

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 413
3043031

BETWEEN

JASON KITELEY
Applicant

AND

CARBINE AGINVEST LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim Oldfield, Counsel for the Applicant
David France, Counsel for the Respondent

Submissions received: 2 July 2019 from Applicant
28 June 2019 from Respondent

Determination: 12 July 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2019] NZERA 324 it was determined that the Applicant, Mr Jason Kiteley, was not unjustifiably dismissed by the Respondent, Carbine Aginvest Limited (Carbine). Further that Carbine did not owe Mr Kiteley monies in respect of a Long Term Investment (LTI) or his full entitlement in respect of a Short Term Incentive (STI).

[2] However it was recorded in the determination that Carbine had agreed to pay Mr Kiteley outstanding holiday pay entitlement on the STI payment which had been paid to him on termination.

[3] In that determination costs had been reserved in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so, and the Respondent has filed submissions in respect of costs.

[4] The matter involved 1.5 days of investigation meeting time.

[5] Mr France, on behalf of the Respondent, citing actual costs of \$45,285.00, is seeking a contribution towards the costs of the Respondent in the sum of \$8,000.00.

[6] In support of that submission, Mr France, citing the Employment Court decision in *Mattingly v Strata Title Management Ltd*, is seeking an uplift in the usual level of the notional tariff awarded in respect of a 1.5 day hearing in the Authority on the basis that written submissions were received following the Investigation Meeting.¹

[7] Mr France, observing that although the Employment Court in *Mattingly* accepted that the ‘common practice’ of the Authority is to invite written submissions after the hearing of evidence, and for a multiplier reflecting only the days or part days of the investigation meeting to be applied in the notional daily tariff, a departure from the norm may be required depending upon the particular circumstances of a case.²

[8] Mr France submits that the written submissions were extensive, addressing the reasonableness of the Respondents processes and the principles of estoppel in order to assist the Member in reaching a determination in the matter.

[9] Mr Oldfield, on behalf of the Applicant, submits that there is no need to depart from the usual Authority approach in the matter of costs in this matter, being that costs encompass the submissions of the parties as part of the daily tariff without uplift.

[10] Mr Oldfield further submits that a reduction in the daily tariff should apply because of the Applicant’s partial success in that he recovered a little over \$75,000.00 gross as unpaid holiday pay as a result of the Authority proceedings. Mr Oldfield submits that the Respondent only provided holiday pay on 11 June 2019 and the Applicant does not agree that there was any resolution prior to that date.

Principles

[11] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

¹ *Mattingly Strata Title Management Ltd* [2014 NZEmpC 15 at [21]

² *Mattingly*, above n1

[12] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*³.

[13] The Authority has flexibility in exercising its discretion and may make adjustments either upwards or downwards in a principled way without compromising the Authority's modest approach to costs".⁴

[14] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* as confirmed in *Fagotti v Acme & Co Ltd*.⁵ .

[15] It is a principle set out in *Da Cruz* that costs are modest.⁶ Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee* at para [48] "As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred."⁷

Costs Award

[16] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1.5 day investigation meeting this would normally equate to a costs award of \$6,250.00.

[17] However as observed by the Employment Court in *PBO Ltd* : "The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs"⁸

[18] It is the Authority's usual practice for submissions to be provided following the evidence, however I accept that there are occasionally exceptions to that practice, and I find that this case is one such exception. This is on the basis that both Counsel provided lengthy, knowledgeable and comprehensive submissions subsequent to the Investigation Meeting which were of assistance to the Member in determining the case.

³ *Automobile Association Inc v McKay* [1996] 2 ERNZ 622

⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 12 808

⁵ *Da Cruz* above n 3, *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [114]

⁶ *Da Cruz*, above n 3

⁷ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305

⁸ *Da Cruz* above n 3 at [45]

[19] I also take into consideration the Applicant's partial success in having received a significant payment in respect of unpaid holiday pay following the Authority's proceedings.

[20] Accordingly, Mr Kiteley is ordered to pay a contribution to Carbine's costs in the sum of \$7,250.00 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority