**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**OTAUTAHI ROHE**

[2023] NZERA 405
3161426

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| | BETWEEN | HUGH O'NEILL<br>Applicant |
| | AND | PORT OTAGO LIMITED<br>Respondent |

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| Member of Authority: | David G Beck |
| Representatives: | Paul McBride, counsel for the Applicant<br>John Farrow and Kelly Thomson, counsel for the Respondent |
| Investigation Meeting: | On the papers |
| Submissions Received: | 17 July 2023 from the Applicant<br>26 July 2023 from the Respondent |
| Date of Determination: | 28 July 2023 |

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**COST DETERMINATION OF THE AUTHORITY**

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**The determination**

[1] Following an investigation meeting on 27,28 February and 1,2,3 and 17 March 2023 the Authority found that:

**(a)** Captain Hugh O'Neill was unjustifiably dismissed.

**(b)** Port Otago Limited must within 28 days of this determination being issued, pay: Captain Hugh O'Neill the sum of $17,500 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000;and:

**(c)** Lost remuneration of nine months pursuant to s 123(1)(c)(ii) Employment Relations Act 2000.

**(d)** Interest due on lost wages.

[2] I reserved costs and encouraged the parties to reach an agreement. No agreement was achieved. The investigation meeting took five and a half days with an additional half day afforded for submissions. I now consider the submissions of each party to assist in exercising the Authority's inherent discretion to determine costs.

**Submissions from the parties**

[3] A submission for Mr O'Neill concentrated on a claim for a "substantial order of costs" in the amount of $45,000 plus GST or $40,000 plus GST and disbursements (where "actual costs incurred where stated as $51,500 + GST and disbursements). In support of a significant uplift above the usual Authority notional daily rate approach, counsel cited the following broad factors that were expanded upon in submissions:

(a) The nature of the events and issues.

(b) The actual course of the Authority's investigation process (additional two days spent 'investigation meeting); and

(c) The Respondent's position, as exemplified in its Calderbank offer dated 4 October 2022 as to the substance – suggesting that if Mr O'Neill withdrew his application costs lie where they fall and warning him if Port Otago Limited successfully resisted his claim "actual costs" would be sought.

(d) A suggestion that a Calderbank offer made by the respondent to resolve costs post the determination on a notional daily rate approach of $18,500, was "unrealistic and demonstrably flawed".

[4] The current Authority notional daily rate approach is $4,500 for an investigation meeting of the first day of an investigation and $3,500 for each day thereafter. [1]

[5] Factors that counsel suggested increased Mr O'Neill's costs included: Port Otago Limited adopting an intransigent and unreasonable approach that necessitated the proceedings; the need to deal with substantial contested matters prior to the investigation meeting; additional costs of preparation due to a delayed investigation meeting; the necessity to reschedule and extend the investigation meeting to accommodate a witness; directed written submissions and an overall finding that Port Otago's reasons for dismissing Mr O'Neill were entirely unfounded. Counsel then sought to suggest that essentially Port Otago Limited unnecessarily deployed significant resources to defend the "demonstrably indefensible" implying that the investigation was unnecessarily prolonged.

[6] Counsel for Mr O'Neill in the alternative, suggested if the Authority adopts its usual notional daily rate approach, then an uplift on the daily tariff was required and he cited cases that supported this approach including *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2]

[7] By contrast, counsel for Port Otago Limited contested the factors alluded to in support of an uplift and suggested tariff-based costs of $20,8333.33 (based on 5 days and two thirds of a day of investigation time) was an appropriate starting point, with a reduction of a third to reflect Mr O'Neill's partial success. .

**Costs principles**

[8] 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* [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

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

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]

**Partial success?**

[9] 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]

[10] To assess costs where a party has a degree of success can sometimes be problematic. [7] It is arguable that Mr O'Neill's success was partial as he was not reinstated and it was found he had contributed to the situation that gave rise to his personal grievance claims. However, standing back and examining the main elements of the claims and contrasting them with cases of partial success on substantive matters, Mr O'Neill was vindicated and he established he was unjustifiably dismissed

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[4] Section 160(2) Employment Relations Act 2000.
[5] *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].
[6] *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].
[7] Op cit at [37]

and he obtained an above moderate award of compensation for the distress of this and was awarded a significant sum of lost wages. In the normal course of events this was a reasonably successful outcome and the general rule of 'costs following the event' is apt.

[11] I find this does not call for a particularly nuanced assessment in this case and do not find a reduction in the starting point of the notional daily rate is warranted but neither am I convinced that a significantly excessive costs award is warranted in these circumstances.

**Assessment**

[12] The Authority's notional daily rate approach is endorsed by the Employment Court as being consistent with the principles and objectives of the Employment Relations Act 2000. [8]

[13] In this situation I am not persuaded an uplift in costs to that actually incurred is warranted – evidently no settlement offer was advanced by Mr O'Neill as he appears to have placed emphasis on his unsuccessful claim to be reinstated (which is his prerogative). While there was a large amount of contested evidence to hear and significant preparation was required, this was a reasonably lengthy process with experienced counsel ably assisting the Authority but no particularly complex legal issues arose. I do not intend to arbitrate on parties' views of how their case was presented as that would be straying into an unwarranted assessment of considering costs as a punishment, suffice to say I was satisfied that all matters were appropriately contested and my analysis of the facts did not fully vindicate either parties' approach.

[14] Taking all the factors identified in submissions into account, I consider that it is equitable to award Mr O'Neill tariff-based costs for six and a half days. This in my view, reflects a balance of investigation time and preparation required. I fix the total amount at $23,750 and the Authority filing fee.

[15] I decline to award disbursements on the basis of counsel's incurred travel costs (that I did not find were unreasonably incurred) as local counsel are available as an option and I consider it would be inequitable in this jurisdiction for the respondent party to bear this additional cost.

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

[16] I follow the usual Authority approach of not awarding GST.

**Order**

[17] I order Port Otago Limited to pay Hugh O'Neill the sum of $23,750 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