

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 208  
3003511

BETWEEN            BRODIE HALLIDAY  
                                 Applicant

AND                    LANE GROUP LIMITED  
                                 Respondent

Member of Authority:    Helen Doyle

Representatives:        Ben Nevell, Counsel for Applicant  
                                 Don Rhodes, Advocate for Respondent

Submissions received:    8 November 2017 from Applicant  
                                 16 November 2017 from Respondent

Determination:            29 November 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A        I order Lane Group Limited to pay to Brodie Halliday the sum of \$4,500  
             being costs and \$241.89 for disbursements**

**The substantive determination**

[1]        The Authority, in a determination dated 26 October 2017, found that the applicant was unjustifiably dismissed and made awards for reimbursement of lost wages and payment of compensation. There was no award for a penalty for a breach of good faith and no finding that the respondent breached its health and safety obligations to the applicant.

[2]        Costs were reserved and a timetable for an exchange of submissions set. The Authority has now received submissions from Mr Nevell on behalf of the applicant and Mr Rhodes on behalf of the respondent. The applicant is legally aided.

### **The applicant's submissions**

[3] Mr Nevell in his submission refers to the principles for determination of costs in the Authority from the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>1</sup> and affirmed by the full Court of the Employment Court in *Fagotti v Acme & Co. Limited*.<sup>2</sup>

[4] Mr Nevell submits that costs should follow the event. The applicant was legally aided and actual costs incurred were \$7,187.89 which includes \$828 for attendance at mediation. Mr Nevell submits additionally, although these are not claimed, that there were legal fees of \$4,394.41 incurred for legal representation during the disciplinary meeting and for advice to the point of lodging a personal grievance. He notes that the applicant will have to repay his legal costs out of the proceeds. Mr Nevell says the Authority investigation occupied one full day and two hours on a second day with the investigation that day conducted by telephone. He submits costs should be assessed on the basis of 1.25 days of hearing.

[5] Mr Nevell submits that whilst the applicant was not successful in his claim for penalties for breach of s 4 of the Act he was substantially successful in his claim and costs should follow the event. He submits that no "Calderbank offers" were exchanged and that there is no basis to depart from the principle that costs should follow the event assessed in accordance with the daily tariff.

[6] The applicant seeks a cost award of \$7,028.39 made up of 1.25 days at the daily tariff of \$4,500 being \$5,625 and an additional award of \$333.50 for the cost submission. There is also a claim for the cost of preparation and attendance at mediation of \$828 together with disbursements for the filing fee of \$71.56, an additional one day's hearing fee of \$153.33 and courier costs of \$17.

[7] Mr Nevell submits that the full Court in *Fagotti* left open the question whether mediation costs should be recoverable. He submits that they should be in this case because the applicant's total costs, including mediation, exceed the amount of compensation and the respondent is a well-resourced company with significant funds to pay the costs of \$828 and further that mediation is essentially compulsory.

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<sup>1</sup> *PBO Ltd v Da Cruz* [2005] ERNZ 808

<sup>2</sup> *Fagotti v Acme & Co Limited* [2015] NZEmpC 135

**The respondent's submissions**

[8] Mr Rhodes accepts that Mr Nevell has referred to the appropriate Court judgments with respect to costs. He submits the respondent is prepared to pay a contribution of \$3,000 taking a daily tariff of \$4,500 but reducing from that the amount of contribution found by the Authority of 33%. The respondent submits this is a reasonable contribution given the claim was not of such difficulty to support a claim for additional costs and that the second day was simply to accommodate travel arrangements.

**Determination**

[9] Although the applicant was not successful with some of his claims he was successful in his grievance that he was unjustifiably dismissed and in accordance with a fundamental principle is entitled to an assessment of costs.

[10] The Authority must exercise its discretion as to whether costs are awarded and in what amount in a principled and not arbitrary manner. Awards in the Authority will be modest and frequently assessed on the basis of a notional daily rate.

[11] I will start with the length of the investigation. There was one full day of investigation and investigation on a second day which according to my minute book was from 9.30am to 10.29am being one hour. The Authority heard affirmed evidence by telephone from three witnesses on the second day with Mr Nevell and Mr Rhodes present. Two of those witnesses gave evidence primarily about whether the respondent had complied with health and safety obligations to the applicant. The claim was unsuccessful. The third witness was very brief.

[12] This matter was not legally complex although there had been a series of performance issues raised over a period of time which added to the factual complexity.

[13] I find in the round costs should be assessed on the basis of one full day as the evidence on the second day was primarily about an unsuccessful claim. The starting point is the notional daily tariff which is \$4,500. I note that the value of the notional daily tariff was

considered again in *Fagotti*.<sup>3</sup> One of the benefits referred to in the full Court judgment is that it enables parties and their representatives to assess more accurately costs as part of litigation.

[14] The notional daily tariff was increased for matters lodged from 1 August 2016 to \$4,500. An increase is sought to that by Mr Nevell for preparation of cost submissions. There was no complexity or anything out of the ordinary with the cost submission in this matter. I am not minded to increase the notional daily tariff in those circumstances.

[15] Mr Nevell also seeks the costs of mediation. In *Fagotti*<sup>4</sup> the matter of mediation costs was left to await a fully argued case. There was an obiter comment that there is a “respectable argument” such costs may be recoverable as compensation.

[16] Mr Nevell submits that there are factors that support an award for mediation costs in the sum of \$828. Whilst I accept that the claim is modest mediation costs have not tended to be included in awards for costs in the Authority. Mediation in this matter was voluntary and took place before proceedings were lodged. The ability of the respondent to pay is not the main issue nor is the fact that the applicant has limited means. It is more fundamentally whether or not such costs are recoverable. There are no factors in this case to persuade the Authority that mediation costs should be taken into account.

[17] Mr Rhodes submits that the daily tariff should be reduced by the amount of contribution found under s 124 of the Employment Relations Act 2000 (the Act). One of the principles about costs is that they are not to be used as a punishment or an expression of disapproval of the unsuccessful party’s conduct unless there is conduct that increases costs. I am not satisfied that the conduct for which contribution was found increased costs. The Court of Appeal in *White v Auckland District Health Board*<sup>5</sup> held that the Employment Court erred because having taken into account the appellant’s contributory behaviour in denying a remedy for compensation the Employment Court was not then entitled to take into account the same behaviour to deny costs. For these reasons I make no deduction to the daily tariff as suggested by Mr Rhodes for contribution.

[18] I find that a fair and reasonable award for costs in the circumstances of this case is \$4,500.

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<sup>3</sup> *Fagotti* above n 2 at [108]

<sup>4</sup> *Fagotti* above n 2 at [113]

<sup>5</sup> *White v Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635 at [40] [51] and [52]

[19] I allow the following claims for disbursements in the combined sum of \$241.89 as they involve payment of money to a third party:

- (i) Filing fee \$71.56
- (ii) Hearing fee \$153.33
- (iii) Courier costs of \$17.00

[20] I order Lane Group Limited to pay to Brodie Halliday the sum of \$4,500 being costs and \$241.89 for disbursements.

Helen Doyle  
Member of the Employment Relations Authority