

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2023] NZERA 348
3173063

BETWEEN KEVIN MAHER
Applicant

AND SOLUTIONS TEAM LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Matthew Belesky, counsel for the Applicant
Abi Burrows, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 25 May 2023 from the Applicant
16 June 2023 from the Respondent

Date of Determination: 3 July 2023

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] In a 17 April 2023 determination, the Authority found that Kevin Maher was unjustifiably dismissed and that his former employer breached good faith obligations in effecting the dismissal. The Authority ordered that Solutions Team Limited (Solutions) must pay Kevin Maher:

- (i) \$17,500 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000 (the Act).

(ii) \$23,267 (gross) lost earnings pursuant to s 123(1)(c)(ii) of the Employment Relations Act 2000 (the Act).

(iii) \$2,761.31 gross as other money lost pursuant to s 123(1)(b) of the Act .¹

[2] The Authority did not order that Kevin Maher be reinstated.

[3] The Authority reserved costs and encouraged the parties to reach an agreement. No agreement was achieved. The investigation meeting took two days. I now consider the submissions of each party on costs to assist in exercising the Authority's inherent discretion.

Submissions from the parties

[4] Mr Maher's counsel made a submission claiming a significant uplift of the Authority's notional daily rate or tariff of \$8,000 for a two days' investigation noting that Mr Maher's actual costs that included mediation related costs was \$28,345.86 inclusive of GST. Mr Maher claimed a total costs award of \$15,000.²

[5] The uplift in the notional daily rate was sought predominantly on the basis that Solutions Team Limited had not settled the matter at an early stage in the dispute when Mr Maher made a Calderbank offer and engaged in delaying tactics to increase costs. In addition, counsel cited Solutions obstructive approach to proceedings in that they did not file a statement in reply as directed and failed to disclose key documentation in a timely manner including wage and time records. Counsel also suggested that an uplift be made for GST, costs incurred in mediation and disbursements.

[6] By contrast, Solutions' counsel, suggested tariff-based costs of \$8,000 was an appropriate award and that a significant and early Calderbank offer by Solutions should be assessed against the modest improvement the applicant made in litigation which counsel suggested cancelled out the effect of the Calderbank offer.

[7] Counsel also alluded to Mr Maher's failure to achieve his primary remedy of reinstatement, a reduction of the compensatory remedy for contribution (implying this was a 'mixed success' situation) and a view that Solutions had not unreasonably

¹ *Kevin Maher v Solutions Team Limited* [2023] NZERA 185.

² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

delayed proceedings. Solutions also made the point that Mr Maher had no compelling reason to engage 'out of town' counsel and disbursements for this decision should be borne by him. Counsel also pointed to the rarity of cases where the Authority award Counsel for costs for attendance at mediation that was not unusually, directed by the Authority.

Costs principles

[8] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ including that those costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.⁴ These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*. The principles include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases 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) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.⁵

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁴ Section 160(2) Employment Relations Act 2000.

⁵ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

The dilemma of mixed success

[9] Judge Smith in *William Coomer v JA McCallum and Son Limited* noted (omitting citations):

Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any ‘realistic appraisal’. That conclusion followed because they obtained a monetary award It was immaterial that they had not succeeded to the full extent of their claim because’ ... success on more limited terms is still success. ⁶

[10] To assess costs where one party has a degree of mixed success can sometimes be problematic. ⁷ It is arguable that Mr Maher’s success was partial. However, standing back and examining the main elements of the claims and contrasting them with cases of partial success on substantive matters, Mr Maher established he was unjustifiably dismissed and obtained an above moderate award of compensation for the distress of this and was awarded lost and unpaid wages. In the normal course of events this was a significantly successful outcome. I find this does not call for a particularly nuanced assessment.

Settlement offer

[11] The making of a settlement offer in the form of a *Calderbank* offer is a relevant factor when considering costs where such does not better the award made by the Authority. Here the settlement amount was offered in a timely fashion shortly after mediation on 4 October 2022 and although not a modest offer, it did not significantly differ from the Authority award that because of the effluxion of time included additional lost wages and would have saved Solutions from incurring additional costs.

[12] Solutions to their credit did make a timely and significant counteroffer on 5 October 2022 but the parties were some distance apart in their respective expectations (three months lost wages). At this point in time, only Mr Maher was legally represented.

[13] Whilst generally the Authority has a low-level jurisdiction hence a focus on scale costs, there is authority to suggest a ‘steely’ approach to *Calderbank* offers is

⁶ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

⁷ *Op cit* at [37]

required in the broader public interest⁸ and the Employment Court has held that a *Calderbank* offer sometimes leads to an uplift in costs for the successful party seeking such on ordinary principles to encourage early settlement.⁹

[14] I intend to consider the *Calderbank* offer made by Mr Maher. He offered to settle at an early stage of litigation and he then succeeded in litigation in significant excess of the settlement offer. In addition, I am persuaded that the failure to disclose material in a timely and as directed fashion, occasioned Mr Maher to incur additional costs. I, however, do not consider this case has any unusual features that warrants considering costs for Mr Maher's attendance at mediation.

Assessment

[15] The Authority's tariff-based approach has often been endorsed by the Employment Court as being consistent with the principles and objectives of the Employment Relations Act 2000.¹⁰ However, a general principle for a successful party is that costs should 'follow the event' and here Mr Maher was successful in his predominant unjustified dismissal claim and obtained significant remedies for such including a lost benefit award. I am persuaded that an uplift in the tariff-based approach the Authority normally takes is warranted given the early *Calderbank* was close to the eventual outcome and was not accepted.

[16] Taking all the factors identified in submissions into account, I consider that it is equitable to award Mr Maher an uplift on tariff-based costs of \$3,000 and together with tariff-based costs I fix the total amount at \$11,000 and the Authority filing fee. I decline to award disbursements and GST,

⁸ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385.

⁹ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 at [24].

¹⁰ See for example *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28.

Awards

[17] I order Solutions Team Limited to pay Kevin Maher the sum of \$11,000 as a contribution to legal costs and the Employment Relations Authority filing fee of \$71.55 within 28 days of the issuing of this determination.

David G Beck
Member of the Employment Relations Authority