



New Zealand Employment Relations Authority Decisions

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Thom v Fletcher Building Limited (Christchurch) [2018] NZERA 1009; [2018] NZERA Christchurch 9 (25 January 2018)

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Thom v Fletcher Building Limited (Christchurch) [2018] NZERA 1009 (25 January 2018); [2018] NZERA Christchurch 9

Last Updated: 8 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 9
3008972

BETWEEN CHRISTOPHER THOM Applicant

AND FLETCHER BUILDING LIMITED Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, Counsel for Applicant

Blair Scotland, Counsel for Respondent

Submissions received: 15 December 2017 from Applicant

11 January 2018 from Respondent

Determination: 25 January 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. Fletcher Building Limited is ordered to pay to Christopher Thom costs in the sum of \$4,200 and to reimburse the filing fee of \$71.56.

Employment relationship problem

[1] The Authority in its determination dated 28 November 2017 found the applicant was unjustifiably disadvantaged but not unjustifiably dismissed and there was no award for a penalty. The respondent was ordered to pay the applicant, taking contribution into account, the sum of \$12,923.10 for reimbursement of lost wages, together with compensation in the sum of \$3,200.

[2] Costs were reserved and a timetable set for an exchange of submissions in the event that agreement was not reached. The Authority has now received cost submissions from Mr Beck on behalf of the applicant and Mr Scotland on behalf of the respondent.

The applicant's submission

[3] Mr Beck submits that the Authority should exercise its discretion in equity and good conscience to make a higher than tariff award of two-thirds of actual costs of \$12,071.50, in the sum of \$8000 together with reimbursement of the filing fee of \$71.56.

[4] In support of that submission he attaches two without prejudice save as to costs offers in the nature of "Calderbank" offers. He refers to the principles for determination of costs in the Authority from the full Court of the Employment Court in *PBO Ltd (Formerly Rush Security Ltd) v. Da Cruz*¹, affirmed more recently by the full Court of the Employment Court in *Fagotti v Acme & Co. Limited*.² Mr Beck submits that whilst costs are not punitive,

conduct that unnecessarily increases costs can be taken into consideration in increasing or decreasing an award of costs and that equity and good conscience is to be considered on a case by case basis.

The respondent's submission

[5] Mr Scotland in his submission does not accept that an award of \$8000 is appropriate. He submits that the two "Calderbank" offers made to the respondent were for amounts greater than those awarded by the Authority and the first offer was rejected, as was the second. Mr Scotland submits that the second "Calderbank" offer which was for a reduced amount, excluding costs, was for \$19,000 and the Authority's award was \$16,123.10.

[6] Mr Scotland submits that the "Calderbank" offers should not impact on the award of costs because they were not reasonable and that they did not "beat" the award made to the applicant as they were higher than the Authority awarded. Mr Scotland submits that costs should be awarded at the notional daily tariff of \$4,500 but reduced to \$3,500 because the investigation meeting finished at 3:30pm and the applicant was only partially successful in his

¹ *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808

² *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

claims. Mr Scotland sets out that the respondent agrees to reimburse the applicant's filing fee.

Determination

[7] Costs follow the event and the applicant is entitled to an assessment of a contribution towards his costs.

[8] The Authority must exercise its discretion as to whether costs are awarded and in what amount in a principled and not an arbitrary manner. Awards in the Authority will be modest and frequently assessed on the basis of a notional daily rate.

[9] The investigation meeting commenced at 9.30am with three-quarters of an hour for lunch and finished at 3.05pm. Submissions were not delivered in the afternoon as there were some legal issues which counsel wished to consider. It was a somewhat unusual matter and the submissions received were helpful to the Authority.

[10] I find in those circumstances when I exercise my discretion the daily tariff should not be reduced and therefore the starting point for an assessment for costs is the nominal daily tariff of \$4,500.

[11] I then turn to whether there should be an increase or reduction to the tariff of \$4,500.

[12] I shall consider firstly the pre-investigation offers. The second offer made by the applicant to settle, although closer than the first to the award by the Authority, was \$19,000. The offer comprised one month's salary being \$10,000 and a compensatory amount of \$9000. Costs sought were \$6000 plus GST. The Authority award was for \$12,923.10 salary and \$3200 compensation. The pre-investigation offer can be contrasted with the offer in the Employment Court judgment in *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear*.³ That offer was within a few hundred dollars of the Authority award and accordingly was given significant consideration. I am not satisfied that the offer in this matter objectively assessed was close enough to conclude it was unreasonable of the respondent to have rejected it and that it should have an impact on the cost award. The daily rate is not increased on that basis.

³ *Watson v New Zealand Electrical Traders Ltd* [2006] NZEmpC 118; (2006) 4 NZELR 59

[13] I do not find that either party contributed to an increase in costs by conduct during the investigation meeting.

[14] A modest reduction of \$300 for the unsuccessful grievance of unjustified dismissal and claim for a penalty is made. The amount of this reduction recognises the narrow and confined factual situation out of which the two grievance claims and the penalty claim were considered.

[15] I find in the exercise of my discretion that a fair and reasonable award for costs is the sum of \$4,200 together with reimbursement of the filing fee of \$71.56.

[16] I order Fletcher Building Limited to pay to Christopher Thom the sum of \$4,200 costs together with reimbursement of the filing fee of \$71.56.

Helen Doyle

Member of the Employment Relations Authority