

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 2
5320550

BETWEEN AARON PICKERING
 Applicant

AND SEALORD GROUP LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Anjela Sharma, counsel for the applicant
 Peter Kiely, counsel for the respondent

Submissions received: On the papers
 From the applicant on 14 March 2013
 From the respondent on 2 April 2013

Determination: 9 January 2014

COSTS DETERMINATION OF THE AUTHORITY

Sealord Group Limited to pay Aaron Pickering:

- **\$7,822 in legal costs;**
- **reimbursement of the \$71.56 filing fee;**
- **\$1,425 towards Ms Tapper's professional fees.**

[1] On 12 August 2013 I issued a determination that Mr Pickering was an employee of Sealord and had been unjustifiably dismissed. I awarded him \$71,973.86 lost remuneration, \$8,000 humiliation compensation and 5% interest. Regrettably there were two different dates from which the interest was ordered to be calculated which makes a difference to the final amount payable. The date differences were not simply a result of a typographical error. On 25 October 2013 Ms Sharma asked me to clarify the interest issue for the parties. However, I declined to do so because I considered the Authority to be functus officio once the determination had been issued.

[2] Both parties have challenged my determination in the Employment Court. Sealord has lodged a de novo challenge. Mr Pickering challenges the amount of lost remuneration and compensation awarded. The Court will also consider the question of interest.

[3] Because there is a de novo challenge the Employment Court will also consider the issue of costs in the Authority when it considers the issue of costs for the matter before it.

[4] Mr Pickering has applied for a significant contribution to his costs of legal representation by Ms Sharma being \$25,000 excluding GST plus:

- Ms Sharma's office expenses of \$253.75
- Accountancy fees of \$1,925.00 (Heidi Tapper's costs)
- District Court enforcement costs totalling \$466.50
- Authority filing fee of \$71.56
- Costs submissions at \$850.00

[5] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Costs are at the discretion of the Authority.

[6] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party. Mr Pickering was successful in his claims.

[7] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and were outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ a judgment of the Full Court of the Employment Court. The Court in the *Da Cruz* case also noted that in exercising its discretion the Authority frequently judges costs against a notional daily hearing rate. That notional rate is currently \$3,500 per day.

[8] Costs must be reasonable and costs awards are generally modest. Another principle set out in *Da Cruz* is that without prejudice offers can be taken into account in setting the amount of costs.

[9] In the determination I signalled that if I needed to make a costs determination the starting point was \$7,000, based on a two-day hearing at the notional daily tariff of \$3,500.

¹ [2005] ERNZ 808

[10] In the *Da Cruz* case a full bench of the Employment Court reminds representatives to be circumspect in accumulating costs because of the well-known modest awards generally made by the Authority:

Finally, in accord with the Court of Appeal in Binnie and this Court in Harwood we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.²

Applicant's claim

[11] The purpose of making a costs award is to ensure that the successful party has some reasonable contribution towards legal costs actually faced by that party. Ms Sharma has recorded time of \$38,726.00 against Mr Pickering's case in the Authority. However, she has not rendered a bill to Mr Pickering and does not intend to do so until after the Employment Court has made a decision.

[12] At this stage Mr Pickering is not out of pocket for legal expenses and does not have a bill requiring him to pay Ms Sharma within a particular time frame. Nonetheless Ms Sharma has made an application for costs on his behalf.

[13] Ms Sharma argues that the daily tariff amount should be increased because:

- the respondent advanced its case in a way that was unnecessarily complex including the employee/independent contractor argument, allegations of serious performance issues and breach of confidentiality, and an allegation that the applicant failed to mitigate his loss,
- detailed submissions needed to be filed,
- additional affidavit evidence needed to be obtained after the meeting,
- the respondent was represented by two people,
- professional accounting fees were reasonably incurred to calculate future earnings, and
- the applicant made a *Calderbank* offer that was for less than he actually received from the Authority.

Respondent's submissions in reply

[14] Mr Keily's submissions suggest two alternative approaches. The first is that I should exercise my discretion not to award any amount of costs at this point because

² Ibid, paragraph 47.

the applicant has elected a de novo hearing in the Employment Court and has claimed costs in the matter in relation to the challenge and in the proceeding that was before the Authority. Mr Kiely submits that:

- Costs will now be dealt with by the Employment Court in accordance with s.183(2) of the Employment Relations Act 2000 (the Act) therefore an order on costs from the Authority would be an unnecessary duplication
- Even if the Authority makes a costs order it would be stayed until the challenge has been heard and a decision made. That means Mr Pickering will be in no worse a financial position if no costs order is made now.
- Because Mr Pickering has not received an account for fees, and will not until after the Employment Court has made a decision, he is not entitled to an order for contribution to his fees at this stage. Section 143(d) of the Act recognises that the Authority's procedures for problem solving need to be flexible. Under that provision and in light of the fact that Mr Pickering not having received any account for legal services no order for costs should be made in the Authority.

[15] In the alternative, Mr Kiely submits that there is no reason to depart from the usual daily tariff approach and therefore an award of \$7,000 should be made. Mr Kiely rejects each of Ms Sharma's submissions for increasing the tariff as not relevant.

[16] The Authority will make a determination on costs in despite the likelihood of payment of any amount ordered being stayed by the Court. Despite Mr Pickering not yet being obliged to pay Ms Sharma it is inevitable that at some stage he will be required to pay her the cost of his representation in the Authority.

Costs in relation to legal representation

[17] In its statement in reply Sealord asserted that Mr Pickering had been an independent contractor. Sealord's approach to the case was discussed in a case management conference on 13 July 2012 in which it was decided that the preliminary matter of whether or not Mr Pickering was an employee would be investigated at the same time as the substantive issue of unjustified dismissal. Therefore Ms Sharma was aware that the issue of Mr Pickering's employment status would be argued by Sealord. That approach did not add any unnecessary complexity to the matter.

[18] Sealord was entitled to argue that Mr Pickering failed to mitigate his loss and that was an argument Ms Sharma was well positioned to deal with and did so. I do not consider that added any complexity to the matter.

[19] Sealord's allegations of breach of confidentiality and serious performance issues are the kinds of matters that are routinely raised as going towards substantive justification for dismissal or to an employee's contribution. They did not add any unnecessary complexity to the proceedings.

[20] The fact that written, detailed submissions were filed does not move the proceedings out of the ordinary range.

[21] Ms Sharma and Mr Pickering chose to present further affidavit evidence after the investigation meeting. However, that was a tactical decision and not a requirement of the Authority and the additional affidavit evidence did not affect the outcome of the matter.

[22] The respondent was represented by Ms O'Connell of Teesdale Loof. Mr Teesdale was present but he did not play any role in questioning witnesses or making submissions. Therefore, it is not entirely correct that Sealord was represented by two people. In any event, even had it been it would not have made any difference to how Ms Sharma needed to present Mr Pickering's case to the Authority.

[23] Ms Sharma submits that Mr Pickering's 19 October 2012 offer to settle for \$30,000 compensation under s.123(1)(c)(i) of the Act and \$50,000 loss of income as well as an unspecified amount of legal costs - *a full contribution to Mr Pickering's legal fees payable on receipt of invoice* - to that date is a Calderbank offer which the Authority should take into account in setting the quantum of costs. Ms Sharma submits that Mr Pickering beat the offer and the Calderbank offer should operate to increase the amount of Mr Pickering's legal costs payable by Sealord.

[24] Mr Kiely submits that Mr Pickering did not beat the Calderbank offer – the amount that was certain at the time was the \$80,000 requested as compensation and loss of income. Ms Sharma has now clarified that the costs to 19 October 2012 were \$4,761, inclusive of GST, meaning that Mr Pickering offered to settle the proceeding for \$84,761.00. The amount awarded by the Authority, without interest being taken into account, was \$79,973.86.

[25] Mr Kiely also submits that Mr Pickering's offer to settle was void for uncertainty because the amount of legal costs accrued by Ms Sharma to 19 October 2012 was unspecified. That is the stronger argument. I agree that the offer was inadequate and void for uncertainty, in a similar way to that in the Court of Appeal

case of *Binnie v Pacific Health Ltd*³. Sealord was not informed of the amount of legal costs that Mr Pickering was seeking and so was not sufficiently informed to adequately weigh up the offer made at that stage.

[26] I have considered the Calderbank offer made and conclude that because of its uncertainty as to legal costs it cannot operate to increase the amount of costs payable to Mr Pickering.

[27] Overall, taking into account the Da Cruz principles I conclude that the daily tariff amount of \$7,000 for two days is the correct starting point for the amount of costs to be paid by Sealord. However, there is an additional consideration. After the investigation meeting I gave both parties the opportunity to make any further submissions in light of the Employment Court case of *Hutton & 111 others v ProvencoCadmus Ltd (in receivership) and Provenco Payments Ltd*⁴. Both parties did so. I consider it reasonable that Ms Sharma's costs of doing so, recorded in her time report on 25 February, 11 and 12 March 2013, be reimbursed in an amount of \$322. Therefore, the total legal costs that Sealord should pay Mr Pickering is \$7,322.

Accountancy fees

[28] Ms Sharma submits that the full cost of Ms Tapper's professional accountancy fees should be borne by Sealord. She attached two invoices from Ms Tapper to the costs submissions; the second being for \$1,550. However, I agree with Mr Kiely's submission that the costs incurred up to the date of the investigation meeting were \$1,425.00.

[29] Mr Kiely submits that the expert accountancy evidence was unnecessary and unreasonable and therefore Sealord should not have to bear any of the cost.

[30] Although I did not rely entirely on Ms Tapper's figures I did find her evidence useful. In a situation such as Mr Pickering's it was not possible to make a direct comparison between the previous tax year and what his earnings could have been in the future. However, I also found it useful to consider the figures provided by Sealord.

[31] Ms Tapper's evidence was useful and the costs claimed are reasonable. Sealord should reimburse Mr Pickering \$1,425.00 for Ms Tapper's fees.

Disbursements

[32] Ms Sharma has claimed \$253.75 in office expenses mainly made up of photocopying but also including the Authority filing fee of \$71.56 and some postage.

³ [2002] 1 ERNZ 438 (CA)

⁴ [2012] NZEmpC 207

[33] The Authority does not award reimbursement for expenses which are not true out-of-pocket expenses. Office expenses should be covered by the hourly rate charged. The cost of filing in the Authority is an out-of-pocket expense and should be reimbursed by Sealord.

District Court enforcement costs

[34] I do not consider the Authority has jurisdiction to award costs for initiating the enforcement action in the District Court. Instead recovery of those costs is within the District Court's jurisdiction.

Costs submissions

[35] Ms Sharma claims \$900 toward the cost of making the costs application. Mr Kiely submits that is not reasonable. His reasoning is that my determination indicated that this was an appropriate case to award costs based on the daily tariff approach and that Ms Sharma is unable to identify any factors that would increase that. Therefore, Mr Pickering's costs claim is unreasonable. Instead, he claims \$500 on Sealord's behalf towards costs for preparing the memorandum in response.

[36] I do not agree that Mr Pickering is not entitled to any contribution towards the costs submissions made by Ms Sharma. I have awarded a proportion of Ms Tapper's costs as well as a small amount over and above the daily tariff as well as the filing fee which together amount to more than \$7,000. However, I do not consider that \$900 is reasonable amount to charge in all the circumstances. Instead I consider costs of \$500 to be reasonable. Therefore, Sealord should pay Mr Pickering a total of \$7,822 towards his legal costs.

Christine Hickey
Member of the Employment Relations Authority