

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 241
3031251

BETWEEN HERMAN POTGIETER
Applicant
AND INTENT GROUP LIMITED
Respondent
3041414

BETWEEN INTENT GROUP LIMITED
Applicant
AND HERMAN POTGIETER
First Respondent
AND LUMUS LIMITED
Second Respondent

Member of Authority: Jenni-Maree Trotman
Representatives: Bruce Murray, Counsel for Mr Potgieter and Lumus Limited
Tania Waikato, counsel for Intent Group Limited
Investigation Meeting: On the papers
Submissions and further Information received: 25 March 2019 and 08 April 2019 from the Applicant
25 March 2019 from the Respondent
Date of Determination: 23 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

On 11 March 2019 I issued a determination in which I made a number of findings in relation to a claim made by Herman Potgieter against Intent Group Limited (Intent) and a cross claim filed by Intent against Mr Potgieter.¹

[1] In terms of Mr Potgieter's claim these findings included that Intent had breached Mr Potgieter's individual employment agreement (IEA) by failing to pay him commission at the correct rate and by not paying him his sales commission entitlements following the termination of the IEA. Intent was ordered to pay Mr Potgieter various amounts for commission. I also declined Mr Potgieter's application for rectification.

[2] In terms of Intent's cross claim I found Mr Potgieter was overpaid the sum of \$535.17. This sum was ordered to be deducted from the amounts I ordered Intent to pay Mr Potgieter. I also found Mr Potgieter did not breach his IEA and did not breach s 4 of the Act.

[3] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions. Both parties applied for costs by way of memoranda dated 25 March 2019. A reply memorandum was filed on behalf of Mr Potgieter on 8 April 2019.

Application for costs

[4] Both parties apply for a contribution towards their respective costs in the amount of \$8,000 representing the current daily tariff in the Authority for a two day investigation. They each oppose the other's application.

Issues

[5] The issues for determination are:

- a) What award of costs should be made where each party enjoyed a measure of success?

¹ *Potgieter v Intent Group Limited* [2019] NZERA 139 at [121].

- b) Are there any factors that warrant an adjustment to these costs?

Legal Principles

[6] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and were outlined by a full Court in *PBO Ltd v Da Cruz*.²

[7] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.³ The principles include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

² *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

³ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

Issue One: What award of costs should be made where each party enjoyed a measure of success?

The starting point

[8] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500 for each day thereafter.⁴ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[9] The investigation meeting took place over 2 days. Using the daily tariff the starting point for an award of costs is \$8,000.

[10] In considering costs, the starting point is that the losing party should pay the costs of the successful party, absent exceptional circumstances.⁵ However, that is not always the case. There are cases where the parties have mixed success. In such cases it is not necessarily easy to determine who won the case so as to be entitled presumptively to costs.⁶ In such cases the Court has indicated that the correct approach is to stand back and look at things "in the round".⁷

Analysis

[11] I regard the present case as being one in which there has been a mixed measure of success. In light of the mixed success, I have considered the attendances devoted to the respective claims by the parties at the investigation meeting itself and in the lead up to the meeting.

[12] In terms of the matters relating to Mr Potgieter's claim:

- a) The first issue for determination was what the agreement was between the parties in terms of payment of commission to Mr Potgieter during employment. Mr Potgieter maintained Clause 4(b) of his IEA applied to calculate his commission and the SC Structure Document was not applicable. Intent Group maintained the SC Structure Document was

⁴ *Hines v Eastlight Port Limited* [2018] NZEmpC 111 at [25]; *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].

⁵ *Weaver v Auckland Council* [2017] NZCA 330 at [20].

⁶ *Health Waikato Ltd v Elmsley*, [2004] 1 ERNZ 172 (CA) at [35].

⁷ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156 at [37] – [43].

applicable. I found the parties intended Clause 4(b) of the Third Schedule to the IEA and the Commission Structure Policy to operate together.

- b) The second issue was whether Intent breached Clause 4(b) of the IEA Mr Potgieter maintained it did and Intent denied this. I found Intent had breached Clause 4(b) of the IEA, to this extent Mr Potgieter was successful.
- c) A second limb to this issue was the amount payable to Mr Potgieter. Mr Potgieter was successful in establishing he was owed money in terms of Client D but not to the extent claimed. He was unsuccessful in establishing he was due any payment for Client B. The parties were equally successful under this limb.
- d) The third and fourth issues related to the agreement between the parties in terms of payment of commission to Mr Potgieter after termination of his employment and the amount, if any, that was owed. Mr Potgieter was successful in establishing Intent had breached his IEA and his entitlements continued to exist following his termination but not to the extent that he claimed.
- e) The fifth issue was whether Mr Potgieter was entitled to rectification of his IEA. I found he was not.

[13] In terms of the attendances devoted to Intent's claim, the following factors are relevant:

- a) The first issue for determination in Intent's claim related to an allegation that it had overpaid wages to Mr Potgieter for the month of September 2017. I found that it had, however not to the extent claimed.
- b) The second issue was whether Mr Potgieter breached the terms of his employment agreement. I found he had not.
- c) The third issue was whether Mr Potgieter had breached s 4 of the ERA. I found he had not.

[14] Standing back and reviewing the respective attendances I am persuaded that the matters that Mr Potgieter was successful on required more time and effort than did those matters where Intent was successful.

[15] I assess costs on the basis that Mr Potgieter is entitled to 70% of the costs he would otherwise be entitled to for the success he achieved and Intent is entitled to 30% for the success that it achieved.

[16] This results in a starting point for legal costs payable by Intent to Mr Potgieter of \$5,600 and \$2,400 for legal costs payable by Mr Potgieter to Intent Group.

Issue two: Are there any factors that warrant an adjustment to costs?

Calderbank offer

[17] If a Calderbank offer is made, and the opposing party does not beat the offer, the Court has held that it is in the broader public interest for there to be a steely response.⁸

[18] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:⁹

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[19] *Bluestar* also made clear that regard must be had to the principle that 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.¹⁰

[20] These comments also apply with respect to Calderbank offers made before an Authority investigation.¹¹

[21] In *Xtreme Dining Ltd t/a Think Steel v Dewar* the full Court noted that the correct question in circumstances where a Calderbank offer has been made was

⁸ *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 (CA) at [53].

⁹ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18]-[20].

¹⁰ At [18] and [20].

¹¹ *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [109].

whether the party to whom the offer was made had acted unreasonably in rejecting the offer, at the time that it did so.¹²

Analysis

[22] Following mediation, Intent made an offer to settle this matter on a without prejudice save as to costs basis in the amount of \$49,593. This offer was made prior to any steps being taken in the Authority other than the filing of Mr Potgieter's first statement of problem and Intent's statement in reply. The parties agree that the award made by the Authority amounts to a sum of \$38,953.83.

[23] The issue is whether Mr Potgieter's rejection of this offer was reasonable. Adopting a steely approach, I find it was not. While there were discrepancies with how Intent calculated the figure offered in its Calderbank letter over what the Authority awarded, the end result was an offer excessively exceeding the amount recovered by Mr Potgieter in the Authority.

[24] Intent was put to significant costs following the rejection of this offer, including responding to two amended statements of problem relating to two different clients and commissions. These costs could have been avoided if Mr Potgieter had acted reasonably and accepted the Respondent's offer to settle. Intent incurred significant costs following the settlement offer. I consider a fair contribution towards these costs is \$4,500. I increase the costs otherwise payable to Intent by this sum.

Outcome

[25] Mr Potgieter is ordered to pay to Intent an amount of \$1,300 towards its legal costs within 14 days of the date of this determination. This sum represents the difference between the legal costs payable by Mr Potgieter to Intent Group (\$6,900) and the legal costs payable by Intent to Mr Potgieter (\$5,600).

Jenni-Maree Trotman
Member of the Employment Relations Authority

¹² *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].