties about aspects of those submissions. I asked for and received further information pertaining to:

- a. The actual costs incurred by South Pacific Meats in dealing with Mr Dunstan's claim;
- b. Mr Dunstan's financial situation.

[6] These additional submissions contained financial information from both parties, which in the circumstances is confidential to them and should not be disclosed further. For South Pacific Meats this is the wage rate for its in-house counsel and for Mr Dunstan it is his weekly outgoings. Accordingly, pursuant to clause 10 of Schedule 2 of the Act I order that the wage rate for South Pacific Meats' in-house counsel and Mr Dunstan's weekly outgoings are both subject to a permanent non-publication order.

Discussion

[7] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹ and have been affirmed by the Full Court in *Davide Fagotti v. Acme & Co Ltd*².

[8] I have considered the power to award costs and the principles expressed in *Da Cruz*, *Fagotti* and other relevant Employment Court and Court of Appeal decisions³, on the approach to be adopted by the Authority on costs.

[9] I am satisfied that it is appropriate to award costs to South Pacific Meats as it was the successful party in this claim. Despite what Mr Beck says, I am not satisfied that the nature of the case or the principled approach adopted by both parties justifies costs lying where they fall.

¹ [2005] 1 ERNZ 808

² [2015] NZEmpC 135

³ *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305, *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

[10] Having decided to award costs to South Pacific Meats, the starting point for quantum is the daily tariff. I can depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a Calderbank offer are more appropriate.

[11] In this case there was a Calderbank offer made by South Pacific Meats on 30 September 2017. That offer was to settle all matters by payment of \$2,000.00 pursuant to s 123(1)(c)(i) of the Act. The offer included other ancillary matters such as confidentiality but did not address costs.

[12] Mr Dunstan did not accept the offer. I accept that Mr Dunstan could reasonably refuse this offer because it did not address the issue of costs. The short point is if Mr Dunstan had accepted the offer he would likely have incurred an overall loss on the claim as his costs at the point of accepting the offer would have exceeded the \$2,000.00 payment he would have received.

[13] Therefore, the Calderbank offer does not provide a basis for departing from applying the daily tariff. In addition, there is no other reason why I should depart from applying the daily tariff, so I am satisfied that the daily tariff is the correct approach.

[14] As submitted by Mr Williams, the investigation meeting took a half day so the starting point is \$2,250.00. I must now consider whether this should be increased or decreased based on the submissions of counsel.

[15] The factors relevant to the consideration of the increase or decrease of the daily tariff include:

- a. Costs awards in the Authority will be modest;
- b. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- c. Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- d. Without prejudice offers can be considered;

- e. Impecuniosity of the other party may be relevant;
- f. A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[16] I am not satisfied that either the Calderbank offer or Mr Dunstan's conduct in advancing his claim as he did, justifies an increase in the daily tariff:

- a. As I have already indicated, I accept the Calderbank offer was reasonably refused by Mr Dunstan.
- b. Whilst Mr Beck pleaded Mr Dunstan's claim based on only one employment agreement, when there was a second relevant employment agreement, Mr Beck did so on instructions and there can be no criticism of this. There was nothing in the evidence to suggest that Mr Dunstan purposely withheld the second employment agreement from Mr Beck – this appears to have been an oversight.

Mr Beck then modified Mr Dunstan's claim when the existence of the second employment agreement became known. He did this through correspondence and it was made clear in the evidence submitted. This was entirely appropriate. In my experience, whilst it is uncommon, an employment relationship problem can change focus in the course of documents being disclosed and evidence being exchanged. Counsel should adapt and so long as there are no last minute surprises requiring an adjournment or additional work, these kinds of developments do not necessarily mean costs should be increased. In this case, the change in the pleaded case does not warrant an uplift in the daily tariff, particularly because South Pacific Meats' position in reply did not change.

[17] I am however satisfied that the daily tariff should be reduced to reflect the actual costs incurred.

[18] I have reviewed the costs incurred by South Pacific Meats in this matter. I will not set out the details of the information provided as part of it is subject to an order of non-publication, suffice to say the calculations show South Pacific Meats incurred costs of \$2,138.78. On review of those costs, I can advise that I accept the claimed hourly rate by in-house counsel as being reasonable. However, I do not accept the total number of hours claimed as being reasonable, so I reduce the daily tariff to \$2,000.00.

[19] Mr Dunstan also claims that costs should be reduced to reflect his financial hardship. I heard evidence in the investigation meeting of Mr Dunstan's financial position and this was reiterated in submissions on costs by Mr Beck and then by Mr Dunstan, in response to my request. I do not accept that this means I should not award costs to South Pacific Meats at all, but a small reduction is appropriate.

[20] Considering Mr Dunstan's financial circumstances, I reduce the daily tariff to \$1,500.00.

[21] Mr Williams also seeks disbursements for South Pacific Meats for the cost of his flights to attend the investigation meeting in Christchurch. Normally the cost of travel for out of town counsel is not a disbursement that a successful party will receive – this is on the basis that local counsel could be instructed and unless the case requires the particular expertise of the counsel retained, local counsel should have been used. This however is a situation where South Pacific Meats used Mr Williams who is in-house counsel. That seems entirely appropriate as there is a lower cost than instructing external counsel and it is an appropriate use of in-house expertise and knowledge. In this case, South Pacific Meats can recover the cost of Mr Williams' flights being \$398.68.

[22] Finally, because of Mr Dunstan's financial position, I order that he can pay the costs awarded in instalments. I will leave it to the parties to agree a suitable payment arrangement.

Determination

[23] Mr Dunstan must pay South Pacific Meats \$1,500.00 as a contribution to the costs incurred in this matter plus disbursements of \$398.68. Mr Dunstan can pay these costs by instalments.

Peter van Keulen
Member of the Employment Relations Authority