

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 178  
3151785

BETWEEN	PHILLIP BOULTON Applicant
AND	FOOD THINGY LIMITED t/a BIRD THE WORD Respondent

Member of Authority: Alastair Dumbleton

Representatives: Lawrence Anderson, advocate for the Applicant  
Russell Drake, advocate for the Respondent

Costs submissions received: 17 March 2023

Determination: 12 April 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] An application made by Phillip Boulton to the Authority was investigated and determined on 6 March 2023.

[2] In its written Determination the Authority found

- Although Mr Boulton had wished to challenge his dismissal by Food Thingy Ltd (FTL), he was prevented from bringing a personal grievance or legal proceedings by a valid and effective 90-day trial provision in his employment agreement

- The employment agreement had been unfairly bargained for by FTL, although compensation or other remedy was not ordered against the employer
- FTL breached its duty of good faith when it refused to give Mr Boulton, orally, a reason for invoking the trial provision, although a penalty was not ordered against the employer
- FTL did not unlawfully reduce the hours of work of Mr Boulton
- FTL failed to allow rest breaks to Mr Boulton, who had a personal grievance for that reason. FTL was ordered to pay him compensation of \$500.

[3] With these findings the parties can appropriately be viewed as having had mixed success but, reflecting the predominant outcome, FTL was held by the Authority to be entitled to an order for its reasonable legal costs to be met by Mr Boulton.

[4] The law to be applied by the Authority in determining costs was reviewed by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup>.

[5] Principles formulated by the Court include that costs are not to be awarded as punishment or to express disapproval of a party's conduct. Awards are to compensate a party who or which has incurred expense in applying to the Authority for it to investigate and determine claims or has incurred expense in responding to such claims. The amount of costs will usually be modest, and they will normally be awarded to the party who or which is successful in the outcome of the Authority's investigation.

[6] The Authority has a discretion to award costs based on a daily tariff, which it fixes from time to time and publicises. Currently the tariff is \$4,500 for the first full day and \$3,500 for each subsequent day of an investigation meeting.

[7] The principles formulated also include that conduct which increased costs unnecessarily can be considered in increasing or reducing an award.

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<sup>1</sup> [2005] ERNZ 808

[8] The Authority must be satisfied that costs sought do not exceed actual costs. Whether fees are reasonable or have reasonably been incurred, is also a long-established factor in assessing costs in the employment law jurisdiction; *Order of St John v Greig*<sup>2</sup>.

[9] In applying for an award of costs FTL has submitted that costs should be fixed by applying the Authority's current daily tariff (\$4,500) to the full day of the investigation meeting which took place.

[10] FTL submitted that it was wholly successful in the result of the investigation and that there should be no reduction of the tariff.

[11] For Mr Boulton in reply, it was submitted that no award of costs should be made, for reasons including that FTL had not actually incurred any costs of representation.

[12] This submission may have been prompted by FTL's failure to provide evidence or advice as to the actual costs, if any, it had expended on the investigation meeting.

[13] Since the purpose of costs is to compensate, the Authority expects to receive evidence or advice that there has been an adjustment or transference of funds by a party, indicating expenditure for which compensation can be assessed and claimed. It is a basic principle that a party will not be entitled to recover any more costs than those actually and reasonably incurred. The Authority must therefore be satisfied that costs were incurred and what the amount of those was.

[14] Upon request Mr Drake forwarded copies of invoices rendered to FTL for his firm's services. Although he also sought to provide those for the eyes of the Authority only, the Authority sent them to Mr Boulton's advocate. This was done in accordance with its Practice Note of March 2016, which is published to advocates and the public generally on its website. There is nothing exceptional involved in the production of invoices or their contents which requires any departure from standard practice in this case.

[15] The usual contents of invoices and purposes for which they are provided to the Authority, is clearly information likely to have some bearing on the Authority's

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<sup>2</sup> [2004] 2 ERNZ 137

decision whether to award costs and the amount. For that reason, Mr Boulton as a potentially affected party, had a right to know about that information and have an opportunity to comment on it. Providing it to him is necessary under s 157(2) of the Employment Relations Act 2000 (ER Act), which requires the Authority to comply with the principles of natural justice in carrying out its role.

[16] Applying the daily tariff is a suitable approach in this case, although an adjustment of the one-day amount needs to be made to allow for Mr Boulton's level of success in relation to the findings in his favour of unfair bargaining, breach of good faith and failure to allow his full entitlement to rest breaks.

[17] Although only the last was supported with a monetary remedy (\$500 compensation), the importance of the findings as providing vindication is undiminished by that.

[18] Unfair bargaining is a breach of a statute based on good faith relationships and a declaration that there has been a breach is an important statement upholding an employee's rights, particularly in a relationship where power is regarded by the statute as unevenly balanced against the employee. If a penalty had been claimed for FTL's failure to provide Mr Boulton with a reasonable opportunity to seek advice about the employment agreement offered to him, the Authority is likely to have awarded a penalty to punish the breach.

[19] No other remedy was ordered because the Authority was satisfied that entry into the employment relationship was not procured or induced by the failure to bargain fairly. Mr Boulton had been keen to start new employment as soon as possible, he was unsurprised to find a 90-day provision in his agreement and he had been subject to similar provisions before, but even if he chose not to use it, Mr Boulton was entitled to a reasonable opportunity to seek advice.

[20] As to the failure to orally give a reason for the dismissal, the Employment Court has held in *Smith v Stokes Valley Pharmacy (2009) Ltd*<sup>3</sup> that a failure to give a statement in that form when requested is a breach of good faith. A declaration to that effect can have some remedial effect.

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<sup>3</sup> [2010] NZEmpC 111

[21] FTL was also found not to have allowed Mr Boulton all the rest breaks he was entitled to. To remedy his personal grievance claim in that regard, FTL was ordered to pay compensation of \$500.

[22] Looking at the result of the investigation on an issue by issue basis therefore, FTL was not completely successful in the way the employment relationship problem has been resolved. Two thirds success is a more balanced assessment of the outcome overall for FTL.

[23] Accordingly, costs are fixed at \$3,000, being two thirds of \$4,500. These are to be paid by Mr Boulton directly to FTL, within 14 days of the date of this determination.

Alastair Dumbleton  
Member of the Employment Relations Authority