

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 450
3119153

BETWEEN	DANSTAN OHARA WICKRAMASINGHE MALAGODA GAMAGE Applicant
AND	NORTH CITY CAR VALET (2013) LIMITED Respondent

Member of Authority: Peter Fuiava

Representatives: Dave Cain and Alex Kersjes, advocates for the
Applicant
Cherie Holland, counsel for the Respondent

Submissions and information received: 13 and 28 July 2022 from the Applicant
27 July and 1 August 2022 from the Respondent

Determination: 9 September 2022

COSTS DETERMINATION OF THE AUTHORITY

- A. North City Car Valet (2013) Limited to pay \$2,667 as a contribution towards the applicant's costs no later than 5 pm Friday 7 October 2022.**

[1] In a determination issued as [2022] NZERA 287 on 30 June 2022, the Authority found that Danstan Ohara Wickramasinghe Malagoda Gamage (Mr Ohara) was owed \$106.20 (gross) in unpaid wages, \$374.72 (gross) in unpaid holiday pay, interest thereon, expenses of \$71.56 being the filing fee to lodge proceedings in the Authority, and \$2,000 by way of penalty against North City Car Valet (2013) Limited (North City) for failing to provide Mr Ohara with a written employment agreement under s 65 of the

Employment Relations Act 2000 (the Act). The penalty was directed to be paid in its entirety to Mr Ohara.¹

[2] While Mr Ohara was successful regarding the above, he was unsuccessful with the main plank of his claim which was that he had been unjustifiably dismissed by Zhangyu (Kelvin) Guo, North City's company director.

[3] The essential issue in this determination is the assessment of costs where there has been mixed measure of success.

[4] At [49] of the Authority's determination the parties were encouraged to resolve the issue of costs between themselves. That has not been successful. As directed, Mr Ohara filed his memorandum as to costs on 13 July 2022. A reply memorandum from North City was filed some 14 days later.

Costs principles

[5] The Authority has the power under clause 15 of Schedule 2 of the Act to award costs. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.² Those principles are as follows:

- a. The Authority has a discretion whether to award costs, and how much, but the discretion must be exercised in accordance with principle and not arbitrarily.
- b. The statutory jurisdiction toward costs is consistent with the Authority's equity and good conscience jurisdiction.
- c. Equity and good conscience are to be considered on a case-by-case basis.
- d. Costs are not to be used to punish or express disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- e. The Authority can consider whether all or any of the parties' costs were unnecessary or unreasonable.

¹ Employment Relations Act 2000, s 136.

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

- f. Costs generally follow the event (i.e., the unsuccessful party will normally be required to contribute to the costs of the successful party).
- g. *Calderbank offers* may be taken into account when setting costs.
- h. Awards will be modest.
- i. Frequently costs are judged against the notional daily tariff.
- j. The nature of the case can influence costs, which means the Authority may order those costs should lie where they fall.

[6] On 2 May 2022, Practice Note 2, Costs in the Employment Relations Authority, came into effect. Among other things, the practice note reaffirmed the Authority's use of the notional daily tariff as the starting point in assessing costs.

Costs submissions

[7] In his submissions Mr Cain acknowledged that although Mr Ohara had been unsuccessful with his unjustifiable dismissal claim, he was nevertheless successful with his remaining claims as noted above. Having succeeded with those claims, Mr Cain submits that costs should follow the event and that North City, as the unsuccessful party, should be required to contribute to Mr Ohara's costs.

[8] Mr Cain provided the Authority with a copy of an invoice in the amount of \$11,054.44 (GST included) for professional services rendered to Mr Ohara of which \$112.56 related to disbursements. Mr Cain notes that the investigation meeting (on 21 January 2022) took one full day which was followed by an exchange of written closing submissions in February 2022 and a two-hour submissions' hearing by audio-visual link (AVL) for the hearing of oral closing submissions. Mr Cain seeks costs equivalent to an investigation meeting of one-and-a-half days which equates to \$6,250 (\$4,500 for the first day + \$1,750 being half the daily tariff for a subsequent day). No uplift from the daily tariff was sought.

[9] In response, Ms Holland's submissions refers the Authority to *The 20 District Health Boards v New Zealand Nurses Organisation* where the Employment Court found that the New Zealand Nurses Organisation had won the "substance" of the case.³ Ms Holland submitted that, similarly, North City won the substance of the case here

³ *The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 163 at [21].

and that Mr Ohara should be required to contribute to its costs as a result. This was not a situation of mixed success where costs should lie where they fall.

[10] Ms Holland submitted that the most substantial period of time taken in the investigation meeting was spent by the Authority extracting information from witnesses to determine whether Mr Ohara was unjustifiably dismissed. Counsel noted that all four of the respondent's witnesses were found credible and that the Authority had made a strong determination in North City's favour. Counsel further advised that the company had incurred legal costs of approximately \$23,000 and that it was seeking \$6,250 in costs against Mr Ohara as a result.

[11] Finally, Ms Holland submitted that by way of email dated 13 January 2022 at 5.23 pm, a Calderbank offer of \$5,000 was sent to Mr Ohara's employment advocate. in full and final settlement but this was rejected.

[12] Alex Kersjes, the principal for whom Mr Cain works, emailed the Authority on 28 July 2022 to advise that the offer Ms Holland made was not a valid Calderbank offer because it did not have the words "except as to costs."

[13] The Authority subsequently emailed the parties to ascertain whether North City conceded that no Calderbank offer had been made and if not, Ms Holland was asked to provide a copy of the email in question. On 1 August 2022, Ms Holland advised that a valid Calderbank offer had been made a copy of which was provided.

Costs analysis

Settlement offer not a valid Calderbank offer

[14] A Calderbank offer is a without prejudice save as to costs offer that is made to settle a dispute. Such an offer puts the other side on notice that if the dispute goes to hearing and the outcome is less favourable than the Calderbank offer that was made, the side making the offer may disclose it to the court when determining costs. While there is no prescribed form for a Calderbank offer it should have the words "without prejudice, except as to costs"; explain the consequences of failing to accept the offer; be clear and transparent; and provide a reasonable time for acceptance.

[15] Ms Holland’s email of 13 January 2022 does not expressly record the words “made without prejudice, except as to costs.” Nor does it explain what the consequences are for declining the offer. While the email is a without prejudice settlement offer, it is not a Calderbank offer and therefore cannot be taken into consideration in setting costs.

Who won the case?

[16] Determining who may have won a case in a mixed success situation is not a straightforward exercise and requires a nuanced approach. The approach taken by the Authority is to analyse the outcomes for the respective parties. That approach was approved by the Employment Court in *Best Health Products Limited v Cherie Nee*.⁴

[17] The representatives both agree that the starting point should be based on an investigation meeting lasting one-and-a-half days as that would take into account one full day investigation meeting, the preparation of closing written submissions, and a two-hour closing submissions’ meeting by AVL. However, there is one matter which both representatives have overlooked in their costs’ submissions—the preliminary determination of 20 July 2021.⁵

[18] The preliminary determination concerned an evidential challenge brought by North City to exclude a surreptitious audio recording by Mr Ohara from being admitted into evidence. The audio recording related to a conversation Mr Ohara had with Mr Guo at North City’s work premises on 28 August 2020. For the reasons set out in the preliminary determination, which I need not traverse here, North City’s challenge was unsuccessful and the recording and its transcript were allowed into evidence.

[19] Keeping in mind that cost awards should be modest, the Authority notes that the preliminary matter required the filing of written submissions from the representatives and a submissions’ hearing by AVL. In combination with the release of a written preliminary determination by the Authority, a half day uplift is appropriate in the circumstances.

⁴ *Best Health Products Limited v Cherie Nee* [2016] NZEmpC 16.

⁵ *Danstan Malagoda v North City Car Valet (2013) Limited* [2021] NZERA 309.

[20] In the aggregate, the Authority adopts as its starting point in this case the notional tariff for a two-day investigation meeting of \$8,000. As of the date of drafting this costs determination, \$4,500 is the current daily tariff for the first day of hearing of any matter in the Authority. For a second or subsequent day, \$3,500 is the going rate. Factors to consider next are matters which could lead to an increase or decrease from this starting point.

[21] Mr Cain's quantum of costs does not recognise that Mr Ohara was unsuccessful with his core claim that he had allegedly been unjustifiably dismissed. A significant amount of the Authority's time in the investigation meeting was spent questioning Mr Ohara, Mr Quo and North City's two other witnesses in establishing the facts. Not only was Mr Ohara unsuccessful with his unjustified dismissal claim, for which he sought lost wages and compensation, he was also unsuccessful with his claim that Mr Guo agreed to pay him \$20 per hour from the commencement of his employment and that Mr Guo had promised to provide him with 40 hours work per week after Mr Ohara obtained a post-study work visa.

[22] Given the Authority's determination went largely against Mr Ohara, this must be taken into account if its costs calculus is to accord with principle, equity and good conscience. However, I do not endorse the view that North City "won the case" because it was ordered to pay a \$2,000 penalty for a breach of a minimum employment standard which cannot be overlooked.

Conclusion

[23] While it is true that Mr Ohara did not succeed to the full extent of his claims against North City, limited success is still success. Put at its highest, Mr Ohara was successful to approximately one third of his claims against North City and this includes the preliminary determination that went in his favour.

[24] The maxim that costs follow the event applies but this must be tempered in light of Mr Ohara's Pyrrhic victory in the Authority. The starting point of \$8,000 must therefore be reduced by two thirds.

Orders

[25] Accordingly, North City Car Valet (2013) Limited is to pay Danstan Ohara Wickramasinghe Malagoda Gamage \$2,667 as a contribution towards his costs no later than 5 pm Friday 14 October 2022.

Peter Fuiava
Member of the Employment Relations Authority