

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 64
3161581

BETWEEN

MICHAEL OXLEY
Applicant

AND

COMPASS GROUP NEW
ZEALAND LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Bede Laracy, advocate for the Applicant
Paul McBride, counsel for the Respondent

Investigation Meeting: 7 September 2022 at Wellington

Submissions received: 13 January 2023 from the Applicant
15 December 2022 from the Respondent

Determination: 13 February 2023

COSTS DETERMINATION OF THE AUTHORITY

The determination

[1] On 21 November 2022 I issued a determination in which I found that Mr Oxley was not unjustifiably disadvantaged in his employment.¹ Compass Group New Zealand Limited (Compass Group) were successful in its defence of the claims made by Mr Oxley. The issue of costs was reserved, and the parties have not been able to agree on costs.

Timing of the costs application

[2] Compass Group sought leave to apply for costs outside of the timeframe advised by the Authority and as recorded in the substantive determination. Mr Oxley opposes

¹ *Michael Oxley v Compass Group New Zealand Limited* [2022] NZERA 609.

that application. I consider it clear that Mr Oxley was put on notice by Compass Group that it was seeking costs, and that any delay was largely a result of attempts to resolve the costs issues without need for recourse to the Authority (including difficulties in obtaining timely instructions from Mr Oxley). I do not consider there to be any prejudice to Mr Oxley arising from any delay and leave as sought by Compass Group is granted.

Submissions for Compass Group New Zealand Limited

[3] Counsel for Compass Group New Zealand Limited (Compass Group) submitted that his total costs were \$11,250. Compass Group seek a total contribution towards its costs of between \$7,500 and \$10,000 based on the current daily tariff, attendance at a one day investigation meeting, and on the basis that Mr Oxley unreasonably rejected a Calderbank offer made on 1 April 2021.

Submissions for Michael Oxley

[4] Mr Oxley submits that the Authority should not make an order of costs against him in excess of \$4,500, that being the daily tariff, and that the daily tariff should be reduced by half on account of Mr Oxley's personal financial circumstances.

[5] Submissions made on behalf of Mr Oxley detailed various events impacting on his ability to pay costs. I accept that there are financial impediments to making payment for costs that Mr Oxley faces. Mr Oxley's submissions sought to distinguish his case from that in *Scarborough v Micron Security*² where, as submitted by Compass Group, impecuniosity was considered a matter going to enforcement of an award, and not its quantum. Mr Oxley submits that in *Scarborough* the decisive factor was the presence of aggravating factors, and that such factors are not present here.

Analysis

Costs principles

[6] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.³

² *Scarborough v Micron Security* [2015] ERNZ 812 at [38].

³ Employment Relations Act 2000, Schedule 2, clause 15.

[7] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account in setting costs, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.⁴

[8] The daily tariff is usually taken as a starting point,⁵ although is not to be used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

Costs to follow the event

[9] I consider that Compass Group were successful in defending the claims made by Mr Oxley. Therefore, the starting presumption is that it is entitled to an award of costs.

Application of the daily tariff

[10] The substantive proceeding involved a one day investigation meeting. An application of the daily tariff approach would see a contribution of \$4,500.

Calderbank offer

[11] An offer of settlement for \$3,000 (and in addition contribution to legal fees of \$1,200) was made on 1 April 2021, well prior to the investigation meeting or any other substantive steps in the Authority. Mr Oxley was provided a reasonable opportunity to consider and respond to the offer, that being until 6 April 2021. The settlement offer was made on the basis that Mr Oxley's resignation from his employment would apply as of 10 April 2021 and recorded that Compass Group did not accept Mr Oxley's claims.

[12] I consider that the Calderbank offer made was in clear terms and was otherwise reasonable. I consider that Mr Oxley's rejection of the offer should be taken into account. I find that an uplift of \$1,000 is appropriate in the circumstances.

Mr Oxley's ability to pay

[13] I accept that impecuniosity is a relevant factor for consideration. However, consideration must also be given to the interests of Compass Group and wider public

⁴ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

⁵ Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

policy considerations.⁶ I consider it appropriate to take into account Mr Oxley's financial difficulties and an absence of any significant 'aggravating' factors. I consider that a modest downwards adjustment of \$1,500 is appropriate in the circumstances.

Orders

[14] For the above reasons I order Michael Oxley to pay Compass Group New Zealand Limited \$4,000 as a contribution towards the costs it incurred; and

[15] Payment is to be made within 28 days of this determination.

Rowan Anderson
Member of the Employment Relations Authority

⁶ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.