

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE

[2023] NZERA 769
3223459

BETWEEN

LUCAS SARGISON
Applicant

AND

BINE & CO LIMITED T/A
THE SLIP INN
Respondent

Member of Authority: Davinnia Tan

Representatives: Alex Kersjes, counsel for the Applicant
Cieran Bine Thomas for the Respondent

Investigation Meeting: On the papers

Submissions received: 9 November 2023 from Applicant
4 December 2023 from Respondent

Determination: 20 December 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] On 25 October 2023, I issued a determination in this matter, finding that Mr Sargison was unjustifiably dismissed by Bine & Co Limited (Bine & Co) and ordered Bine & Co to pay Mr Sargison:

- (a) The sum of \$6,784.83 gross as compensation for lost wages; and
- (b) The sum of \$15,000.00 without deduction as compensation for hurt, humiliation and injury to feelings.

[2] In that determination, the parties were encouraged to resolve any issue of costs between them, and the Authority made reference to its usual practice of applying the daily tariff to determine costs.

[3] The parties have not been able to resolve costs between themselves.

[4] Counsel for Mr Sargison has filed an application for a costs award of \$6,000 plus disbursements.

Submissions

Mr Sargison

[5] Counsel for Mr Sargison submitted that it has not been able to resolve the issue of costs with Bine & Co and its approach to the matter has made the process unnecessarily laborious and complicated, adding to an inflation of both cost and time.

[6] Counsel submitted that Mr Sargison had offered to settle the employment dispute at \$7000 (comprised of \$3,500 for compensation and \$3,500 as a contribution to Mr Sargison's legal costs) which was an effective Calderbank offer, and noted that he had received an amount that exceeded this amount following the Authority's determination of 25 October 2023.

[7] Counsel stated that Mr Sargison's actual legal costs were \$10,740.49 and acknowledged that the investigation meeting took half a day. As such Counsel submitted that the starting point should be \$2,250 taking into account the Authority's daily tariff. However counsel considers weight should be given to the Calderbank offer it made to Bine & Co and as such Mr Sargison seeks a costs award of \$6,000 which he considers to be a fair and reasonable quantum in these circumstances.

Bine & Co

[8] Mr Thomas has submitted that following the Authority's substantive determination of 25 October 2023, he has sought to arrange a payment plan in order to comply with the Authority's orders. In support of his submission, Mr Thomas provided copies of email exchanges between himself and counsel for Mr Sargison.

[9] These emails demonstrate that there is a disagreement between the parties on how compliance with the Authority's orders in its determination of 25 October 2023 should be given effect to by Bine & Co.

[10] However no submissions have been provided by Bine & Co directly on the issue of Mr Sargison's application for costs.

Principles

[11] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[12] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹ as confirmed in *Fagotti v Acme and Co Limited*.² The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment, and as the Court of Appeal has stated several times, a “steely approach” is to be adopted when considering Calderbank offers.³

[13] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.⁴

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

Analysis

[15] I acknowledge that the parties currently disagree on the methodology of compliance with the substantive determination.

¹ [2005] 1 ERNZ 808.

² [2015] NZEmpC 135 at 114.

³ *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA) at [53] and *Blue Star Print v David Mitchell* [2010] NZCA 385 at [20].

⁴ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

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

[16] However, the issue of resolution of costs is a separate matter and it is clear from the email exchanges that the matter of costs has been lost in that wider dispute and remains unresolved. This has resulted in an application for costs by Mr Sargison to resolve the issue of costs.

[17] As such this determination shall only deal with the issue of costs. How the parties comply with the substantive determination is a different issue to whether Mr Sargison is entitled to costs (although I note that there are avenues to pursue under the Act in the event of non-compliance).

[18] As the successful party, Mr Sargison is entitled to costs. The starting point is the daily tariff of \$4,500 for the first day of the investigation meeting. The investigation meeting took half a day, so accordingly the starting point is a costs award in favour of Mr Sargison of \$2,250.

[19] Taking into account the well-established principles on costs set out above, I consider that given an effective Calderbank offer was made to genuinely settle the matter which Bine & Co rejected. This meant that Mr Sargison had to pursue his grievance through proceedings in which he was successful and was awarded a sum that exceeded the Calderbank offer. This means that an uplift should properly be awarded. Mr Sargison submitted that an uplift of \$3,750 is appropriate.

[20] Balanced against the principle that costs are to be modest and taking into account the actual legal costs incurred, I am satisfied that \$4,500 is a fair and appropriate costs award in these circumstances.

Orders

[21] Accordingly I order Bine & Co to pay Mr Sargison \$4,500 as a contribution to legal costs and the filing fee of \$71.56, a total of \$4,571.56 within 28 days of the issuing of this determination.

Davinnia Tan
Member of the Employment Relations Authority