

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 54
3009671

BETWEEN DAVID BOONE
 Applicant

A N D THORNTON GREEN
 HOLDINGS LIMITED
 First Respondent

A N D CAR FINANCE 2U LIMITED
 Second Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person
 David Ure, Counsel for Respondents

Investigation Meeting: On the papers

Submissions Received: 11 and 20 December 2017 for Applicant
 27 November and 18 December 2017 for Respondents

Date of Determination: 20 February 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY (No 2)**

- A. Within 14 days of the date of this determination Car Finance 2U Limited is to pay David Boone the following:**
- (i) \$9,854.88 gross, being the three months' wages, after deduction of 30% for his contribution, ordered in the Authority's first determination; and**
 - (ii) \$3,000.00 for costs and \$71.56 for the filing fee.**

Background

[1] This is the second determination which the Authority has issued between these parties. In its first determination of 13 November 2017 ¹ the Authority found that the applicant David Boone had been employed by the second respondent Car Finance 2U Limited (Car Finance 2U or the company). The company had unjustifiably dismissed Mr Boone and was ordered to pay him remedies for that along with \$881.56 as reimbursement of expenses incurred prior to his dismissal.

[2] In the first determination the issues of how lost wages were calculated and the amount of costs were left to the parties to be resolved. Neither issue has been resolved and both parties now have filed further submissions and documents. Mr Boone has also raised an issue about an additional invoice for immigration cost which was not mentioned in the first determination.

[3] In early December 2017 Car Finance 2U paid money into its solicitor's trust account, being the amounts which it considers payable to Mr Boone under the first determination. It sought that Mr Boone specify an account into which it could pay that money. No account was specified. This was against the background of a disagreement as to the three months' wages amount, Mr Boone taking over his own representation and a challenge being filed by him in the Employment Court.

Lost wages calculation

[4] In the first determination Mr Boone was awarded three months' lost wages, less a 30% reduction for contribution. However, as no figure was specified in his claim, the Authority left the parties to attempt to resolve that issue.

[5] They were unable to do so. Mr Boone's pay was made up of base salary and commission, which resulted in some complications regarding what the proper rate was.

[6] Car Finance 2U has offered payment based on \$13,136.16 gross, before the deduction of 30% contribution, which reduced the gross figure to \$9,195.30. This is calculated on an average over the term of Mr Boone's employment.

¹ [2017] NZERA Auckland 355

[7] Mr Boone puts forward a calculation based on \$14,211.12 gross, made up of three months' worth of \$3070.87 gross monthly base salary and \$1666.17 gross average monthly commission.

[8] Mr Boone was on a salary. After his initial period of employment his position became permanent and the annual salary went up by \$1850.44. I do not consider that the rate for the initial period of employment should be taken into account, as the three month award is based on Mr Boone's earnings at the time of dismissal. I accept Mr Boone's figure of \$3070.87 as the average monthly base salary², totalling \$9212.61 for three months.

[9] In terms of the commission component, Mr Boone only completed three working days in October 2016 before being dismissed. He argues for a pro-rated extension of commission earned on the October days actually worked, to give a nominal monthly commission rate for October. I prefer to set aside the October days and calculate average commission based on the May to September 2016 period. This gives an average commission figure of \$1621.93 per month and a three month total of \$4865.79 gross.

[10] Adding the base salary of \$9212.61 and the commission of \$4865.79, gives a total of \$14,078.40. After a reduction of 30%, the total awarded to Mr Boone is \$9854.88, which Car Finance 2U must pay him within 14 days of the date of this determination. Mr Boone sought interest on that sum. However, given the payment into the solicitor's account which Mr Boone has not yet arranged to receive payment of, and a lack of clarity in both parties' proposed calculations, I make no award of interest.

Additional immigration costs

[11] In the statement of problem Mr Boone claimed immigration costs incurred as a result of his unjustified dismissal, including visa application fees and fees payable to his immigration lawyer. The amount of immigration legal fees specified in the statement of problem and in a memorandum of counsel for Mr Boone dated 8 June 2017 was \$2370. The Authority in its first determination awarded Mr Boone that

² \$36,850.44 divided by 12

sum, along with visa application costs, less contribution as a cost incurred as a result of the grievance.

[12] In Mr Boone's memorandum of 11 December 2017 he referred to an additional invoice of \$5,023.04 from his immigration lawyers, which he says he should be reimbursed for, recognising that the 30% contribution set by the Authority applies.

[13] The document mentioning \$5,023.04 is a statement from the law firm indicating a balance payable of that amount. However, the invoice of 30 June 2017 referred to in the statement is for \$3795.00, plus the various office expenses of \$108.04, totalling \$3903.04.

[14] The statement and invoice were filed prior to the investigation meeting as part of a bundle of immigration documents but this was after receipt of the memorandum of 8 June 2017 detailing the remedies sought. The 30 June 2017 invoice was not specifically referred to at the investigation meeting or in the first determination.

[15] Mr Boone now claims that he should be entitled to payment by Car Finance 2U for the 30 June 2017 invoice as it was a cost incurred as a result of his unjustifiable dismissal. Car Finance 2U says that the immigration advice obtained went beyond what was required for Mr Boone, after his dismissal, to obtain a visitor's visa and an additional work visa. The company notes several references in the correspondence and invoices from Mr Boone's immigration lawyers suggesting they relate to permanent residence.

[16] Car Finance 2U also argues that Mr Boone's immigration costs of over \$6000, plus office expenses, were excessive to obtain a visitor's visa and an additional work visa. It obtained prices for work visa applications from two immigration advisers, of \$1380 and \$1800.

[17] Mr Boone in reply says that he is not claiming all his immigration costs in the sense of the total of all of his immigration lawyer's bills.

[18] Mr Boone required more than just a work visa and his immigration situation was perhaps somewhat more complex than a standard case. I accept the reasonableness of some costs over a standard rate. However, residence issues appear

to have been intertwined in the work and bills. I consider that the award of \$2833³ immigration costs and disbursements in the first determination, reflects a reasonable total cost for claimable work and make no further order regarding immigration costs.

Costs

Mr Boone's claim

[19] Mr Boone claims that Car Finance 2U should have to pay costs to him. His submissions did not always clearly distinguish between legal costs incurred for the purposes of this hearing and his legal costs incurred for his immigration advice. However, different law firms provided these services so the invoices are separate.

[20] Mr Boone incurred around \$4000 in legal fees from the lawyers providing him with employment advice up until a point shortly after mediation. However, costs incurred in relation to mediation are not usually the subject of awards as parties are expected to attempt to resolve employment relationship problems. An invoice of \$12,466.36 (including the Authority's filing fee and GST) was filed covering work done in relation to the Authority process.

[21] From his submissions it appears that Mr Boone seeks the daily tariff of \$4,500 for the single day investigation meeting, as well as \$3,711.93, being 50% of his lawyer's fees incurred by the time of a settlement offer in June 2017, detailed below.

Offers to settle

[22] Both sides rely on offers to settle. These were a Calderbank offer from both sides and an additional open offer from Car Finance 2U. The lawyers' letters relied on meet the criteria as Calderbank offers which I may take into account in consideration of the costs award. They are clear as to their terms and give sufficient time for the offer to be considered. They were provided well in advance of the investigation meeting occurring.

[23] Mr Boone relies on a Calderbank offer made by his lawyer on 21 February 2017 for \$13,500 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and \$4000 as a contribution to his costs. This was after mediation but before the claim was filed in the Authority.

³ Before deduction for contribution

[24] Car Finance 2U relies on two offers made. At the time that both letters were sent, the claim had been filed in the Authority and a timetable set but neither party had filed their witness statements yet.

[25] On 12 June 2017 a letter clearly marked “Without prejudice save as to costs” was sent from the company’s representative to Mr Boone’s representative. It offers \$16,000 under s 123(1)(c)(i) of the Act.

[26] On 23 June 2017 an open offer was made of payment of three months’ salary (\$12,000 gross) and compensation for hurt and humiliation of \$4,500. No time was set for acceptance of the offer, but it was sent well over a month before the investigation meeting.

Car Finance 2U’s submissions and the reply

[27] The company submits that the proportion of the offer made on 12 June 2017 to the award was 88.7% and the 23 June 2017 offer 83.4%, based on its calculation of three months’ wages. Car Finance 2U says that the net outcome for Mr Boone, considering actual costs incurred, would have been better for him if he had accepted either of the offers.

[28] It is submitted that the portion of the daily tariff already expended before 12 or 23 June was \$1000, out of \$4,500. Car Finance 2U accepts that it should be liable for these costs. The average of the two offers is said to be 86% of the award. Therefore the company should be liable for 13.95% of the balance of the tariff, namely \$488.25. So totally the company accepts that it should have to pay \$1488.25.

[29] In reply Mr Boone says that at the time of his offer, he had incurred around 24% (\$4000) of the total fees which he would incur. Mr Boone says that 50% (\$8211.93) of his solicitors’ costs were incurred prior to 12 June 2017 when the first offer relied on by the company was made. However, I note that a portion of that amount was occurred in relation to mediation.

Conclusion on costs

[30] The investigation meeting took almost a full day with the notional daily tariff being \$4,500.

[31] Both parties had the opportunity to settle this case by accepting settlement offers made before incurring more substantial costs. Although the offers from the parties are not substantially dissimilar they occurred some months apart, and the reasons for non-acceptance are not entirely evident.

[32] The total which Mr Boone has been found by the Authority to be entitled to, along with the holiday pay which Car Finance 2U paid after the investigation meeting, is around \$20,500. A little under half of that is subject to income tax. A question has been raised about what the appropriate tax rate is. In any event the net amount which Mr Boone receives will be fairly close to at least one of the offers that Car Finance 2U made, when the type of payment offered is taken into account.

[33] I find that a reduction should be made to the daily tariff as Mr Boone, having made an offer to settle, subsequently did not accept relatively similar offers which were within the range of what he has finally been awarded.

[34] I order that within 14 days of the date of this determination Car Finance 2U to pay Mr Boone the sum of \$3000 as a contribution towards his costs and \$71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority