

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 139
3023027

BETWEEN DANIEL MORGAN
Applicant

AND FORTIS CARS LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Senta Knapp, Advocate for the Applicant
No appearance for the Respondent

Submissions received: 11 and 16 April 2018 from Applicant

Determination: 2 May 2018

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A. The Respondent is ordered to pay to the Applicant a total of \$1,196.56 made up of:

- i) The sum of \$1,125 towards the Applicant's legal costs;**
- ii) The sum of \$71.56 for the filing fee the Applicant paid to lodge his Statement of Problem.**

B. Payment of the sum of \$1,196.56 is to be paid within 14 days of the date of this determination.

Employment Relationship Problem

[1] On 13 March 2018, I issued a determination in which I found Mr Morgan had been unjustifiably dismissed by Fortis Cars Limited. I also found he had not been paid his holiday pay entitlements. Fortis Cars was ordered to pay Mr Morgan lost

wages, compensation under s 123(1)(c)(i) of the Employment Relations Act and his outstanding holiday pay.

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions.

Application for costs

[3] By email dated 11 April 2018 Mr Morgan's Advocate, Ms Knapp, filed a one page document headed "Cost submission by The Advocate Solution". No written explanation accompanied this document. The document itself set out various dates. Beside each of these dates was a description, for example "Meeting Daniel Morgan". A time and a monetary figure were then set out. The total of the monetary figures came to \$3,737.50.

[4] In addition a 2 page document was provided. This lists dates when various emails were sent and/or received by Ms Knapp or Mr Morgan with the subject listed as "3023027 Morgan v Fortis". The purpose of this document was not explained.

[5] On 12 April 2018 I directed Mr Morgan to provide the Authority with a copy of his Advocate's invoices together with their retainer letter. These were provided on 16 April 2018. The invoice to Mr Morgan is dated 13 April 2018. It shows a fee of \$3,500 was charged to Mr Morgan. This was calculated using a base fee of \$2,000, plus one third of the monies awarded to Mr Morgan by the Authority, plus GST. A slight reduction was then applied.

[6] As no explanation accompanied the documents filed on behalf of Mr Morgan, it is unclear what amount he is asking the Authority to award him in terms of legal costs.

Authority's Approach to Costs

[7] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act. This confers a wide discretion on the Authority to award costs on a principled basis.

[8] The principles to be applied by the Authority are well settled. They are outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.¹ These principles were affirmed by the Employment Court in *Fagotti v Acme & Co Limited*.²

[9] Costs 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 that 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, and must be reasonable.
- i) Frequently costs are judged against a notional daily rate.
- j) Costs generally follow the event; that is, the successful party's costs are likely to be ordered to be 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.

[10] Recently in *Booth v Big Kahuna Holdings Limited* Judge Inglis wrote:³

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a

¹ [2005] ERNZ 808 at page 819

² [2015] NZEmpC 135

³ [2015] NZEmpC

choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

[11] For matters filed in the Authority from 1 August 2016, the Authority's normal daily tariff increased from \$3,500 to \$4,500 for the first day of an investigation meeting. For each subsequent day of an investigation meeting the Authority's normal daily tariff remains at \$3,500.⁴ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[12] Mr Morgan lodged a Statement of Problem with the Authority on 7 December 2017. The new costs regime therefore applies.

Should the daily tariff be adjusted?

[13] The investigation meeting took less than a quarter day. Using the normal daily tariff the starting point for calculation of costs is \$1,125.

[14] No submissions have been provided as to why this daily tariff should be adjusted upwards or downwards. I am satisfied, in the circumstances of this case, that an adjustment to the daily tariff should not be made. The sum of \$1,125 is a reasonable contribution towards Mr Morgan's costs.

[15] In reaching this conclusion I have taken into account the actual time spent by the Advocate in assisting Mr Morgan with his claim. From the time Mr Morgan filed his application with the Authority, until the date of the Authority's determination, the total time spent by the Advocate amounts to \$1,500. This sum has been calculated as follows:

- a) The summary of time provided by the Advocate shows the time spent in making an application to the Authority, and preparing an amended Statement of Problem, amounted to 1 hour of time. At the hourly rate of \$250 shown on the document this amounts to \$250.
- b) A telephone conference was not required.

⁴ Practice Note 2, Costs in the Employment Relations Authority

- c) A witness statement was filed. The summary of time provided by the Advocate shows the time spent preparing this document was 1 hour.
- d) The investigation meeting was completed in less than 2 hours, as opposed to the 3.5 hours recorded on the summary of time. This time was lengthened by 30 minutes due to the late production of documents by Mr Morgan. No reasonable excuse was provided for these documents being provided at this time.
- e) During the investigation meeting Mr Morgan's Advocate did not make any submissions despite being allowed the opportunity to do so. I therefore disregard the summary of time provided which shows one hour of time being spent preparing for submissions.
- f) Following the investigation meeting additional information was sought by the Authority to enable the calculation of Mr Morgan's holiday pay and his claim for lost wages. The Summary of time shows the Advocate spent 2.5 hours preparing this.

Costs finding

[16] I order Fortis Cars to pay to Mr Morgan the sum of \$1,125. This is a reasonable contribution towards his costs. In addition, Fortis Cars is ordered to pay Mr Morgan a sum of \$71.56 being the Authority's filing fee. These sums must be paid within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority