

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 4
3069692

BETWEEN	FAGAN LEE Applicant
AND	TECH 5 RECRUITMENT LIMITED First Respondent
AND	GROUNDS & SERVICES LIMITED Second Respondent

Member of Authority: David G Beck

Representatives: Anna Oberndorfer, advocate for the Applicant
John Dustow, advocate for the first Respondent
John Farrow and Katrina Pfeifer, counsel for the second Respondent

Investigation Meeting: On the papers

Submissions Received: 14 December 2020 from the Applicant
21 December 2020 from the first Respondent
23 December 2020 from the second Respondent

Date of Determination: 24 December 2020

COST DETERMINATION OF THE AUTHORITY

The Determination

- [1] On 1 December 2020 the Authority issued a determination finding that:
- a. Fagan Lee was disadvantaged whilst in the employ of Tech 5 Recruitment Limited.
 - b. Fagan Lee did not establish a claim had been in an employment relationship with Grounds & Services Limited.
 - c. Tech 5 Recruitment Limited must pay Fagan Lee a \$760.87 (gross) notice payment and compensation of \$5,400 pursuant to section 123(1)(c)(i) Employment Relations Act 2000.

[2] The parties were asked to explore resolving costs by agreement but failed to do so.

Submissions from Fagan Lee

[3] Ms Oberndorfer's submission largely concentrated on how the first respondent conducted proceedings and after initially suggesting that the general rule was that costs follow the event for the successful party and that there was no reason why Mr Lee "should not receive a portion of the daily tariff towards his costs to reflect there was an element of success" Ms Oberndorfer went on to contend that the extent of Mr Lee's success against the first respondent should be acknowledged including an uplift of the daily tariff to reflect the fact that Mr Lee could not recover GST.

[4] In respect of the second respondent Ms Oberndorfer suggested that the pursuit of an unsuccessful claim against them "ought not to be sanctioned through costs" as this would have a chilling effect on similar claims.

[5] Ms Oberndorfer claimed \$3,593.75 and the filing fee of \$71.56 against the first respondent and Ms Oberndorfer suggested the second respondent should bear its own costs.

Submission from Tech 5 Recruitment Limited

[6] Mr Dustow for the first respondent suggested that costs and disbursements should be awarded in the their favour on his assessment that all aspects of Mr Lee's claims had been dismissed and that it was the Authority that had found on matters not pleaded by Mr Lee. Mr Dustow also traversed or rather sought to re-litigate aspects of the case and pre-hearing

matters that some, admittedly had been put at issue by Ms Oberndorfer. I observe such was inappropriate given the first respondent had an option of referring the matter to the Employment Court if they were dissatisfied with the Authority decision and the basis for such. Mr Dustow however, made a legitimate observation that a significant portion of the Authority hearing both in hearing evidence and submissions was spent on dealing with Mr Lee's unsuccessful substantive claims.

[7] Including disbursements and a loss of business opportunity due to attendance of witnesses', Ms Dustow after suggesting scale costs was their 'entitlement' (\$8,000) sought a costs uplift in the first respondent's favour of \$14,380.

Submission from Grounds & Services Limited

[8] Counsel opened their submission by not surprisingly pointing to Mr Lee being "wholly unsuccessful in all of his claims against the Second Respondent" and then went on to develop an argument that because Mr Lee had rejected a Calderbank offer of \$10,000 that they had been a party too, then an award of indemnity or full costs was appropriate against Mr Lee in the amount of \$41,434.20.

Costs principles

[9] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ including: that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.² These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*. 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.

¹ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

² Section 160(2) Employment Relations Act 2000.

- 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.³

The dilemma of 'mixed success'

[10] To assess costs where one party as is here has only mixed success can be problematic as it is arguable that Mr Lee's 'success' (against the first respondent) was partial and compensation modest as he failed to establish that he had been unjustifiably dismissed by either party and in respect of his claim against the second respondent he was unable to get over the threshold of establishing that an employment relationship existed. However Judge Smith in *William Coomer v JA McCallum and Son Limited* noted (omitting citations):

Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any 'realistic appraisal'. That conclusion followed because they obtained a monetary award It was immaterial that they had not succeeded to the full extent of their claim because' ... success on more limited terms is still success.⁴

The settlement offer

[11] The making of a settlement offer in the form of a 'Calderbank' offer or 'without prejudice except as to costs' is a relevant factor when considering costs where such does not better the award made by the Authority. Whilst generally the Authority has a low level jurisdiction, hence a focus on scale costs, there is authority to suggest a 'steely' approach is required in the broader public interest.⁵

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

⁴ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

⁵ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

[12] Here however, the description of the offer provided by the parties is not clear (and no party provided the actual correspondence) apart from global offers made whether the initial Calderbank offer to Mr Lee addressed vindication in the form of an apology or acknowledgment of shortcomings on the first respondent's part and it appears not to have addressed costs which at the time of the offer being made would have been modest. If those elements had been present I would have been more minded to assess the gap between the settlement offer and the eventual outcome as being decisive in favour of letting costs lie where they fall.

Assessment

[13] Given that this was a claim involving an alleged 'triangular' employment relationship I must separately assess the costs between each party.

Mr Lee and Tech 5 Recruitment Limited

[14] I find that as Mr Lee was successful in establishing that Tech 5 owed him certain important duties at both the commencement and ending of the employment placement with the second respondent he is entitled to a modest costs contribution. Given the discretionary nature of the Authority's jurisdiction I consider that scale costs are appropriate for a near two day hearing. I fix the final amount as claimed, at \$3,125 exclusive of GST and reimbursement of the filing fee of \$71.56.

Mr Lee and Grounds & Services Limited

[15] I find that the second respondent is entitled to a contribution to costs as they were effectively "wasted costs". However, the costs claimed by counsel are manifestly excessive and unreasonable for this jurisdiction. Chief Judge Inglis recently reminded parties that the Authority is designed as an "accessible forum" where the Authority Member "takes a key role in investigating the matter" and that "any legal costs incurred by parties in preparing and attending an investigation meeting ought to be modest".⁶ This is why generally the Authority takes a scale costs approach.

⁶ *Canterbury Westland Kindergarten Association v Barnes* [2020] NZEMPC 34/2019 at [22].

[16] Here the legal issues were not complex and involved application of an easily understood legal test that was fact specific.⁷ I also have to take into Mr Lee's ability to meet any costs award given he is a young low paid worker. In all of circumstances I consider it equitable that Mr Lee does make a contribution to the second respondent's costs to reflect the fact that he was wholly unsuccessful in his claim against them – I fix that at an amount of \$3,000.

Awards

[17] I order Tech 5 Recruitment Limited to pay Fagan Lee the sum of \$3,196.56 as a contribution to legal costs (inclusive of the filing fee) and Fagan Lee to pay Grounds & Services Limited the sum of \$3,000 as a contribution to their costs incurred.

David G Beck
Member of the Employment Relations Authority

⁷ *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 150, [2017] ERNZ 835 at [31].