

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 20
5521183

BETWEEN

AND

GETHYN JONES
Applicant

CHRISTCHURCH
EUROPEAN LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Peter Moore, advocate for the applicant
Robert Thompson, advocate for the respondent

Costs submissions received: From the applicant on 23 December 2015 and 27 January 2016. From the respondent on 22 January 2016. Further information on 25 February 2016.

Determination: 2 March 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] On 24 November 2015 I issued my substantive determination which awarded Mr Jones a total of \$20,176.66 including \$8,000 of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. I also ordered a penalty of \$5,000 against Christchurch European Limited (CEL).

[2] The parties were directed to co-operate to calculate what further amounts, if any, are still owed to Mr Jones by way of holiday and statutory holiday pay and minimum wage claims.

[3] Initially CEL denied that Mr Jones was an employee and the investigation meeting was set down to deal with that jurisdictional issue as well as with all of Mr Jones' claims. However, a short time in advance of the investigation meeting the respondent accepted that Mr Jones had been its employee.

[4] The investigation meeting took place over 2 days on 25 and 26 June 2015.

[5] The parties have been unable to agree on costs.

The applicant's submissions

[6] Mr Jones has been billed a total of \$29,120 from the preparation of the statement of problem through to the provision of written submissions. Mr Jones seeks costs of \$14,000 plus disbursements, being the application fee of \$71.56 and the second day hearing fee of \$306.66.

[7] Mr Moore submits there are factors favouring doubling the usual daily tariff of \$3,500:

- CEL only conceded shortly before the investigation meeting that Mr Jones was an employee. By then the preparation for arguing that aspect of the matter had largely been completed meaning legal costs were incurred needlessly.
- CEL failed to keep proper wage and time records and failed to disclose those records it did have for a long time after they were requested. This resulted in costs to Mr Jones because estimated amounts owed had to be prepared using bank records, Mr Jones' invoices, IRD records and calendars. There is likely to be further expense for Mr Jones arising out of the Authority's direction for the parties to work together to resolve outstanding pay issues.
- The respondent's witness statements *were not consistent with the facts* and as a result the applicant was put to the expense of producing transcripts of recordings made by the applicant of events on the last day of his employment. Mr Moore submits that it was cheaper and easier for him and his client to transcribe the recordings than a transcription service because there was a significant amount of over-talking. Mr Moore says the necessity to transcribe the events meant significant and unnecessary costs for the applicant.
- Once the witness evidence had been heard there was not enough time for oral submissions to be made at the investigation meeting. This meant that they had to be made in writing. Had the submissions been

made orally they could have taken another half day of investigation meeting time. Therefore, another half day of costs should be awarded to Mr Jones.

- In Mr Thompson's submissions he made assertions about what was said in the investigation meeting that were not accurate, or were erroneous. It took considerable time for Mr Moore to respond to those errors from an analysis of his handwritten notes from the investigation meeting.

The respondent's submissions

[8] Mr Thompson submits that for a number of reasons costs should lie where they fall; that is, his client should not be required to make any contribution towards Mr Jones' costs.

[9] Mr Thompson submits that in early June the respondent communicated its calculations that the applicant's holiday pay and statutory holiday pay entitlements amounted to \$18,392.34 net. This was done as part of negotiations aimed at settling the matter.

[10] On 23 June 2015 the respondent made a settlement offer, which it submits was a *Calderbank* offer. Mr Thompson submits that because the applicant received less from the Authority than the offer made by CEL it should not be responsible for the applicant's costs.

[11] Mr Thompson also submits that Mr Jones had only limited success. For example, his claim for Kiwisaver was dismissed, a number of disadvantage claims were considered and dismissed and as a result a large amount of compensation claimed by Mr Jones was not awarded. In addition, Mr Jones was not successful in claiming that his retainer had been underpaid. Therefore, Mr Thompson submits that his client had success in defending a number of claims and its success should be reflected in reducing any costs it would otherwise be liable to pay.

[12] Mr Thompson also submits that the way the applicant's case was run increased his client's costs in a number of ways:

- Mr Moore did not submit the briefs of evidence until 2 days after the date he was directed to do so.
- Less than a week before the investigation meeting and without seeking leave Mr Moore produced new evidence by way of audio and video recordings and transcripts of those recordings. Initially the recordings were not in a format Mr Thompson could play. The new evidence meant the respondent was put to extra time and expense in providing new evidence and in amending Mr Thompson's cross examination questions and submissions that had already been prepared.

Determination

The principles the Authority follows in considering costs applications are as set out in *PBO Limited v Da Cruz*¹, a judgment of the Full Court of the Employment Court. These principles include:

- a. A discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case by case basis.
- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. Without prejudice offers can be taken into account.
- h. Awards of costs will be modest.

¹ [2005] ERNZ 808.

- i. Frequently costs are judged against a notional daily rate, which is currently \$3,500.00.
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[13] The Authority's application of the Da Cruz principles was upheld by the Employment Court in *Fagotti v Acme Co Limited*.²

[14] The nature of the Authority as a lower level forum means it is not intended to be an overly costly forum. In *Fagotti* Chief Judge Colgan wrote on behalf of the Full Court:

... as Judge Inglis wrote in Stevens³:

... Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate, currently set at \$3,500) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate. ...

In my view it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority. ...

*As to the question of the utility and value of a "notional daily rate" for costs, we agree that there is significant value in a commonly applied and well publicised notional daily rate for costs in the Authority. This enables parties and their representatives to assess more accurately from the outset what may be a very important element of the litigation (costs) when undertaking the regular economic analyses that parties and their representatives should undertake during that process. This was put succinctly and recently in the costs judgment in *Booth v Big Kahuna Holdings Ltd* where it was said that parties who elect to incur costs that are likely to exceed the Authority's*

² [2015] NZEmpC 135.

³ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94].

*notional daily rate are “entitled to do so but cannot confidently expect to recoup any additional sums”.*⁴

The Calderbank offers

[15] The respondent’s offer was made in the course of what appears to have been ongoing negotiations between the parties only two days before the investigation meeting was due to start. A decision was asked for by the end of that same day. Clearly much preparation by the applicant’s advocate had been done by that stage. I note Mr Moore had invoiced \$8,510 up to 23 June 2015.

[16] The respondent’s 23 June offer to settle was:

1. *\$25,000.00 under section 123.*
2. *\$2000 plus GST.*
3. *A further payment for compensation of \$7,000.00 under an alternative heading under section 123.*
4. *Standard settlement terms of confidentiality and full and final terms will apply.*

This is full and final settlement of all matters, this offer is on a without prejudice basis and save as to costs. If your client is unable to beat this offer we reserve the right to produce this offer regarding any application for costs. This offer is open until 4pm 23 June but can be extended if needed. Currently our client is holding off paying your client statutory entitlements pending this offer.

[17] At 12.50 and 12.51 pm on 24 June Mr Moore sent the following emails to Mr Thompson:

I am unclear how much your client is intending (or was intending) to pay for annual leave, stat days, etc. Can you please clarify?

And

Hi again, Robert. I should further clarify: Is this offer in lieu of or in addition to the holiday pay (etc) owed? Please advise.

[18] Later at 1.13 pm on 24 June Mr Moore made a counter-offer:

Without prejudice save as to costs, my client is prepared to settle this matter in return for:

- 1) *\$25,000 paid under s 123 I c i with respect to the events of 12/9/14.*
- 2) *\$10,000 paid under s 123 I c i with respect to his other grievances.*
- 3) *\$25,000 for unpaid or underpaid statutory entitlements such as holiday pay, minimum wage, etc.*
- 4) *\$15,000 + GST contribution to costs.*

This would be implemented via a s 149 agreement. Please advise.

⁴ *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [17].

[19] There is no record of the first two emails from Mr Moore being responded to by Mr Thompson. At 5.14 pm Mr Thompson emailed Mr Moore notifying him that CEL had paid Mr Jones holiday pay of \$15,350.10 gross and \$8,537.82 gross for statutory holidays. He recorded his client's disappointment that the matter did not settle and repeated that his client had been willing to settle for a total of \$34,000 in full and final settlement.

[20] Mr Thompson appears to be making the submission that the offer to settle was for \$34,000 (plus \$300 in GST) over and above the holiday pay owed.

[21] For a *Calderbank* offer to be relevant to the assessment of costs it must be both transparent and timely.

[22] Mr Thompson acknowledges that the offer to settle gave a small timeframe for response. He submits that further time could have been given, if requested. Mr Moore made two enquiries of Mr Thompson about the offer on 24 June which were not responded to, before a counter-offer was made.

[23] In response to Mr Thompson's submission that more time could have been given for a response I note that the investigation meeting was due to start within two days and there was a natural end to the usefulness of the offer in reducing both parties' costs fast approaching.

[24] The offer itself said that the respondent was *holding off paying* what it considered to be Mr Jones' statutory entitlements *pending this offer*.

[25] That made Mr Moore's queries the following day about whether the offer was instead of or in addition to the statutory entitlements material to his client's consideration of the offer. Indeed, Mr Jones' counter-offer included the amount of statutory entitlements he considered he was entitled to. In addition, it is not clear which aspect of the offer was to go towards costs already incurred by Mr Jones.

[26] Without any response to the queries about how the offer to settle related to Mr Jones' statutory entitlements I do not consider the offer to have been sufficiently transparent.

[27] The lack of transparency and the lack of sufficient timeliness for mature consideration mean that I do not consider the respondent's offer was such as to affect the flow or the amount of costs the applicant is entitled to receive.

Factors that favour an increase in the daily tariff

[28] I agree that certain factors favour an increase in the daily tariff. These are:

- CEL conceding only shortly before the investigation meeting that Mr Jones had been its employee. This meant that a certain amount of work by Mr Moore was unnecessary.
- CEL's failure to keep proper wages and time records meant that Mr Moore and Mr Jones spent longer than would usually be necessary trying to assess the quantum of unpaid wages etc.

[29] Overall, I consider those factors should result in an increase in the daily tariff starting point of \$7,000 by \$3,000 to \$10,000.

[30] Mr Moore claims for time spent on submissions. It is unfortunate that we were not able to hear submissions on the second day of the investigation. Mr Moore submits that if submissions had been presented orally at a further fixture it is likely to have taken half a day.

[31] Further, Mr Moore submitted that the time taken for him to prepare submissions in response to those of Mr Thompson should be a cost that the respondent should bear. I accept that preparation of written submissions in response is more time-consuming than simply making oral submissions supplementing already prepared written submissions at the end of the investigation meeting. I consider this increases the amount of costs payable by \$1,000.

Factors that favour a decrease in the daily tariff

[32] I do not agree that the fact that the respondent's witness statements did not accord with Mr Jones' view of what the recordings showed is a factor that should increase the daily tariff. Mr Jones and Mr Moore were aware from the very beginning that the recordings existed. For their own reasons they chose not to disclose that relevant information earlier. Had that information been disclosed earlier it would

have meant only one set of witness statements being prepared by the respondent and may have assisted early settlement of matters.

[33] I consider this should reduce the amount of costs payable by \$2,000.

Factors that tend neither to increase or decrease the daily tariff

[34] I do not consider that Mr Moore's date of submission of the witness statements two days late is a factor that increased the respondent's costs to the point that there should be a decrease in what is awarded to Mr Jones by way of costs.

[35] Mr Jones was not wholly successful in his claims. However, one of his principal claims was to a large extent settled before the investigation meeting when the respondent paid holiday pay. I consider that the respondent would not have paid holiday pay if Mr Jones had not brought these proceedings. Mr Jones was largely successful in his claims. The other claims took only a very short amount of time in the investigation meeting and did not require extensive rebuttal evidence or legal submissions.

[36] Mr Jones has challenged on aspect of the determination being that his retainer was underpaid to him because too much tax was withheld by the respondent. That may result in him having more success than he has had to date although that is not a factor I can take into account in setting costs.

[37] I do not consider that the use of Mr Moore at \$200 per hour to transcribe the recordings was a reasonable use of his time. I agree that there was an amount of over-talking. However, a person professionally and regularly engaged in transcription work would have made an adequate first draft of a transcript at a much lower cost allowing Mr Jones to then identify the people whose voices were recorded talking over each other. However, it is clear that the amount of costs awarded by the Authority will not be anywhere near what Mr Jones has been invoiced which makes this a neutral factor.

[38] In addition, Mr Moore claims that the fact that Mr Thompson was unable to open one of more of the recordings meaning that efforts had to be made to make the recordings available in multiple formats is a factor that led *significantly and unnecessarily to the costs of the Applicant*.

[39] I do not agree that this is a factor that can increase the amount of costs. The evidence was that of the Applicant and it decided when and how to release it. Had the Authority known of its existence earlier the applicant would have been ordered to disclose it earlier. Making evidence available in a format that the respondent's representative could listen to and/or view it cannot be an unnecessary expense.

Orders

[40] Having carefully considered all relevant factors I order that within 20 days of the date of issue of this determination Christchurch European Limited must pay Mr Jones:

- Costs of \$9,000 (exclusive of GST).
- The filing fee of \$71.56.
- The second day hearing fee of \$306.66.

Christine Hickey
Member of the Employment Relations Authority