

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 350
3173885

BETWEEN JACKSON GEORGE
Applicant
AND XENIA GROUP LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Nathan Santesso, advocate for the applicant
Ben Molloy and Olivia Rose, counsel for the respondent
Submissions Received: 27 May and 14 June 2024 from the applicant
10 June 2024 from the respondent
Date of Determination: 14 June 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority issued a determination on 6 May 2024 in this matter.¹

[2] Xenia was found to have breached its contractual and statutory obligations to Mr George and this founded his constructive dismissal. The dismissal was held to be unjustified. Xenia was ordered to pay \$2,400 in lost wages and \$15,000 compensation to Mr George. In addition, Xenia was required to pay Mr George \$352.36 holiday pay. A penalty of \$15,000 was imposed on Xenia for contractual and statutory breaches, with \$5,000 to go to the Crown and \$10,000 to Mr George.

¹ *Jackson George v Xenia Group Limited* [2024] NZERA 266.

[3] The parties were encouraged to resolve any issue of costs between themselves. They have not done so and Mr George applied for costs. Memoranda were received from both parties. Mr George was offered the opportunity to provide additional documents about points referred to in Xenia's memorandum. A description of services was then provided.

Submissions for Mr George

[4] Reliance is placed on a without prejudice save as to costs offer. An unsigned letter of 8 February 2023 from Mr George's representative to Xenia's then lawyer was provided. It offered that Mr George would withdraw his claim in return for some standard settlement agreement clauses and payment of a modest amount of wages.

[5] It is submitted that Mr George incurred \$17,250 in costs between the time of the without prejudice offer and the end of the investigation process. The description of services broadly categorises the types of work undertaken, the quantity and the hourly rate. Mr Jackson seeks an order of \$10,000 plus GST of costs in his favour.

Submissions for Xenia

[6] Xenia advises that it did not receive a copy of the 8 February 2023 letter offering to settle. Regardless of that, it also considers the offer should have limited bearing on any costs award.

[7] The submissions refer to Calderbank offers, in their pure sense, coming from the defendant or respondent rather than the plaintiff or applicant. They are intended to allow the respondent a means of protection from the costs of litigation through the ability to make offers to settle.²

[8] Further, the offer was only part of the matrix of matters for the Authority to consider. Xenia is said not to have acted unreasonably in not accepting the offer - it wished to have the opportunity to defend the claims made against it. Vindication may be a relevant factor in turning down a settlement offer.³

² *Moore v McNab* (2005) 18 PRNZ 127 (CA) at [56].

³ *The Commissioner for Salford School v Campbell* [2016] NZCA 126 at [14].

Better evidence of the costs incurred is submitted to be warranted with the appropriate costs awarded in accordance with the daily tariff.

Costs discussion

[9] The Authority has the power to award costs.⁴ This power is discretionary and is to be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the principles guiding the Authority's approach to costs are described as including:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction
- Equity and good conscience is to be considered on a case by case basis
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award
- Costs generally follow the event
- Awards will be modest
- Frequently costs are based on a notional daily tariff.⁵

[10] I begin by establishing the Authority's daily tariff rate for this matter. The investigation meeting was held over two days. Allowing the daily tariff rate of \$4,500 for the first day and \$3,500 for the second day, a starting total of \$8,000 is established.

[11] Are there any factors justifying an increase or decrease from there?

[12] There are some difficulties with the without prejudice save as to costs offer. There is the question of whether it was received. There is another about the time for consideration of the offer. The letter is dated 8 February and it is not evident when it was sent. On the basis that it may have been at the end of day on 8 February, Xenia only had until 5pm on 10 February 2023 to consider it. In the absence of any evidence of wider discussions about resolution, that is a brief period for acceptance.

⁴ Employment Relations Act 2000, Schedule 2, cl 15.

⁵ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

[13] I conclude the without prejudice save as to costs offer does not justify an increase from the tariff rate.

[14] Mr George is entitled to be reimbursed for the Authority's filing fee.

Orders

[15] In conclusion Xenia Group Limited is to pay Jackson George the following amounts within 28 days of the date of this determination:

- \$8,000.00 as a contribution to his costs; and
- \$71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority