

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 197
5565529

BETWEEN SEAN LAGAN
Applicant

A N D DIANE ASTLE REALTY LTD
Respondent

Member of Authority: Peter van Keulen

Representatives: Penny Shaw, Counsel for Applicant
Robert Thompson, Advocate for Respondent

Submissions Received: Written submissions, 14 September 2016 for Respondent
Written submissions, 7 October 2016 for Applicant

Date of Determination: 1 November 2016

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

The substantive determination and subsequent application for costs

[1] In a determination dated 22 August 2016, I determined that Diane Astle Realty Limited (DARL) had not constructively dismissed Mr Lagan¹.

[2] In my determination, I reserved costs in the hope that the parties would be able to reach agreement. They have been unable to do so and the advocate for DARL, Mr Thompson, has lodged and served written submissions seeking costs against Mr Lagan.

[3] Mr Thompson submits:

- a. That costs should follow the event and as DARL was successful in defending Mr Lagan's constructive dismissal claim it should be awarded costs;

¹ [2016] NZERA Christchurch 139

- b. Costs should be modest to reflect the non-technical, practical and cost effective mandate the Authority has for investigating and resolving disputes;
- c. The applicable daily tariff, \$3,500.00 per day in this case, is the starting point but the Authority should not apply that rigidly. It may be appropriate to adjust the tariff up or down, after having regard to the particular characteristics of a case.
- d. In this case, the characteristics do not justify either a reduction or an increase in the daily tariff. This matter was a straightforward unjustified dismissal claim that took one day for evidence and a further 30 minutes for oral submission (conducted by telephone conference).
- e. The appropriate award for costs should be in favour of DARL as it was successful in its defence and the quantum should be \$3,500.00 based on applying the daily tariff.

[4] Counsel for Mr Lagan, Ms Shaw, has lodged and served submissions in response to DARL's submissions. Ms Shaw says:

- a. The principles applicable to awarding costs in the Authority are well established.
- b. She acknowledges DARL's acceptance that the daily tariff applies and agrees that normally a case of this type would warrant an award based on the daily tariff of \$3,500.00.
- c. However, the Investigation Meeting only dealt with the unjustified dismissal claim. Mr Lagan had also lodged claims for unpaid holiday pay and payment for working on public holidays (the Additional Claims). The Additional Claims were resolved immediately prior to the Investigation Meeting and therefore were not part of my investigation.
- d. Mr Lagan was required to bring the Additional Claims in order to have them dealt with and Mr Lagan is entitled to recognition of the costs he incurred in doing so.

- e. Therefore, I should reduce the amount of costs I award to DARL.

Costs

[5] The principles the Authority should apply and the approach it should take, in respect of the power to award costs², are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³. The principles and the approach to be adopted by the Authority have been reaffirmed recently by the Employment Court in *Davide Fagotti v. Acme & Co Ltd*⁴.

[6] Based on *Da Cruz*, *Fagotti* and other relevant Employment Court and Court of Appeal decisions⁵, the principles to be applied and the approach to be adopted by the Authority includes:

- a. An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily;
- b. The decision to award costs is consistent with equity and good conscience jurisdiction of the Authority but equity and good conscience should be considered on a case-by-case basis in terms of the award of costs;
- c. Costs will generally follow the event but in some instances this will not be the case where, for example, the nature of the case is such that costs should lie where they fall or alternatively where an applicant has not bettered the terms of a *Calderbank* offer which he or she unreasonably rejected prior to the investigation meeting;
- d. The starting point for determining quantum of any costs award is the daily tariff. It is open to the Authority to depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate. However, the standard approach is to start with the daily tariff and then consider whether that tariff should be increased or decreased depending on circumstances of the case.

² Clause 15 of Schedule 2 of the Employment Relations Act 2000

³ [2005] 1 ERNZ 808

⁴ [2015] NZEmpC 135

⁵ *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305, *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

[7] The factors relevant to the consideration of the increase or decrease of the daily tariff include:

- a. Costs awards in the Authority will be modest;
- b. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- c. Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- d. Without prejudice offers can be considered;
- e. Impecuniosity of the other party may be relevant;
- f. A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

Discussion

[8] I am satisfied that costs should follow the event and an award of costs should be made in favour of DARL.

[9] The only question to be resolved is whether I should reduce the amount awarded to DARL to reflect the cost Mr Lagan incurred in pursuing the Additional Claims, which were resolved prior to the Investigation Meeting.

[10] There is some merit to Ms Shaw's argument. Mr Lagan had concerns over holiday pay and payment for working on public holidays. Mr Lagan raised these concerns with DARL but they were not resolved and Mr Lagan lodged a statement of problem that included the Additional Claims.

[11] I accept that Mr Lagan incurred cost in lodging the Additional Claims and he would have incurred cost for preparing for the investigation of the Additional Claims, particularly given the late resolution of them.

[12] However, I cannot arbitrarily reduce the daily tariff or arbitrarily set the amount of a cost award. I must be satisfied that it is appropriate to acknowledge the

cost incurred by Mr Lagan in circumstances where he did not pursue the Additional Claims by way of investigation and where he lost the claim he did pursue.

[13] It seems to me that there are two arguments to support this:

- a. I reduce the daily tariff because DARL's behaviour in relation to the Additional Claims warrants it and equity and good conscience support this approach; or
- b. I make an award of costs in Mr Lagan's favour in respect of the Additional Claims, recognising some success on his part in pursuing the Additional Claims, and I then offset this smaller amount against the amount I award to DARL.

[14] I am not privy to any details of how or why the Additional Claims were resolved. So, for example, I do not know:

- a. If the Additional Claims were resolved in favour of one party;
- b. Whether the resolution of the Additional Claims included a contribution to costs;
- c. Whether DARL made some concession that it could or should have made earlier that might have prevented the Additional Claims being bought; or
- d. Whether Mr Lagan accepted some argument from DARL, which justified not paying the Additional Claims when raised.

[15] This creates a problem. Without this information, I cannot assess whether I should reduce the daily tariff or whether I should award Mr Lagan any costs for pursuing the Additional Claims. I do not know if one party was "successful" in terms of the resolution of the Additional Claims. Nor do I know if one party was blameworthy in terms of the conduct of the Additional Claims.

[16] I simply cannot assess costs on part of a claim that has been resolved prior to my investigation. Therefore, Ms Shaw has not persuaded me that I should, or that I even can, reduce the amount of costs I award to DARL to recognise the costs incurred by Mr Lagan in pursuing the Additional Claims.

[17] This approach is consistent with the principles applied by the Authority. I am not aware of the Authority awarding costs for claims that have been settled. Nor am I aware of the Authority reducing costs because the parties have narrowed the issues before the investigation.

[18] In fact, narrowing issues is common and encouraged by the Authority. It is helpful if parties narrow the issues for determination, by either settling and/or reducing the claims advanced or by agreeing facts and/or issues. What this does is reduce the amount of time spent in the Investigation Meeting. This in turn will reduce the number of days or part days of daily tariff that the Authority might apply if it determines costs. It is in this way that the parties' contribution to resolving some of the claims or narrowing the issues is recognised in costs.

[19] If a party believes it might be entitled to costs for resolving any claims before an Investigation Meeting then the terms of resolution should address costs and it should not be left to the Authority.

Costs determination

[20] In the circumstances I am satisfied that:

- a. Costs should follow the event and DARL is awarded costs;
- b. The daily tariff is to be applied without reduction or enhancement;
- c. There is to be no offset in the amount awarded to reflect any costs incurred by Mr Lagan in pursuing and resolving the Additional Claims.

[21] I order Mr Lagan to pay \$3,500.00 to DARL as a contribution to its costs.

Peter van Keulen
Member of the Employment Relations Authority