

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 77  
3048299

BETWEEN                      SARAH JARVIS  
   Applicant  
  
A N D                              FLYNN TRAVEL LIMITED  
   Respondent

Member of Authority:        Peter van Keulen  
  
Representatives:              Timothy Jackson and Jonathan Loh, counsel for the  
   Applicant  
   Tony Shaw, counsel for the Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions Received:        12 December 2019 from the Applicant  
   10 January 2020 from the Respondent  
  
Date of Determination:        20 February 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     In a determination dated 28 November 2019<sup>1</sup>, I determined that Flynn Travel Limited had unjustifiably dismissed Sarah Jarvis but it had not acted in an unjustified manner, which caused disadvantage to her. I also determined that Flynn Travel did not breach Ms Jarvis' employment agreement by not concluding a sale of its business to her.

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<sup>1</sup> *Sarah Jarvis v Flynn Travel Limited* [2019] NZERA 681

[2] I awarded Ms Jarvis \$2,992.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000 (the Act) and \$13,000.00 compensation pursuant to s 123(1)(c)(i) of the Act.

[3] I also reserved costs in order to give the parties an opportunity to try to resolve the question of costs. The parties were unable to agree costs and now Ms Jarvis seeks costs.

### **Application for costs**

[4] Counsel for Ms Jarvis seeks an order that Flynn Travel pay Ms Jarvis' actual and reasonable costs of \$10,585.23 or alternatively that Flynn Travel pay \$6,250.00 plus disbursements as a contribution to Ms Jarvis's costs; this sum being based on applying the daily tariff.

[5] In support of its claim for actual (or indemnity) costs, counsel for Ms Jarvis refers to a Calderbank offer refused by Flynn Travel and the fact that Ms Jarvis' costs are reasonable and she is entitled to an award commensurate with her actual costs given her success.

[6] Counsel for Flynn Travel says in response:

- (a) Flynn Travel accepts that costs should follow the event but Ms Jarvis' success was limited and any costs award should be reduced to reflect the extent she was unsuccessful with parts of her claim.
- (b) There were two Calderbank offers made, one by each party, and neither has any bearing on the application for costs given the level of the remedies awarded. Without a relevant Calderbank offer there is no basis to depart from applying the daily tariff so the daily tariff applies.
- (c) The daily tariff should not be applied as counsel for Ms Jarvis requests as the investigation meeting was less than one day and any amount should be reduced further to reflect the mixed success that Ms Jarvis had.

### **Analysis**

[7] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are

outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup> and other relevant Employment Court and Court of Appeal decisions.<sup>3</sup>

#### *Costs for Ms Jarvis*

[8] The starting point on costs is that an award of costs should follow the event, that is, a successful party should normally be awarded costs.

[9] In some cases the question of which party is the successful one is not easy to establish. In such cases the guidance from *William Coomer v JA McCallum and Son Limited*<sup>4</sup> is particularly helpful. In this case Judge Smith reviewed relevant Court of Appeal authorities and applied them concluding that there was no basis to establish why, after being successful with his personal grievance and being awarded compensation, Mr Coomer's success should be outweighed by what was perceived to be the respondent's success. And, Mr Coomer's success, albeit limited, could not have been achieved without lodging his claim in the Authority.

[10] The same approach applies here. Whilst Flynn Travel was successful in defending Ms Jarvis' unjustified action grievance and her breach of contract claim, which accounted for a reasonable proportion of the resources committed to my investigation, that success is insufficient to displace the success Ms Jarvis had with her unjustified dismissal claim.

[11] I determine that Ms Jarvis is entitled to an award of costs in respect of this matter. I must now turn to consider the quantum of that award.

#### *Applying the daily tariff*

[12] The starting point for quantum is the daily tariff. I can depart from applying the daily tariff in certain circumstances where, for example, indemnity costs may be appropriate.

[13] In this case I agree with counsel for Flynn Travel, there is no basis for awarding actual or indemnity costs in this matter. The Calderbank offers are not relevant to the question of costs as Ms Flynn did not beat her offer but she did better the offer made by Flynn Travel.

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<sup>2</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

<sup>3</sup> *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; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

<sup>4</sup> *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

And the suggestion that Ms Jarvis' costs are reasonable and a full award at that reasonable amount is appropriate to reflect her success is contrary to the established principles for awarding costs in the Authority (which I referenced in paragraph [7]).

[14] So, I conclude that it is appropriate to award costs to Ms Jarvis based on the daily tariff.

[15] My starting point in applying the daily tariff is to calculate the number of days or part days to which the tariff should apply. In this case I am satisfied that one day is correct – this takes account of the fact that the meeting did not last a full day but submissions were lodged subsequently.

#### *Adjusting the daily tariff*

[16] So having established that my starting point is \$4,500.00 being the daily tariff for a one day investigation meeting I must now consider if that should be adjusted. The daily tariff amount can then be adjusted for various reasons, including to reflect the limited success of the party receiving the costs award.<sup>5</sup>

[17] In this case weighing the relative resource expended on the various parts of Ms Jarvis' claim and apportioning part of the daily tariff to those parts of the claim that Ms Jarvis lost, I conclude that an appropriate reduction is \$2,000.00.

[18] After the reduction to the daily tariff, Flynn Travel must pay \$2,500.00 as a contribution to Ms Jarvis' costs.

#### *Disbursements*

[19] Ms Jarvis is also entitled to receive a payment for the filing fee for her claim, so Flynn Travel is to pay a further \$71.56 to Ms Jarvis.

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<sup>5</sup> *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

## **Order**

[20] Flynn Travel Limited is to pay \$2,571.56 to Ms Jarvis as a contribution to her costs in this matter.

Peter van Keulen  
Member of the Employment Relations Authority