

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 194
3019075

BETWEEN KARAN GULATI
Applicant

AND FAT PROPHETS (NZ) PTY
LIMITED
Respondent

3019076

BETWEEN VISHAL RATHOD
First Applicant

AND FAT PROPHETS (NZ) PTY
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: David Fleming for Applicant
Paul Fisher for Respondent

Submissions received: 25 May 2018 from Applicant
No submissions received from Respondent

Determination: 19 June 2018

COSTS DETERMINATION OF THE AUTHORITY

- A. Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Galuti and Mr Rathod the total sum of \$12,144.22 within 28 days of the date of this determination.**

[1] In a determination dated 27 April 2018¹ I found in favour of the applicants in relation to their claims for arrears of wages for unpaid commission payments and personal grievances. I made orders against Fat Prophets (NZ) Pty Limited accordingly. The applicants were unsuccessful in their claims for penalties.

[2] I reserved costs, indicating that if the parties were unable to resolve costs, both parties would have the opportunity to file cost memoranda and evidence. The parties have been unable to resolve the matter.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs.

[4] The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks² reasonable.² The principles applying to costs are well settled and do not require repeating.³

[5] An assessment of costs will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁴

[6] The investigation meeting took two days which means the starting point is \$8,000. The investigation meeting time was reduced due to hearing both matters at the same time.

Settlement offers

[7] The applicants made two offers to settle on a without prejudice basis offering to resolve all matters arising out of the employment relationship. The final offer was made on 17 November, was open for acceptance until 1 December and included:

- a) Payment of \$20,000 to each of the applicants to settle the issue of commissions;

¹ [2018] NZERA Auckland 130.

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁴ Practice Note 2, Costs in the Employment Relations Authority.

- b) Payment of \$15,000 to each of the applicants under s 123(1)(c)(i) of the Act to resolve the personal grievance claims; and
- c) A contribution of \$6,250 plus GST toward their combined legal costs.

[8] The Authority will take into account any offers made by the parties to settle matters:⁵

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[9] The Employment Court has stated:⁶

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a *de novo* challenge, having regard to the circumstances of the particular case.

[10] Both applicants were more successful money-wise at the Authority than either of the two offers made to Fat Prophets in settlement. The applicants had not incurred significant costs by 22 August when the first offer was made. However, the applicants had incurred a significant portion of their costs when the second offer was made on 17 November.

[11] No information has been received to explain why the offer made on 17 November was rejected. I accept that if either of the two offers made to Fat Prophets’ were accepted Fat Prophets would have been in a substantially better position.

[12] I have concluded it is appropriate to uplift the daily tariff to recognise the attempt made by the applicants to settle their employment relationship problems.

⁵ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

⁶ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15; [2014] ERNZ 1 at [27].

Determination

[13] Mr Gulati and Mr Rathod incurred actual legal costs totalling \$22,881.37 plus disbursements of \$944.22 which included the filing fees on both applications, a hearing fee for an additional day and the costs associated with the printing of the applicant's bundle of documents. I am satisfied the costs were reasonably incurred.

[14] The case itself was complex due to the number of issues requiring determination. The issues included questions about whether there was a binding agreement to pay commissions, questions about the amount of commission owing to each applicant and separate personal grievance claims. To add to the complexity there was a large volume of documentary evidence that required assessment.

[15] I have uplifted the daily tariff to take into account the offers of settlement made and the complexity of the matter. In all the circumstances I consider an appropriate contribution to the applicants' costs to be \$11,200 plus disbursements.

[16] Fat Prophets (NZ) Pty Limited is ordered to pay Mr Galuti and Mr Rathod the total sum of \$12,144.22 within 28 days of the date of this determination as a contribution to their costs.

Vicki Campbell
Member of the Employment Relations Authority