

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 465
3032571

BETWEEN IAIN MILNE
Applicant

AND AWESOME ART LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Kelly Coley, advocate for the Applicant
Kathy Jarrett, for the Respondent

Submissions Received: 14 August and 30 August 2020 from the Applicant
28 August and 29 October 2020 from the Respondent

Determination: 12 November 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] On 8 June 2020 I issued a determination addressing Iain Milne’s claim he had personal grievances in respect to allegations he was both unjustifiably dismissed and unjustifiably disadvantaged.¹ While he failed to establish he was unjustifiably dismissed and did not succeed with the disadvantage claims as pleaded, I concluded he had been disadvantaged having applied s 122 of the Employment Relations Act 2000. Perhaps more important is the fact that as a result Mr Milne was awarded the compensatory sum he originally sought.

[2] Costs were reserved and as the successful party Mr Milne now seeks a contribution toward those he incurred pursuing his claims.

¹ [2020] NZERA 222

[3] Mention should also be made that the respondent, Awesome Art Limited (Awesome Art), unsuccessfully sought to have the determination of costs removed to the Employment Court.²

[4] Normally the Authority will use a daily tariff when addressing a costs claim, with the current starting point being \$4,500 for the first day and \$3,500 for each day thereafter.³ From there adjustment may be made depending on the circumstances.

[5] The investigation took three days which was followed by subsequent exchanges, including the preparation of submissions. It would, I conclude, be fair to accept Mr Milne's *conservative estimate* that the time taken was in the order of three and a half days. Application of the tariff would therefore see a contribution in the order of \$13,250.

[6] Mr Milne's costs exceeded the tariff and included disbursements of \$393.04. For various reasons referred to in the submission, Mr Milne asks I *consider awarding costs with an appropriate* [but unspecified] *uplift to the usual daily tariff*.

[7] Awesome Art opposes the application and suggests costs should lie where they fall. In the event that is not accepted, and in the alternate, it is suggested the tariff be reduced, though by what is again unspecified.

[8] In support of his claim Mr Milne refers to various factors which I would suggest come under two main headings – the behaviour of Awesome Art's representative and its refusal to accept reasonable offers of settlement.

[9] With respect to behaviour Mr Milne references various issues which, in his view, added unnecessary time to the investigation. These include accusations Ms Jarrett wasted time by repeatedly engaging in irrelevant lines of questioning despite being told to desist and why; that she introduced various time wasting distractions by making unnecessary derogatory comments about Ms Coley and caused further delay via continued breaches of mediation confidentiality which then had to be addressed. There is also a claim that answers given by Awesome Art's principle witnesses were often evasive and this added to the cost by increasing the time taken.

² [2020] NZERA 427

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[10] My observations during the investigation lead me to have considerable sympathy with these submission but they do not, in my view, support an increase in the tariff. That is because the additional time generated by these event has already resulted in an increased tariff and responding to Ms Jarrett's behaviour toward both Ms Coley and Mr Milne by further increasing the tariff would amount to a punishment. That is precluded in a costs setting.

[11] Far more persuasive are the submissions regarding Awesome Art's refusal to accept reasonable offers of settlement.

[12] There is evidence of multiple offers made on Mr Milne's behalf including a valid calderbank letter proffered some weeks before the first statements of evidence were due. In it Mr Milne sought a sum less than half that he subsequently achieved but there was no response. The existence of a valid calderbank strongly supports a submission the tariff be increased.

[13] The later attempts to settle, which while not valid calderbanks due to their timing, would have again benefitted Awesome Art. There was only one response to multiple offers which was that Mr Milne withdraw his claim and costs lie where they fall. The cavalier rejection of these offers is a factor which should be taken into account, especially as by the time they were made it was becoming clear Awesome Art might have some problems and these had been discussed as the investigation progressed.

[14] Turning to Awesome Art's submission.

[15] The arguments tendered in the initial submission (28 August 2020) were based on two main points. The first is a premise both parties costs were a result *of a failure by the applicant's representative to be cognisant of the employment training problem* and have it resolved via input from the Tertiary Education Commission. The second is Mr Milne was unsuccessful with his claims as pleaded (labelled mixed success) and the potential effect of a calderbank is written off on the grounds *it relate(s) to the ERA and (was) premature to the decision on the apprenticeship training problem.*

[16] The October submission again canvasses the same points but adds further points. There is comment about the delay in summoning a witness who in the final analysis proved vital and this, it is asserted, added to costs by contributing to the need for a third day. It is stated Awesome Art's trading position has changed and there is a

suggestion of impecuniosity. Also added is a claim Awesome Art should be the beneficiary of a costs award with arguments tendered accordingly.

[17] The suggestion Awesome Art should be the beneficiary of a costs award fails totally. Costs follow the event. The event was a claim by Mr Milne he had a personal grievance and with that he was successful, albeit not on the grounds pleaded. I will say more on this later when considering the argument regarding mixed success though I feel compelled to now comment on invoices attached to Awesome Art's final submission.

[18] They show Ms Jarrett's accounting firm allegedly invoiced her husband's firm, Awesome Art, for representation services. I find this extremely disturbing as notwithstanding the existence of her accounting firm Ms Jarrett held herself out as a functionary of Awesome Art and there was no suggestion she was acting as a professional advocate. Had it been known she was charging for her services as a professional representative it is unlikely she would have been allowed to also appear as a witness.

[19] The arguments about jurisdiction, which comprise the bulk of the submissions, face a problem which is that the apprenticeship was undertaken as part of an employment relationship. The employment relationship came to an untidy and premature end with the resulting dispute being within the Authority's jurisdiction. I also have to observe the bulk of these arguments rely upon a reiteration of the facts and Awesome Art's interpretation of them which differs in some respects from those of the applicant and my findings. Those are issues which influenced the substantive determination and should be addressed via a challenge as my substantive conclusions cannot now be altered through a costs determination.

[20] The argument regarding mixed success also fails to convince and in saying that I note *Coomer v J H McCallum and Son Ltd*,⁴ where the Court concluded it is appropriate to determine who was successful by standing back and looking at things in the round. Again I reiterate Mr Milne's main claim was that he had a personal grievance and with that he was successful. I do not consider the fact his success came in a way other than that pleaded for two reasons. First the Employment Relations Act envisages this possibility through the inclusion of s 122 and in this instance Awesome

⁴ *Coomer v J H McCallum and Son Ltd* [2017] NZEmpC 156 at [43]

Art was put on notice of the possibility it might be invoked and why. Second, and with respect to remedies, Mr Milne was totally successful in that the compensation he received was that sought.

[21] I take the summons argument no further. This was a witness initially suggested by Ms Jarrett but she failed to furnish the required paperwork despite attempts by the Authority's officers to assist. The witness was ultimately called by the Authority once it became clear he could give useful relevant evidence and his calling did not add to the time taken in any discernible way. By the time he was summonsed the third day was already necessary as three employer witnesses, including Ms Jarrett herself, remained to be heard and the main reasons a third day was by then necessary are those already articulated in paragraph [9] above.

[22] The rationale as to why the calderbank should be disregarded is again based on Awesome Arts' jurisdictional argument (namely that the ERA was not the venue in which this matter should have been determined) and that I have dismissed. Suffice to say the first offer was lodged in a timely way and hindsight shows its acceptance would have benefited Awesome Art. The whole purpose of a calderbank is to have such attempts recognised and the higher Courts have previously urged a steely approach be taken to their recognition.⁵

[23] Finally I comment on the possible impecuniosity argument and note it fails due to a total lack of evidence.

Conclusion

[24] For the above reasons I conclude Awesome Arts submission the tariff be reduced fails to convince while on the other hand Mr Milne has proffered a strong rationale for an increase – mainly the rejected offers of settlement. Having considered other awards in the Authority I conclude an increase in the order of 20% appropriate.

[25] As a result I order the respondent, Awesome Art Limited, pay the applicant, Iain Milne, the sum of \$16,000.00 (sixteen thousand dollars) as a contribution toward the costs he incurred in establishing he had a personal grievance.

⁵ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[26] Payment is to be made within 28 days of this determination.

Michael Loftus
Member of the Employment Relations Authority