



- (a) There was no valid trial period in the employment agreement between Neal Gapes and Omnicron Productions Limited (Omnicron or the company);
- (b) Mr Gapes was unjustifiably dismissed by Omnicron; and
- (c) Omnicron was to pay Mr Gapes \$13,435.88 gross as reimbursement of remuneration and \$13,500.00 as compensation for non-economic loss.<sup>1</sup>

[2] Mr Gapes did not succeed in establishing his claim for commission.

[3] The parties were invited to attempt to resolve the question of costs between themselves but were unable to reach agreement.

### **Submissions from Mr Gapes**

[4] Mr Gapes' submissions refer to him seeking the daily tariff of \$4,500 but then go on to say that he is seeking an award of the "full costs" of \$14,914.50. I take that figure to be based on actual costs of \$10,414.50 (incl GST) plus the \$4,500 daily tariff.

[5] Although Mr Gapes represented himself at the investigation meeting, he received advice and assistance from a lawyer before and during the Authority's proceeding. He decided not to have the lawyer present at the investigation meeting due to the expense involved and his own financial position. Mr Gapes filed a lawyer's invoice for \$10,414.40 (incl GST), which included work up to and including mediation and Authority preparation. Mr Gapes also relies on *Calderbank* (without prejudice save as to costs) offers made on his behalf.

[6] The submissions cover Mr Gapes' financial circumstances and evidence is provided in support.

[7] Mr Gapes refers to Ondrej Havas, Omnicron's executive producer as well as director and shareholder, being responsible for his costs. Omnicron is not referred to.

[8] Mr Gapes suggests that I can take into account an earlier reference by Omnicron to the prospect of paying Mr Gapes a finder's fee in lieu of a commission payment.

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<sup>1</sup> *Neal Gapes v Omnicron Productions Limited* [2020] NZERA 115.

## **Submissions from Omnicron**

[9] Omnicron's representative informed the Authority that he did not have instructions in relation to the costs application but did note that that normal principles in relation to the tariff should apply.

## **Costs principles**

[10] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. The Authority's discretion is governed by principles which were outlined by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.<sup>2</sup> These include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. In addition, 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 can be taken into account in inflating or reducing an award.

[11] Costs are awarded as a contribution towards money spent on representation. They are not designed to provide some additional compensation or damages which the claimant feels was not adequately covered by a substantive decision. Even indemnity costs, where the claimant is fully reimbursed for his costs, do not give the claimant more than he or she has actually paid out for representation and disbursements in pursuing or defending the claim.

## **Assessment**

[12] Costs usually follow the event, that is, the unsuccessful party will be required to make a contribution towards the successful party's costs. Mr Gapes was largely successful in his claims, in that he established the trial period was not valid and that he was unjustifiably dismissed. He should receive a contribution to his costs.

[13] Looking at the actual costs, costs incurred in preparation for and attendance at mediation are not usually allowed for in a costs award as parties are expected to make efforts at resolution. However, the invoice also includes substantial costs related to the initial receipt of instructions and preparation for the Authority.

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<sup>2</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

[14] I do not accept that Mr Gapes is entitled to indemnity costs. Such costs are usually only awarded in cases involving exceptionally bad behaviour, which is not the situation here.<sup>3</sup>

[15] I now consider the notional daily tariff. This tariff is designed to be a starting point for consideration of costs. It is not added on to the actual costs incurred.

[16] The investigation meeting lasted one full day and so the applicable tariff is \$4,500. I then look at whether there are matters which should lead to an increase or decrease from the tariff.

[17] I take into account that Mr Gapes was not represented at the investigation meeting.

[18] I have considered whether a reduction should be made for Mr Gapes' pursuit of the unsuccessful commission claim but have concluded that it should not be. The evidence regarding the commission claim took up a relatively small amount of the investigation meeting. The whole matter was considered in a day.

#### *Calderbank offers*

[19] A series of offers to settle were made on Mr Gapes' behalf over an extended period of time. Shortly after Mr Gapes' dismissal, a 30 November 2018 offer was made "without prejudice save as to costs", to settle for \$10,000 under s 123(1)(c)(i) of the Act.

[20] Another *Calderbank* offer was made on 10 March 2019 for \$15,000 under the same sub-section. Omnicron counter-offered. Mr Gapes' representative then made another *Calderbank* offer on 20 March 2019 to settle for payment of \$8,500 under s 123(1)(c)(i), along with \$3,675 plus GST towards costs. Another counter offer was made for Omnicron.

[21] The last *Calderbank* offer was made on 8 October 2019, which included Omnicron paying \$15,876 under s 123(1)(c) of the Act along with a \$8,124 (incl GST) contribution towards costs.

[22] The total grievance remedies I awarded were \$26,935.88. Even including the costs, the amount in the 8 October 2019 offer was less than the amounts Mr Gapes was awarded in the substantive determination. The earlier offers were for considerably less. Omnicron thus had opportunities to resolve this matter for less than the amount awarded.

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<sup>3</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [8].

[23] The earlier offers were before the claim was filed in the Authority and allowed a week for consideration. The final offer was made a couple of weeks before the investigation meeting and only allowed three days but this was in the context of the series of offers, with Omnicron being represented and having made its own offers. Omnicron had reasonable opportunities to resolve and avoid further costs being incurred.

[24] The Authority should take a “steely” approach to awarding costs where an unsuccessful party has not accepted a settlement offer which would have resulted in that party obtaining a better outcome than it achieved in the Authority’s determination.<sup>4</sup> However, this still does not require an uplift to a level amounting to an award of indemnity costs.<sup>5</sup>

[25] An increase should be made to the daily tariff for the *Calderbank* offers.

*Matters which cannot be dealt with in the costs award*

[26] Although Mr Gapes’ submissions seek to make Mr Havas responsible for the costs, I can see no basis for that. The employment agreement was with Omnicron, the claim was filed solely against the company and the orders in the substantive determination were against Omnicron. Mr Havas is not a party to this proceeding.

[27] Mr Gapes seeks interest on the grievance remedies awarded in the substantive determination. This is not a costs matter.

[28] Mr Gapes now seeks to raise the prospect of being awarded a finder’s fee referred to by Omnicron as a possibility at one point. This is not a question of costs. The commission issue was dealt with in the substantive determination.

*Award*

[29] I order Omnicron Productions Limited to pay Mr Gapes within 21 days of the date of this determination the sum of \$6,000.00 as a contribution towards his costs.

[30] In addition Mr Gapes is entitled to be reimbursed for the Authority’s filing fee. I order Omnicron Productions Limited to pay Mr Gapes the sum of \$71.56 within 21 days of the date of this determination.

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<sup>4</sup> *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [109].

<sup>5</sup> *Stevens v Hapag-Lloyd (NZ) Limited* [2015] NZEmpC 28 at [94].

**Nicola Craig**  
**Member of the Employment Relations Authority**