

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 28
5350102
5353837

BETWEEN CHRISTOPHER PICKERING
Applicant

A N D DETECTION SERVICES
LIMITED
Respondent

Member of Authority: Alastair Dumbleton
Submissions Received: 28 August, 12 and 24 September 2012
Date of Determination: 29 January 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 31 July 2012 – [2012] NZERA Auckland 260 – the Authority found that the applicant, Mr Christopher Pickering, had been unjustifiably dismissed and also that he had not been paid his entitlement to a bonus due under a term or condition of his employment agreement with the respondent, Detection Services Ltd.

[2] To resolve his grievance claim Mr Pickering received from the Authority a declaration that he had been unjustifiably dismissed and he was awarded \$5,000 compensation for hurt feelings, humiliation and distress. The bonus claim was resolved with an award by the Authority to Mr Pickering of \$117,351, inclusive of interest.

[3] In concluding its determination the Authority (Member Dzintra King) reserved leave for costs to be applied for and a response given within a specified timeframe.

[4] Through counsel Mr McBride a costs application was received from Mr Pickering together with comprehensive submissions in support of a substantial award

to him. Counsel Mr Dench on behalf of Detection Services Ltd replied with equally extensive submissions in opposition to the application, and Mr McBride responded to those.

[5] As Mr Pickering's unjustified dismissal personal grievance and his claim for payment of a bonus entitlement were viewed by the Authority as being closely connected, it investigated the two claims together.

[6] The determination records that the investigation meeting in the Authority took place over 9 full or part days and that submissions on the substantive claims were filed by the parties over a further period after it had finished. The Authority also recorded that it had found it necessary to obtain the services of an expert witness, in this case a forensic accountant whose work and evidence the Authority described as "invaluable in enabling me to make a decision regarding the amount of the bonus." The input from the Authority's expert inevitably added to the length of the investigation meeting and the submissions needed to be made by the parties in response to that expert's opinion.

[7] Mr Pickering's actual costs and expenses were about \$210,000 including GST and disbursements. That amount is comprised of legal fees and disbursements of \$143,966, forensic accountant's fees and disbursements of \$66,658 and hearing fees invoiced to him of \$2,300. The total legal fees and expenses include all time spent on the matter from July 2011 before the matter was lodged in the Authority, including mediation the parties undertook.

[8] Mr Pickering seeks a costs award of \$138,601 as a contribution to actual costs, expenses and disbursements. The amount sought is close to two thirds of \$210,000.

[9] Detection Services Ltd has not disclosed the level of costs and expenses it incurred but the amount is likely to be reasonably comparable to those of the applicant, as a barrister, Mr Dench, was retained and also an expert forensic accountant was engaged to provide an opinion in support of the company's opposition to the quantum of bonus claimed by Mr Pickering.

[10] Remedies sought by Mr Pickering for his unjustified dismissal claim were compensation of between \$35,000 and \$50,000 for distress and humiliation, and reimbursement of lost wages. The Authority found that he had not mitigated or attempted to mitigate the latter and made no award. It awarded him \$10,000

compensation but reduced that amount by 50% to \$5,000 on account of contributory fault found on his part.

[11] Blame was attributed because of the actions of Mr Pickering in incorporating a company called Aqatar, failing to send particular invoices when requested by his employer and insisting that he had sole ownership of all rights to an invention for detecting water leaks in pipes when the system had been developed jointly with his employer. This conduct was found by the Authority to have seriously undermined, if not destroyed, his employer's trust and confidence in Mr Pickering.

[12] In relation to the bonus claim, a total of \$243,920 including interest had been sought by Mr Pickering but his award was \$117,351. Settlement offers 'without prejudice save as to costs' were made by both parties. Mr Pickering made an offer of \$135,000 to Detection Services Ltd and was offered \$80,000 by it, which he rejected.

[13] The Authority charged its regulatory filing and hearing fees but apart from that has not sought to recover from either or both of the parties the abnormal or irregular expense of engaging its own expert, a substantial sum in this case. It appears from the determination that the Authority would not have been able to decide the bonus claim without the assistance of that expert. His engagement would also have increased the costs of the parties who were given, and took, the opportunity to address the opinion the expert provided to the Authority. In principle, while it may be open to the Authority to pass on such irregular costs necessarily incurred by it to parties, that will not be done in this case.

[14] Not unexpectedly given the quantum at issue in the bonus claim, a challenge has been made to the Employment Court from the Authority's determination. Further cost is likely to be incurred by the parties in what have already been expensive proceedings.

[15] Not being the member who investigated and determined this long and complicated case, I am at some disadvantage in deciding the question of costs, particularly when the result of the case itself was not complete success for either party in relation to the grievance or bonus claims. Mr Dench submits that any award to Mr Pickering must reflect the limited success Mr Pickering had and the degree to which Detection Services Ltd was correspondingly successful in its opposition to the claims, particularly by having the quantum of award made in both claims restricted.

[16] In submissions, counsel referred to several authorities from the Employment Court and other jurisdictions, including the leading case on costs awards in the Authority of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[17] Because the investigation in this case was in relation to two distinct claims, each determined with different levels of success, the case does not lend itself to applying one daily rate to the total number of days taken up by the investigation meeting.

[18] Mr McBride and Mr Dench differ as to the proportion of total hearing time that was taken up by each of the two claims. The grievance claim took somewhere between 5 and 7 days, and the bonus entitlement claim therefore between 3 days and 1 day. The unusually long meeting period in relation to the grievance claim is explained by the causal connection between the issue of justification for dismissal and the issue of ownership or proprietary right in the leak detection system and its development, that had arisen before the dismissal. The latter issue I accept was the focus of the case and needed to be resolved before substantive justification could be determined.

[19] Currently, the daily tariff for an investigation meeting in the Authority is \$3,500. For the bonus claim in which Mr Pickering successfully recovered \$117,000, I consider the daily tariff should be increased to \$5,000, giving a total for 2 hearing days, approximately, of \$10,000 in relation to legal fees for that claim.

[20] In relation to the expense of Mr Walker's forensic accounting expert fees of \$66,658, I consider that in principle the entire amount should be reimbursed to Mr Pickering by Detection Services Ltd. The detail of submissions made urging that only a contribution should be made rather than an indemnity award, raises again the state of disagreement that existed between the accounting experts and that led the Authority to engage an expert of its own in relation to this crucial matter. I approach the matter on the basis that the respondent had not discharged its obligation to correctly assess the entitlement and Mr Pickering was put to the expense of needing an expert to do that. The fees charged by forensic accounting experts are generally high and I am satisfied that the amount is reasonable.

[21] With regard to 6 days approximately taken up by the personal grievance claim, I propose to apply the standard current daily rate of \$3,500, but to a period of 4 days,

giving a total of \$14,000 in relation to legal fees. At 6 days the meeting was unnecessarily prolonged because of Mr Pickering's insistence that he alone had developed the leak detection system, a claim that was not upheld. I accept that he should reasonably have acknowledged his employer's collaboration and not disputed that in the investigation.

[22] When fixing costs, as a matter of principle the contribution found by the Authority and applied by it to reduce the remedy of compensation awarded should not later be revisited to reduce the costs award; *White v Auckland District Health Board* [2008] NZCA 451. However, I consider the daily rate without adjustment upwards, and with a reduction in hearing time, is appropriate because of Mr Pickering's limited success with his grievance claim. He recovered compensation of \$5,000 (after reduction for contribution). Although he was also vindicated with a declaration that he had been unjustifiably dismissed, for process reasons, he was held to be half to blame for the situation that established his grievance. No basis has been provided to the Authority by him for valuing that outcome at any particular level. Mr Pickering was not successful in recovering lost wages, as he was found not to have mitigated his loss. For that reason, I consider the \$3,500 daily rate is appropriate without upward adjustment.

[23] In addition, Mr Pickering is entitled in principle to recover as an expense the filing fees for his two claims when they were commenced and hearing fees, in total \$2,300 but which I reduce to \$1,750 to reflect reasonable rather than actual hearing time required.

[24] Total costs and expenses as calculated above are \$92,408. That sum is awarded, in the exercise of the Authority's discretion.

Determination

[25] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, Detection Services Ltd is ordered to pay \$92,408 in costs and expenses to Mr Christopher Pickering.

A Dumbleton

Member of the Employment Relations Authority

(pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)