

**Attention is drawn to an order  
prohibiting publication of parties'  
identification**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
OTAUTAHI ROHE**

[2022] NZERA 592  
3150704

BETWEEN                      GWH  
   Applicant

A N D                              ZOG LIMITED  
   Respondent

Member of Authority:        David G Beck

Representatives:             Virginia Nicholls, advocate for the Applicant  
   Daniel Erickson, counsel for the Respondent

Investigation Meeting:        On the papers

Submissions Received:        30 October 2022 from the Applicant  
   2 November from the Respondent

Date of Determination:        14 November 2022

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**COST DETERMINATION OF THE AUTHORITY**

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**The Determination**

[1]     On 17 October 2022, the Authority issued a determination finding that:

- a.    GWH was not unjustifiably dismissed from her employment with ZOG Limited but was the subject of an unjustified action as ZOG Ltd had mishandled a temporary job offer.
- b.    ZOG Ltd also reduced GWH salary without proper consent for 17 weeks.

- c. ZOG Limited was required to pay GWH:
  - i. \$5,189.64 arrears of wages; and
  - ii. \$5,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

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

### **Submission for GWH**

[3] Ms Nicholls submitted that GWH should recover actual costs incurred being \$20,200 plus identified disbursements of \$932.22 that were described as “reasonable and necessary”. However, Ms Nicholls did not identify any unique features that would allow the Authority to consider an uplift in costs normally granted.<sup>1</sup> A Calderbank offer was referred to as without elaboration, being “below the threshold” but not produced by Ms Nicholls.

### **Submission for ZOG Limited**

[4] Mr Erickson submitted that there was no justification for above the usual Authority tariff costs as GWH had not been successful with her predominant unjustified dismissal claim. Mr Erickson traversed cases on ‘mixed success’ and pointed to unnecessarily advanced claims by the applicant that had in his view, delayed the investigation process. He then cited and produced, the Calderbank offer that ZOG Ltd had advanced on 29 July 2022 as being a factor for consideration as the amount offered (\$10,000) was considered close to the eventual outcome and advanced prior to the investigation meeting.

### **Costs principles**

[5] 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*<sup>2</sup> including those costs are not to be used as a punishment or as a reflection on how either party

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<sup>1</sup> [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

<sup>2</sup> *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.<sup>3</sup>

### **Mixed success**

[6] To assess costs where one party as is here has only mixed success can be problematic as it is arguable that GWH's 'success' was partial and compensation modest as she failed to establish that she had been unjustifiably dismissed. Set against this was the claim for arrears of wages due to an established breach of GWH's employment agreement.

[7] Judge Smith in *William Coomer v JA McCallum and Son Limited* has observed (omitting citations):

Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any 'realistic appraisal'. That conclusion followed because they obtained a monetary award .... It was immaterial that they had not succeeded to the full extent of their claim because' ... success on more limited terms is still success.<sup>4</sup>

### **The settlement offer**

[8] The making of an 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 or as in this case came close to what the Authority awarded. 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.<sup>5</sup>

[9] Here however, the content of the letter although well set out in terms of defending ZOG Ltd's position did not address the hurt and distress GWH had suffered flowing from the withdrawn temporary job offer and in suggesting costs lie where they fall, did not properly address GWH's incurred costs. If the latter elements had been present, I may have been minded assessing the narrow gap between the settlement offer and the eventual outcome as being decisive in favour of letting costs lie where they fall.

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<sup>3</sup> Section 160(2) Employment Relations Act 2000.

<sup>4</sup> *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

<sup>5</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

## **Assessment**

[10] A general principle for a successful party is that costs should 'follow the event' and here GWH was successful in her unjustified disadvantage claim and I find an aggravating factor was ZOG Ltd not acknowledging earlier the legitimacy of the wage arrears claims.

[11] In all these circumstances, including taking the Calderbank into account, I consider an uplift in costs is not warranted. Exercising the Authority's discretion, I consider the normal daily tariff should apply and award costs of \$8,000 and the Authority filing fee to take account GWH's success and that this was a two days' investigation meeting.

## **Award**

[12] I order ZOG Limited to pay GWH the sum of \$8,000 as a contribution to GWH's legal costs and \$71.56 for the Authority filing fee.

David G Beck  
Member of the Employment Relations Authority