

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 92
3009692

BETWEEN JORDAN GIBSON
 Applicant

AND MURRAY CRANE
 Respondent

Member of Authority: Robin Arthur

Representatives: Michael Smyth, counsel for the Applicant
 Garry Pollak, counsel for the Respondent

Submissions received: 24 January 2019 from the Applicant
 None from the Respondent

Determination: 20 February 2019

COSTS AND FURTHER DETERMINATION OF THE AUTHORITY

[1] This determination resolves two matters: what costs should be awarded for the Authority investigation and the net amounts for the wage arrears, with interest, Murray Crane has been ordered to pay Jordan Gibson.

[2] By determination issued on 20 November 2018 the Authority ordered Mr Crane to pay the following amounts, with interest, to Mr Gibson by no later than 11 January 2019:¹

- (i) \$6,590.55 (net) for wages; and
- (ii) \$5,833.33 (gross) for notice; and
- (iii) \$4,576.91 (gross) for holiday pay (for 17 days annual leave); and
- (iv) \$3,955.53 (less applicable tax, if any) for Kiwisaver contributions.

¹ *Gibson v Crane* [2018] NZERA Auckland 360.

[3] The November determination also reserved costs, encouraging the parties to resolve that issue themselves but setting a timetable for the parties to lodge memoranda if a determination on costs was needed.

[4] Mr Gibson's counsel lodged a memorandum on costs by the required date. The memorandum stated that, at the date of its lodging on 24 January 2019, Mr Crane had not made any of the payments of the amounts that the November determination had ordered by paid by 11 January 2019. The memorandum also provided net figures for the amounts Mr Crane was ordered to pay Mr Gibson for notice and holiday pay. It also provided a calculation of the interest due on the net amounts owed.

[5] The memorandum advised Mr Crane had not responded to an invitation to agree outstanding matters. It noted that communication with Mr Crane's counsel suggested there may have been difficulty getting instructions from Mr Crane. The Authority file shows the memorandum was served electronically on Mr Crane's counsel by Mr Gibson's counsel and again by the Authority, advising the date any reply was due. No reply memorandum was lodged by the directed date of 8 February 2019. In the absence of any such response I have relied on Mr Gibson's submissions in determining the issues for resolution.

Net amounts of arrears due

[6] Mr Gibson provided calculations applying what appeared to be the appropriate effective tax rate to the amounts awarded to him on a gross basis for wages due during his notice period and for outstanding holiday pay. The net results were \$4,663.91 for the notice period and \$3,618.96 for holiday pay. No tax was deductible for the amount due for contributions to Kiwisaver. Accepting those calculations, the Authority's earlier order for payment of arrears is modified as follows to state each amount on the following net basis:

- (i) \$6,590.55 for wages; and
- (ii) \$4,663.91 for notice; and
- (iii) \$3,618.96 for holiday pay; and
- (iv) \$3,955.53 for Kiwisaver contributions.

[7] The total net amount due is \$18,828.95.

Interest

[8] Mr Gibson was awarded interest on the amounts ordered as arrears for the whole of the period from 1 April 2017 to the date they were paid in full. Interest is calculated using the online Civil Debt calculator.² The calculation shows interest due on the total net amount of \$18,828.95 for the period from 1 April 2017 to the date of this determination, 20 February 2019, is \$1,240.27. The amount of interest due for the period from 21 February 2019 to the actual date of payment will need to be ascertained using the online calculator at the time.

Costs

[9] Mr Gibson was entitled to an award of costs as a contribution to his cost of representation in successfully pursuing his claim. His total costs were a little over \$14,500. The narration on invoices for those costs indicated they were for legal advice and assistance that was reasonably incurred throughout a lengthy and sometimes complex path to eventual investigation. Only the costs of mediation needed to be excluded as those are not typically included in an assessment of costs in the Authority.

[10] The daily tariff of \$4,500 was the appropriate start point for the assessment of costs. Mr Gibson sought an uplift on the tariff to reflect four factors in the particular circumstances of the case: complexity, additional time responding to the question of whether the matter should be removed to the court, an unsuccessful counterclaim and the nature of the claim. The first three factors warranted an uplift for the following reasons.

[11] What would otherwise have been a straightforward wage claim became more complicated because of issues arising out of the liquidation of 1949 Limited, the company that had employed Mr Gibson and whether Mr Crane, its director, could be fixed with liability for wage arrears under relatively new statutory provisions.³ This complexity was compounded by Mr Crane raising a counterclaim, ultimately not pursued, in which he sought to exercise the restraint of trade provisions in the employment agreement between Mr Gibson and the company in liquidation. There

² Employment Relations Act 2000, Schedule 2 clause 11(1) and Interest on Money Claims Act 2016, Schedule 2.

³ Employment Relations Act 2000, s 142W and s 142Y.

was an important technical point regarding whether Mr Crane or the liquidator of the company held any right to enforce such provisions. This was one of the reasons that the Authority then considered whether the whole matter should be removed to the Employment Court. While removal was not ordered, Mr Crane had supported doing so.⁴ The counterclaim was clearly raised as a tactic to dissuade Mr Gibson from pursuing what proved to be his legitimate claim for wage arrears. It resulted in him incurring further legal costs for advice and representation even though the counterclaim was not pursued at the Authority investigation.

[12] The impact of those three factors warranted an increase in the daily tariff from \$4,500 to \$8,000. That is the amount that would have applied on the standard tariff if a second day of the investigation meeting had been held. The additional advice required, preparation and attendances related to those three factors, broadly assessed, were equivalent to what would be required for a second day.

[13] Mr Gibson submitted a further uplift was warranted due to the nature of his claim as being for wage arrears comprising minimum entitlements. This argument, put plainly, was that the value of his minimum contractual entitlements would be reduced if he had to use some of the wage arrears awarded to him to meet the shortfall between his actual costs and whatever costs were awarded by the Authority. This dilemma was compounded, he submitted, by being unable to compromise his claim to minimum entitlements by making a *Calderbank* offer and to settle for a lesser amount. While the point was well-made and highlighted a practical difficulty, it was also answered by long-standing judicial observations about the need to exercise caution in the total level of costs incurred when pursuing cases in the Authority.⁵

Expenses

[14] Mr Gibson was entitled to be reimbursed in full for the fee of \$71.56 he had to pay to lodge his application in the Authority and for the expense of \$294.68 incurred for photocopying of the bundle of documents used in the Authority investigation.⁶

⁴ *Gibson v Crane* [2018] NZERA Auckland 120.

⁵ *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [107]-[108]

⁶ Employment Relations Act 2000, Schedule 2 clause 15.

Summary and orders

[15] The following sums must be paid by Mr Crane to Mr Gibson by no later than 28 days from the date of this determination:

- (i) \$18,828.95 as arrears for wages, notice, holiday pay and Kiwisaver contributions (the arrears due); and
- (ii) \$1,240.27 as interest on the arrears due for the period from 1 April 2017 to 20 February 2019; and
- (iii) Interest on the arrears due for the period from 21 February 2019 to the date of payment, as calculated by the Civil Debt online calculator; and
- (iv) \$8,000.00 as costs; and
- (v) \$71.56 as reimbursement of the Authority filing fee; and
- (vi) \$294.68 as reimbursement of expenses.

[16] A certificate of determination setting out these amounts is to be issued with this determination. The certificate may be used in pursuing any enforcement measures, should they be necessary.⁷

Robin Arthur
Member of the Employment Relations Authority

⁷ Employment Relations Act 2000, s 141.