

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2023] NZERA 118
3157064

BETWEEN KIMBERLEY PRICE
Applicant

AND PINEVALE FARMS LIMITED
First Respondent

AND MARK HURST
Second Respondent

Member of Authority: David G Beck

Representatives: Louise Smith-Moore, advocate for the Applicant
Amy Keir, counsel for the Respondents

Investigation Meeting: On the papers

Submissions Received: 17 February 2023 from the Applicant
22 February 2022 from the Respondent

Date of Determination: 8 March 2023

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] In a 30 January 2023 determination, the Authority found that Kimberley Price was unjustifiably dismissed; Pinevale Farms Limited (Pinevale) was her employer and that Pinevale must pay Kimberley Price:

- (i) \$20,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000 (the Act).

(ii) \$25,000 (gross) unpaid wages, pursuant to s 123(1)(b) of the Act.

(iii) \$800 (gross) unpaid wages for a notice period worked.

(iv) \$8,287.13 (gross) unpaid holiday pay.

(v) \$2,160 (gross) for working on nine public holidays.

(vi) Interest on the above amounts.

[2] As part of the determination, the Authority did not find that Mark Hurst employed Ms Price in a personal capacity and he was not joined as a party to the proceedings

[3] I reserved costs and encouraged the parties to reach an agreement. No agreement was achieved. The investigation meeting took two days with timetabled submissions thereafter. I now consider the submissions of each party to assist in exercising the Authority's inherent discretion.

Submissions from the parties

[4] Ms Smith-Moore's submission concentrated on a claim for actual costs in the amount of \$25,858.74 (inclusive of disbursements). In support of an uplift for costs on the usual Authority daily tariff approach, Ms Smith Moore cited an early Calderbank offer directed to Pinevale Farms Limited. This was made on 11 February 2022 seeking a compensatory payment of \$20,000 and \$4,000 plus GST for costs.

[5] The current Authority tariff approach is \$4,500 to cover the first investigation meeting day and \$3,500 for a second day. ¹ Ms Smith-Moore suggested given protracted proceedings, that an uplift of \$4,000 beyond the normal tariff or an amount to be determined by the Authority is warranted. The other factor cited in support of an uplift was unnecessary travel costs incurred by the applicant's representative when the first investigation meeting was cancelled at a late stage.

[6] By contrast, Pinevale and Mark Hurst's counsel, opposed the suggestion that there be an uplift in tariff-based costs and suggested consideration should be given to the fact that Ms Price was unsuccessful in all her claims and, that the result was only a fraction of the value of the claims made. Ms Keir implied that Ms Price's advocate's conduct of the matter and how

¹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

the various claims were formulated, increased costs unnecessarily for all parties. On the Calderbank offer, while acknowledging that the ultimate outcome for Ms Price significantly exceeded the settlement offer proposed, Ms Keir suggested that the offer was properly rejected as it did not result in an agreement that Mr Hurst be removed from the proceedings. Ms Keir pointed to the incongruity of only settling on behalf of Pinevale, while allowing Ms Price to proceed to the Authority on her ultimately mistaken view, that Mr Hurst was personally liable for the actions of the employer.

Cost principles

[7] 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*² including that costs are not normally to be used as a punishment or as a reflection on how an unsuccessful party conducted proceedings and awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.³ These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*. They 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.

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

³ Section 160(2) Employment Relations Act 2000.

⁴ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

The dilemma of mixed success

[8] 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.⁵

[9] To assess costs where one party as is here, has a degree of mixed success can sometimes be problematic.⁶ It is arguable that Ms Price’s success was partial. However, standing back and examining the main elements of the claims and contrasting them with cases of partial success on substantive matters, Ms Price established she was unjustifiably dismissed, she obtained a significant award of compensation for distress incurred and was awarded unpaid wages. More pertinently, the Authority found Pinevale breached statutory obligations for which unpaid holiday entitlements were awarded. In the normal course of a well formulated claim this was a successful outcome for Ms Price. I find this does not call for a particularly nuanced assessment as it is difficult to consider the extent of a claimed partial success for Mr Hurst by his being found not personally liable, as he is the sole director and shareholder of Pinevale and ultimately responsible for seeing that the awards made are met. In addition, only Mr Hurst’s actions were under scrutiny when assessing the outcome and remedies.

The Settlement offer

[10] The making of a settlement offer, in the form of a ‘Calderbank’ offer or ‘without prejudice except as to costs’ may be a relevant factor where such does better the award made by the Authority. Generally, the Authority has a low-level jurisdiction, hence a focus on tariff-based costs. However, there is authority to suggest a ‘steely’ approach is sometimes required in the broader public interest.⁷

[11] Here, the Calderbank offer disclosed by Ms Smith-Moore, whilst being made early and modest compared to the ultimate outcome, is complicated by it not being an offer to end

⁵ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

⁶ Op cit at [37]

⁷ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

litigation against Mr Hurst. In this circumstance, the Authority cannot take the offer into account.

Assessment

[12] The Authority's tariff-based approach has often been endorsed by the Employment Court as being consistent with the principles and objectives of the Employment Relations Act 2000.⁸

[13] In assessing costs overall, I make it clear that the comment Ms Keir has made about the seemingly hopeless nature of some claims advanced being somehow vexatious, is a matter I have not considered particularly significant. This was a legitimate dispute about an employment relationship and whilst Ms Price's advocate and counsel took a very robust approach, the Authority does not, as per the principles outlined in *Fagotti* consider using costs as a punishment for Ms Price's advocates' conduct of her case is warranted.

[14] Taking all the factors identified in submissions into account, I consider that it is equitable to find that Ms Price in successfully pursuing in part, statutory entitlements, is entitled to a modest costs uplift of \$2,000 and overall, a cost contribution for the two days investigation meeting of \$10,000.

Awards

[15] I order Pinevale Farms Limited to pay Kimberley Price the sum of \$10,000 as a contribution to her legal costs within 28 days of the issuing of this determination.

David G Beck
Member of the Employment Relations Authority

⁸ See for example *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpoC 28.