

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 347
3028051
3028052

BETWEEN KYLE DONEGAN
Applicant

AND G2 VENTURES LIMITED
Respondent

AND

BETWEEN BRADLEY WOODS
Applicant

AND G2 VENTURES LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Debra Law, Counsel for the Applicants
No appearance for the Respondent

Investigation Meeting: On the papers

Submissions received: 30 April 2019 from the Applicants
No submissions received from the Respondent

Date of determination: 13 June 2019

COSTS DETERMINATION OF THE AUTHORITY

- A. G2 Ventures Limited is to pay the following sums within 28 days of the date of this determination to:**
- (a) Kyle Donegan \$12,650.00 as a contribution to his costs

and \$71.56 for the filing fee; and

(b) Bradley Woods \$12,650.00 as a contribution to his costs and \$71.56 for the filing fee.

Employment relationship problem

[1] On 21 March 2019 the Authority issued a determination upholding claims by Kyle Donegan and Bradley (Brad) Woods against their former employer G2 Ventures Limited (G2 or the company).¹

[2] Mr Donegan and Mr Woods were found to have been unjustifiably dismissed by G2 and remedies were awarded to them. G2 was also ordered to pay the two special damages, wage arrears and interest. Penalties were also imposed on G2.

[3] In that determination I invited the parties to attempt to resolve the costs issue between themselves but set a timetable for the filing of submissions, if they be unable to reach agreement. G2's former representatives advised the representative for Mr Donegan and Mr Woods that they had no instructions regarding costs. Submissions were then filed seeking costs on behalf of Mr Donegan and Mr Woods. No submissions for G2 were received within the timetable set out in the earlier determination. G2's former representatives advised the Authority that they were yet to receive any instructions on this matter. Over four weeks has now passed without any advice that the former representatives have instructions or any submissions being filed for G2. I now determine the costs issue.

Submissions

[4] The submissions for Mr Donegan and Mr Woods include the following points:

- (a) In addition to the three investigation days there was an earlier aborted hearing date;
- (b) Recorded time for the matters between April 2018 and 11 October 2018 (when submissions were filed) was \$40,000 excluding GST. Actual costs charged (after discount) were \$34,708.39;

¹ *Donegan & Woods v G2 Ventures Limited* [2019] NZERA 169

- (c) Unnecessary additional cost was incurred, initially due to the ‘tactic of avoidance’ employed by G2 and latterly by the way the company approached its defence and evidence in support of that defence at the investigation meeting;
- (d) The Applicants were wholly successful in their claims; and
- (e) An uplift in daily tariff costs was sought to a rate of \$9,000 per day plus disbursements of \$181.21 per day, totalling \$31, 258.39.

Costs principles

[5] The Authority had the power to award costs under clause 15 of Schedule 2 of the Employment Relations Act 2000. The discretion is governed by principles set out by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*². These include a requirement that the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Further, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party’s conduct, although conduct which increased costs unnecessarily may be taken into account in inflating or reducing an award.

Notional daily tariff

[6] The Authority’s notional daily tariff is \$4,500 for the first day of an investigation meeting, and \$3,500 for each subsequent day of hearing. The investigation meeting was held over three days, giving a starting point of \$11,500.

[7] In the earlier determination Mr Donegan and Mr Woods were awarded special damages for costs incurred during their representation during the flawed redundancy process. That was based on an invoice for work up to 18 April. The invoice filed with the costs submissions runs from 16 April 2018 and includes slightly under \$400 (excluding GST) of fees which were captured by the special damages award. That leaves a total of over \$34,000 (excluding GST) in billed fees.

² [2005] 1 ERNZ 808

Costs considerations

[8] Although indemnity costs are not explicitly sought, the total amount sought on behalf of Mr Donegan and Mr Woods comes close to the total amount actually incurred by them.

[9] Whilst I am not satisfied that indemnity costs would be justified, there are three grounds on which uplifts are appropriate.

[10] I accept the submission that that the conduct of G2 added substantially to the time spent by Mr Donegan and Mr Woods' representative. This relates to both prior to and at the investigation meeting. As regards the earlier period, although some evidence was presented regarding health issues of the director then representing G2, this did not indicate substantial periods of unavailability. I highlight the following conduct by G2 prior to legal representatives being instructed:

- (a) Failure to file a statement in reply for some months;
- (b) Failure to respond to email correspondence from the Authority and the other representative;
- (c) Statements that G2's lawyers were about to be involved, without any resulting indication of lawyers being instructed. Similar conduct occurred prior to the claim being filed in the Authority;
- (d) The instructing of counsel less than 48 hours before the commencement of the 3 August 2018 investigation meeting, resulting in G2 applying to adjourn that meeting.

[11] In term of the investigation meeting, G2 ran clearly untenable arguments and pursued positions which were not supported by their own evidence. The earlier determination identifies significant concerns with the evidence of G2's directors. Efforts were made to denigrate Mr Donegan and Mr Woods which I did not find compelling. None of the three grounds argued as contribution to the situation giving rise to the dismissals were established. All these matters resulted in increased preparation and investigation meeting time.

[12] I recognise that costs should not be used to punish an unsuccessful party but conclude that G2's manner of conducting this case has substantially increased Mr

Donegan and Mr Woods' costs. I consider that an uplift of \$3,000 per investigation meeting day is justified on the basis of G2's conduct.

[13] Mr Donegan and Mr Woods were represented by the same lawyer and their claims were heard together. An uplift of \$500 per investigation meeting day is justified for the representation of two employees, whose circumstances were somewhat different.

[14] This gives a provisional total of \$22,000. As the submissions claim GST, I take it that Mr Donegan and Mr Woods are not able to recover GST paid on the legal fees they paid. I therefore uplift costs to reflect that.³

[15] The total level of costs is \$25,300, to be divided between the two. G2 is ordered to pay within 28 days of the date of this determination, Mr Donegan the sum of \$12,650.00 and Mr Woods the sum of \$12,650.00.

[16] As regards disbursements, the practice of the Authority is not to order these on a daily rate basis. I order G2 to pay Mr Donegan and Mr Woods the sum of \$71.56 each for the filing fee, within 28 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZ EmpC 159 at 37