

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 657
3263079

BETWEEN JAKE PIRRET-BUIK
 Applicant

AND SECOND SLICE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Danny Gelb, advocate for the Applicant
 Lawrence Anderson, advocate for the Respondent

Submissions: From the Applicant on 22 October 2024 and from the
 Respondent on 4 November 2024

Determination: 5 November 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] A determination issued on 10 October 2024 found Second Slice Limited (SSL) acted unjustifiably in dismissing Jake Pirret-Buik.¹ SSL was ordered to pay Mr Pirret-Buil lost wages of \$1,716.12 as lost wages, compensation of \$8,000 and arrears of wages of \$147.10.

[2] The parties were encouraged to agree costs between themselves. They were not able to do so and lodged memoranda for the Authority to determine the issue.

[3] They agreed SSL should pay the Authority's tariff of \$4,500 for a one-day investigation meeting as a contribution to the costs Mr Pirret-Buik incurred in successfully pursuing his personal grievance. They disagreed over Mr Pirret-Buik's submission that he should also receive an uplift of a further \$2,000 in costs because SSL had not accepted an offer to settle the matter before the investigation meeting.

¹ *Pirret-Buik v Second Slice Limited* [2024] NZERA 608.

Factors

[4] In determining costs the Authority applies well-established tenets to the particular circumstances of the case.² Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional ‘daily rate’ as a starting point to assess costs.

[5] Undue rigidity in applying the daily rates is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

[6] In this case, the sole disputed issue for resolution was whether or not to order payment of a \$2,000 uplift.

Assessment

[7] On 12 October 2023 Mr Pirret-Buik offered to settle his personal grievance claim with SSL for payment of \$10,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a contribution of \$3,500 plus GST to his costs of representation. Allowing for the GST of \$525, the total cost of his proposed settlement was \$14,025.

Mr Pirret-Buik’s argument

[8] The total value of amounts awarded in the Authority determination was \$9,863.22. To this, Mr Pirret-Buik submitted, should be added the sum of \$4,500 that he could expect to receive as a starting point for assessing costs for a successful application in the Authority. This would give a total of \$14,363.22.

[9] All figures are gross (and, in the case of the distress compensation elements in both equations, free of tax).

² Employment Relations Act 2000, Schedule 2 clause 15(1) and www.era.govt.nz/determinations/awarding-costs-remedies.

[10] Comparing both outcomes, Mr Pirret-Buik submitted SSL would have been better off by \$338.22 if it had accepted his offer. Accordingly, he submitted SSL should be ordered to pay an uplift of \$2,000 as costs because its refusal to accept the proposed settlement had put him and the company to the needless expense of taking part in the Authority investigation.

[11] The offer, made well before the investigation meeting was held in July 2024, was open for acceptance for a week. It was a reasonable offer and SSL had adequate time to consider it.

[12] Accordingly, the offer fell to be considered under the principle that an award for costs could be adjusted to make an unsuccessful party pay a higher proportion of costs because it failed to take an earlier and ultimately better settlement offer and, instead, went ahead with a proceeding that ended up putting everyone to unnecessary expense for costs of representation.

SSL's argument

[13] SSL submitted Mr Pirret-Buik's calculation of the relative merits of the settlement offer and the Authority outcome incorrectly included and compared the costs element.

[14] It said he offered to settle for \$14,025 but received only \$9,863.22 in the Authority determination, so the settlement offer would not have been a better outcome for SSL.

Conclusion

[15] The assessment of the relevant merits of the offer and the outcome in this case really needed to be made without reference to the costs element. While the Authority's daily tariff is relatively predictable, there are the other factors for adjustment, upward or downward, that make the costs element more variable. Party conduct, for example, which unnecessarily increased costs could be taken into account to adjust a costs award in favour of the other party (so even if a party was unsuccessful, the costs they are ordered to pay might be reduced). Ability to pay a costs award is also a variable factor that could affect the outcome, regardless of success or failure.

[16] On that view, the relevant comparison in this particular case is between the untaxed \$10,000 compensation payment Mr Pirret-Buik offered to settle for in October 2023 and the \$9,863.22 award he received from the Authority's October 2024 determination. The latter amount included \$1,863.22 in lost wages and wage arrears, both subject to income tax deductions, likely taking the nett amount down by some few hundreds of dollars.

[17] Compared in that light, the settlement offer made in October 2023 was, ultimately, not such a better option for SSL that it should be held liable to pay a higher-level costs than it must ordinarily bear as the unsuccessful party. While both parties still incurred costs of representation, Mr Pirret-Buik's costs are sufficiently offset by the requirement for SSL to pay the daily tariff.

Order

[18] SSL must pay Mr Pirret-Buik the sum of \$4,500 in costs and reimburse him \$71.55 for the expense of the Authority fee paid to lodge his application. These sums must be paid within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority