

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2023] NZERA 229
3144687

BETWEEN

WARD HAWKER
Applicant

AND

NORTH CANTERBURY
REFRIGERATION & ELECTRICAL
[2018] LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Anthony Marsh, advocate for the Applicant
Robert Thompson, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 18 April 2023 from the Applicant
26 April 2023 from the Respondent

Date of Determination: 5 May 2023

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] In a 3 April 2023 determination, the Authority found that Ward Hawker was unjustifiably disadvantaged; owed unpaid wages and holiday pay; and that North Canterbury Refrigeration & Electrical [2018] Limited (NCRE) must pay Ward Hawker:

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

(ii) \$6,000 (gross) unpaid wages, pursuant to s 123(1)(b) of the Act.

(iii) 8% holiday pay calculated on the above amount (being \$480 gross).¹

[2] As part of the determination, the Authority did not find that Ward Hawker had been constructively dismissed.

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

Submissions from the parties

[4] Mr Hawker's brief submission concentrated on a claim for the Authority notional daily rate or tariff, being \$6,250 for a one and a half-day investigation noting that Mr Hawker's actual costs were \$11,400.²

[5] In addition, Mr Hawker sought costs of four witnesses' attendance at the investigation meeting in the amount of \$530 and the Authority filing fee of \$71.55.

[6] By contrast, NCRE's advocate, suggested tariff-based costs be only a starting point and asserted consideration should be given to the fact that Mr Hawker was unsuccessful in his predominant claim that he was constructively dismissed. NCRE's advocate suggested a fair approach was to reduce the notional rate of \$4,500 for a day's investigation meeting to \$3,500. Unfortunately, NCRE's advocate did not recall that the investigation meeting took one and a half days.

¹ *Ward Hawker v North Canterbury Refrigeration & Electrical [2018] Limited* [2023] NZERA 161.

² For further information about the factors considered in assessing costs see:

www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

Costs 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*³ including those 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.⁴ 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.
- 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.⁵

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁴ Section 160(2) Employment Relations Act 2000.

⁵ *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. ⁶

[9] To assess costs where one party has a degree of mixed success can sometimes be problematic. ⁷ It is arguable that Mr Hawker’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, Mr Hawker established he was unjustifiably disadvantaged and obtained an above moderate award of compensation for the distress of this and was awarded unpaid wages. In the normal course of events this was a significantly successful outcome. I find this does not call for a particularly nuanced assessment as it is difficult to consider the extent of the claimed partial success for NCRE given that the Authority found that Mr Hawker was the subject of ongoing unreasonable and unjustified actions of his former employer.

Assessment

[10] 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

[11] Taking all the factors identified in submissions into account, I consider that it is equitable to award Mr Hawker tariff-based costs he seeks in the amount of \$6,250 and the

⁶ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

⁷ Op cit at [37]

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

Authority filing fee. I decline to award witness expenses as none were summonsed witnesses and Mr Marsh's suggestion that one witness attended as an expert witness was incorrect.

Awards

[12] I order North Canterbury Refrigeration & Electrical [2018] Limited to pay Ward Hawker the sum of \$6,250 as a contribution to legal costs and the Employment Relations Authority filing fee of \$71.55 within 28 days of the issuing of this determination.

David G Beck
Member of the Employment Relations Authority