

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 314  
3036616

BETWEEN                      DAMIAN STONE  
   Applicant  
  
AND                                AURA FX (NZ) LIMITED  
   Respondent

Member of Authority:        Anna Fitzgibbon  
  
Representatives:              Guido Ballara, counsel for the Applicant  
   No appearance by the Respondent  
  
Investigation Meeting:        Determined on the papers  
  
Submissions Received:        15 April 2019 from the Applicant  
   No submissions from the Respondent  
  
Date of Determination:        28 May 2019

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     The respondent, Aura FX (NZ) Limited (Aura), is ordered to contribute \$4,500 towards the costs of the applicant, Mr Damian Stone, within fourteen days of the date of this determination.

**The substantive determination**

[2]     In a written determination of the Authority, issued on 1 April 2019<sup>1</sup>, the Authority determined that Mr Damian Stone was owed unpaid salary being the balance of his notice period and unpaid annual leave, holiday pay and statutory holidays.

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<sup>1</sup> [2019] NZERA 189.

[3] Aura was ordered to make payments of the unpaid moneys to Mr Stone together with interest within fourteen days of the date of its determination. Costs were reserved.

### **Authority's Power to Award Costs**

[4] The Authority's power to award costs against a party to another is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The Authority is bound by the principles set out in *PBO Limited v Da Cruz*<sup>2</sup> when setting awards. These principles are well established and have been reaffirmed by the Employment Court in *Fagotti v ACME*<sup>3</sup>.

### **Applicant's Submissions**

[5] Counsel for Mr Stone says that the actual solicitor/client costs incurred in this matter totalled \$12,261.56 inclusive of GST and the filing fee. These costs have been discounted by Mr Stone's counsel. Counsel seeks a substantial contribution of approximately \$9,500 towards costs incurred in bringing the claim on behalf of Mr Stone. Counsel refers to the fact that Mr Stone was successful, a *Calderbank* was offered well in advance of the investigation meeting and not responded to by the respondent, that the remedies sought against Aura included minimum entitlements and that the amount was reasonable.

[6] Indemnity costs are sometimes awarded in exceptional circumstances, see *Bradbury v Westpac Banking Corporation*<sup>4</sup>. The Court in *Bradbury* listed non-exhaustive categories in which indemnity costs have been ordered which include: where a party makes allegations of fraud, knowing them to be false; there is particular misconduct that causes loss of time to the Court and to other parties; commencing or continuing proceedings for some ulterior motive and doing so in wilful disregard of known facts or clearly established law; or making allegations which ought never to have been made or unduly prolonging a case by making groundless contentions.

[7] I do not consider the circumstances of the current matter to fall within these categories. Certainly, Aura did not engage but this can be dealt with by the Authority as part of its discretion.

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<sup>2</sup> [2005] 1 ERNZ 808.

<sup>3</sup> [2015] NZEmpC 135.

<sup>4</sup> [2009] NZCA 234.

**The Authority's Notional Daily Tariff**

[8] I consider that the Authority's usual notional daily tariff-based approach to costs is appropriate in this case. I accept that Mr Stone is entitled to seek a contribution towards his costs as he successfully brought a claim against Aura.

[9] The starting point in awarding costs in the Authority when an investigation meeting is taking place is the daily tariff, which stands at \$4,500 for the first day of an investigation meeting and \$3,500 for every subsequent day. The investigation meeting did not take an entire day. This was due to the non-appearance by Aura.

[10] Counsel for Mr Stone seeks an uplift in the notional daily tariff to close to the \$9,500 figure sought by him. This would be more than the amount awarded if the matter had taken more than two full days in the Authority. As mentioned, counsel for Mr Stone relies on a number of factors to persuade the Authority that the daily tariff should be increased. One factor is the *Calderbank* offer. The *Calderbank* offer put to Aura was well in advance of the investigation meeting. However, it was for an amount slightly less than that awarded by the Authority in its determination. Further, it included a payment of \$4,200 plus GST towards Mr Stone's costs. Mr Stone was actually awarded less than what was being sought by counsel when submitting the *Calderbank* offer to Aura. I do not consider this to be a factor that would substantially increase any award made by the Authority. The matter did not take an entire day in the Authority. However, counsel for Mr Stone was unsure as to whether or not there would be any appearance by or on behalf of Aura and prepared accordingly.

[11] I consider in the circumstances it is appropriate to award costs in accordance with the daily tariff. I order the sum of \$4,500 to be paid to Mr Stone within fourteen days of the date of this determination.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**