

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 231  
3160402

BETWEEN	DAVID PARKER Applicant
AND	MAGNUM HIRE LIMITED First Respondent
AND	LIAM FIELD Second Respondent

Member of Authority:	Sarah Blick
Representatives:	Daniel Church and Jonothan Whyte, counsel for the applicant Luke Meys, counsel for the respondents
Investigation Meeting:	On the papers
Information and submissions received:	6 March and 2 April 2024 from the applicant 21 March 2024 from the respondents
Determination:	22 April 2024

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**DETERMINATION OF THE AUTHORITY (No. 2)**

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**Employment relationship problem**

[1] On 14 February 2024, the Authority issued a determination in this matter, finding that David Parker had personal grievances and awarded remedies against Magnum Hire Limited (Magnum).<sup>1</sup> A penalty was also imposed on Magnum, and the second respondent Liam Field was also found to be a person involved in breaches of employment standards.

[2] The Authority also found Magnum was liable to pay Mr Parker an additional bonus payment and annual holiday pay which may have accrued on it, along with interest. The parties were asked to confer and attempt to agree on the quantification of

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<sup>1</sup> *Parker v Magnum Hire Limited and Anor* [2024] NZERA 85.

bonus amounts, holiday pay and interest. These have not been agreed and now fall for determination by the Authority.

[3] The Authority awarded special damages to Mr Parker to reimburse his psychologist's fees, but sought further information on fees incurred after the investigation meeting. The Authority reserved a claim for special damages in relation to legal fees incurred prior to the Authority application, pending receipt of information on costs if costs were not resolved between the parties.

[4] In the Authority's earlier 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. The parties have been unable to resolve costs.

[5] The respondents have filed a de novo challenge of the earlier determination in the Employment Court. This determination determines the outstanding matters and costs in the Authority.

### **The Authority's process**

[6] The Authority received evidence and heard submissions on the outstanding matters during the investigation meeting, and since the earlier determination was issued. It has also now received costs memoranda from the parties. By consent the balance of the matters are determined on the papers.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received, but it has been considered.

### **Bonus payments**

[8] In its earlier determination the Authority found the value of the goods and services Mr Parker received in lieu of bonuses should not be taken into account in the calculation of any remaining bonus payment due to him relating to December 2015 and July 2016, which remain payable in money under s 7 of the Wages Protection Act 1983 (WPA), and which could be recovered under s 11(1)(b) of the WPA. As noted, the parties have not agreed on the value of the bonus amounts payable.

*Mr Parker's position on bonus and holiday pay calculation*

[9] Mr Parker's position is that based on information previously provided by counsel for Magnum, its reported annual profit before tax (APBT) for 2015-16 was approximately \$2,030,601. On that basis, Mr Parker calculates the bonus payable for that period was \$100,000. He says holiday pay is due in respect of this amount at 8%, namely an additional \$8,000.

[10] Mr Parker also posits that annual holidays taken in the 12 months from May 2015 to May 2016 should be factored in, during which time the value of the unpaid bonus for the 2014-15 year had to have been factored into the calculation of Mr Parker's average weekly earnings under the Holidays Act 2003, and also into any calculations of average daily pay during the same period (May 2015 to May 2016). Mr Parker says leave records do not assist in this calculation to assess how much leave was taken in that period. In the circumstances, Mr Parker suggests setting the liability again at a notional 8% of the value of the unpaid bonus for 2014-15 based on APBT for that year, being approximately \$1,690,736. He says this results in a bonus figure of \$100,000, and a corresponding holiday pay figure at 8% of \$8,000.

[11] In summary, Mr Parker's position is that:

- \$100,000 (gross) is due for the 2015-16 bonus.
- \$8,000 (gross) is due for holiday pay on the 2015-16 bonus.
- \$8,000 (gross) may be pragmatically agreed as due for holiday pay on the 2014-15 bonus.

*Respondents' position on bonus and holiday pay calculation*

[12] The respondents submit, in applying the Authority's interpretation, that Mr Parker had not earned a full years' bonus in the four months between 1 April 2016 and July 2016. Accordingly, a pro rata approach is required to ascertain how much bonus accrued per month. The respondents say the annual bonus of \$100,000 represents \$8,333.33 per month. There were 7.5 months during the period of time identified by the determination as relevant, being \$62,500 plus holiday pay of \$5,000 (calculated at 8%).

[13] The respondents say annual holiday pay of 8% on the bonus sum of \$62,500 would be a further \$5,000, resulting in a total of \$67,500. Their position on bonuses,

holiday pay and interest is said to be made without prejudice to their de novo challenge to the Authority's earlier determination.

### *Finding*

[14] The Authority has previously found the only relevant period for which Mr Parker may still have an entitlement to the payment of a bonus is limited to 25 December 2015 to the end of July 2016. Mr Parker's entitlement for the year 21 May 2015 to 21 May 2016 accrued on the latter date. He is entitled to payment of the full bonus entitlement of \$100,000, given the accrual date fell within the six-year limitation period of Mr Parker's statement of problem.

[15] In relation to the balance of the period the bonus scheme remained in place, being 22 May 2016 to 31 July 2016, an entitlement did not crystallise. Mr Parker has not calculated an entitlement in relation to that period in any event.

[16] Mr Parker's bonus earnings would have been included in calculations of holiday and leave pay for annual holidays and/or other leave taken after December 2015. Factoring in a notional full 8% calculation in the circumstances is inappropriate as Mr Parker has not put forward evidence of any holidays or leave actually taken during the period specified.

[17] The Authority agrees annual holiday pay on the bonus entitlement which accrued on 21 May 2016 needs to be pragmatically calculated at 8% of that entitlement. Holiday pay of 8% on that bonus sum of \$100,000 would be a further \$8,000, resulting in a combined total of \$108,000. That amount is awarded.

### **Interest**

[18] In its earlier determination, the Authority agreed interest should be calculated from the date the Authority identified that a bonus payment crystallised and fell due. As such, the relevant bonus entitlement accrued on 21 May 2016. Interest should be calculated on the \$108,000 bonus entitlement and holiday pay from 21 May 2016 until the date of payment, using the Civil Debt Interest Calculator.<sup>2</sup>

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<sup>2</sup> Ministry of Justice Civil Interest Debt Calculator, <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

[19] In recent memoranda, Mr Parker has also claimed interest on a personal grievance remedy awarded by the Authority - on three months lost wages of \$32,463.68. The respondents oppose an award on this amount, saying interest on that amount did not begin to accrue on that total until the date of the earlier determination.

[20] The Authority does not generally award interest on the reimbursement of lost wages stretching back to the termination date. It is a remedy awarded at the point of determination, rather than as a contractual entitlement which may have arisen at an earlier date. No award for interest on lost wages award is made.

### **Special damages**

[21] Although information was received in relation to the damages claims prior to the investigation meeting, the outcome on those was reserved, pending updated information and an application for costs.

[22] General principles applicable in an assessment of damages are:

- (a) damages are to compensate the injured party for the loss it has sustained;
- (b) the injured party is not entitled to a windfall;
- (c) the respondent can only be held liable for consequences which can convincingly be said to have been a result of a respondent's conduct; and
- (d) the onus is on the applicant to prove loss, and the extent of loss on the balance of probabilities.

### *Psychologist fees*

[23] Mr Parker sought the support of a clinical psychologist to deal with the mental health issues which have been attributed to the respondents' treatment of him. In my earlier determination I accepted the costs of these therapy sessions were recoverable as special damages in the amount of \$5,071.50.

[24] During the investigation meeting, Mr Woodcock confirmed that Mr Parker would require ongoing psychological counselling and therapy. He gave a broad estimate of the number of further sessions required. In its earlier determination, the Authority said it was not willing to prospectively order reimbursement but if further actual costs were indeed incurred he could provide evidence of the same. He has now provided evidence of further invoices from his psychologist as follows:

- (a) \$718.75 for the costs of his psychologist's preparation and appearance before the Authority.
- (b) \$1,178.75 for further required treatment sessions to date.

[25] Counsel now says the psychologist estimates Mr Parker will require between 12-18 further monthly treatments for depression and anxiety caused by the respondents. He applies for orders requiring Magnum to directly pay the prospective invoices for treatment, or to reimburse him upon proof of payment. He further seeks leave to apply for a variation of orders should there be an increase in the number of required sessions.

[26] Magnum opposes the application for damages for further monthly fees on the basis insufficient specific or reliable evidence has been provided to show a further 18 months counselling is required as a result of its or Mr Field's actions. The respondents cite arguments made at the investigation meeting about Mr Parker mentally attributing his health problems to the respondents when there appeared to have been other causes.

### *Finding*

[27] The Authority accepts Mr Parker is entitled to reimbursement of the further treatment sessions to date at \$1,178.75, having heard evidence of the need for them and questioned the psychologist about them at the investigation meeting. I do not consider it appropriate to make the prospective or further reimbursement orders for treatment sessions sought by Mr Parker in the absence of the respondents having the further opportunity or opportunities to test the ongoing need for sessions, and given the *de novo* challenge now before the Court.

[28] The \$718.75 cost of Mr Parker's psychologist's preparation and appearance before the Authority are dealt with as part of the Authority's determination on costs.

### *Legal fees*

[29] Mr Parker claims \$12,077.50 plus GST as special damages in respect of legal costs incurred by him prior to the end of his employment for attendances which are said not to be party and party costs.

[30] The Court of Appeal in *Binnie v Pacific Health Limited* held that legal expenses prior to the issue of proceedings, such as for investigation into the conduct of employees, could be treated as special damages rather than as party and party costs,

provided a proper line could be drawn between the two.<sup>3</sup> The Employment Court has since confirmed legal costs may be recovered as special damages where such a line can be drawn and where the costs were reasonable and necessary in light of the defendant's actions.<sup>4</sup> The Authority is not satisfied a bright line can be drawn between the costs incurred prior to termination and party and party costs, or that they were entirely necessary and reasonable in the circumstances. Special damages for legal costs are not awarded.

## **Costs**

[31] Mr Parker applies for a significant costs award. The respondents appear to submit that only daily tariff should be awarded. The positions are now outlined.

### *Mr Parker's position on costs*

[32] The remaining amounts Mr Parker seeks as a contribution to legal fees is \$40,939.50 plus GST as follows:

- (a) \$2,189.50 plus GST as indemnity costs in respect of Magnum's withdrawn counterclaim.
- (b) \$37,000 (plus an uplift of 15% to account for GST) in respect of the legal costs of the Authority proceedings.
- (c) \$1,750 (plus an uplift of 15% to account for GST) towards the legal costs of submitting its costs memorandum ("costs on costs").

[33] It is essentially submitted that this is an exceptional case which merits an equity and good conscience approach not strictly adherent to the conventional daily tariff approach. Mr Parker submits it is appropriate and reasonable that he be properly reimbursed for his costs for reasonable steps taken in the proceedings and pursuit of his claims. He suggests costs are being used as a weapon by the respondents.

[34] Mr Parker says the respondents unnecessarily increased costs in the way it conducted the proceedings, including through the following:

- (a) a calculated strategy of smearing his character which became a "wasteful sideshow" about alleged gang affiliations.

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<sup>3</sup> *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438 (CA) at [17]-[18].

<sup>4</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpc 71 at [96]-[97].

- (b) withdrawing one of their “key” witnesses on the evening of the first day of the investigation meeting.
- (c) belatedly seeking leave for a number of witnesses to give evidence remotely.
- (d) running hopeless defences with no prospect of success.
- (e) a “frivolous and vexatious” counterclaim.
- (f) prolonging the investigation meeting by presenting new evidence midway through the investigation meeting, being screenshots from Facebook.
- (g) belatedly claiming in response to an Authority query after the investigation meeting about whether Magnum had impliedly consented to the raising of a personal grievance from at least 2019 onwards.
- (h) forcing Mr Parker to incur more costs by failing to engage to reach agreement on the outstanding issues and costs, resulting in additional costs in engaging with the Authority on those matters.

[35] Mr Parker says a without prejudice save as to costs offer he made in February 2023 ought to be taken into account when determining costs, as well as an offer he made to settle costs of \$22,000 following the earlier determination.

*Respondents’ position on costs*

[36] The respondents submit that Mr Parker’s approach involves significant double-dipping and would result in a global total which is inconsistent with the Authority’s Practice Directions guidance and previous cases. They say Mr Parker is essentially claiming indemnity costs, at effective daily rate for the investigation meeting of \$12,193.91.

[37] The respondents further submit it was Mr Parker’s choice to hire his lawyers, and it was their choice to approach the case the way they did. He cites examples as being that closing submissions lodged on Mr Parker’s behalf running to an “unnecessary” 61 pages; another 22 pages for costs submissions; Mr Parker sought “unnecessary” further disclosure from the respondents in February 2023 related to allegations of tax evasion and the use of fraudulent valuation certificates by the respondents, that were not borne out in the evidence or relied on by Mr Parker at the investigation meeting.

[38] The respondents say Mr Parker is effectively arguing that because the respondents defended the claim, that indemnity costs should follow. They say it ignores the fact that most claims are defended, and every case has a winner and a loser. In saying that, the respondents submit there was a mixed success result, and a determination on costs should reflect that.

[39] For completeness, I have not viewed or taken into account what I understand to have been a without prejudice offer between the parties referred to in the respondents' memorandum on costs, which was redacted from the Authority's record after its status as without prejudice was raised by counsel for Mr Parker.<sup>5</sup>

### *Costs principles*

[40] The Authority has the power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

### *Costs analysis*

[41] Firstly, I make the obvious point that the Authority is not a Court, and successful parties cannot expect to be awarded Court level costs. The Authority has its own unique approach to costs, which is focused on access to justice and modest costs awards. The daily tariff has been put in place to give parties an idea of what the costs consequences of pursuing a claim or losing a claim are likely to be. Even where the tariff is uplifted, it often results in a low proportion of actual costs awards being awarded. The tariff has been set at a modest level, which I have previously reiterated to the parties in my

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<sup>5</sup> Respondents' memorandum on costs, 6 March 2024 at paragraph 24.

communications. It is also unfortunately not uncommon for parties who have incurred significant costs in connection with Authority proceedings to find themselves out of pocket, but that reality should form part of the ‘litigation risks assessment’ prudent parties undertake when appearing before the Authority.

[42] Mr Parker was the successful party. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party’s costs. Mr Parker is entitled to receive a contribution to costs incurred.

[43] Counsel for Mr Parker has tried to resolve costs with Magnum but the documents indicate the respondents responded to his proposal in a limited way. In response to Mr Parker’s position on costs, the respondents’ counsel advised by email on 5 March 2024 that they were given instructions to challenge the Authority’s determination on a de novo basis, and sought agreement on a stay of remedies and costs. The respondents did not identify their position on any bonus and holiday pay entitlements to Mr Parker prior to his counsel lodging a memoranda on the same.

[44] In assessing an appropriate award of costs the notional daily tariff is the usual starting point. The applicable daily tariff is \$4,500 for the first day and \$3,500 for every day thereafter. This matter required five hearing days. The total notional costs, applying the Authority tariff, is \$18,500.

[45] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff.

[46] While Mr Parker was the successful party, not insignificant elements of his claim and/or remedies were dismissed or not made out on the evidence. This included his claims for recovery of:

- (a) Bonus entitlements prior to December 2015, which were clearly out of time.
- (b) Bonus entitlements subsequent to the employment agreement being amended, the agreement having excluded bonus entitlements from December 2016.
- (c) A claimed 5% retirement gratuity based on Magnum’s book value when he retired at age 60.

- (d) Penalties in relation to cash bonuses and holiday pay accruing on them were brought out of time, with only one of the penalty claims for non-provision of wages and time and holiday and leave records found in time.

[47] In my view the daily tariff amount ought to be moderated downwards due to these matters, to \$16,000.

[48] I note Mr Parker lodged amended statements of problem broadening his claims. It was his decision to do so and I note the responsibility for the costs associated with that ought not fall on the respondents' shoulders.

[49] There are also factors which would warrant an increase to the daily tariff, namely the respondents' withdrawn counterclaim, which required Mr Parker to incur some additional costs. Indemnity costs are sought, relying on *Bradbury v Westpac Banking Corporation* where the Court of Appeal identified that such costs may be ordered where a party behaved badly or very unreasonably.<sup>6</sup> I do not consider that the high test in *Bradbury* is warranted. A \$1,000 uplift for that is awarded.

[50] I consider a without prejudice save as to costs offer by Mr Parker on 22 February 2023 should be taken into consideration as an effective settlement offer. It was made well in advance of the Authority's investigation meeting, and has proved reasonable, totalling \$115,000, in light of the Authority's ultimate higher awards. An uplift of \$3,000 is awarded in respect of it.

[51] A contribution for additional written submissions sought by the Authority and received in November 2013 in relation to the timing of the unjustified disadvantage grievance for bullying warrants a small uplift of \$1,000.

[52] There should also be a small uplift of \$500, accounting for the need for the lodge memoranda associated with the bonus entitlement, holiday pay, interest and psychologist fees. The uplift takes into account the fact Mr Parker's submissions on some of those issues have not been successful as outlined in this determination.

[53] I am not satisfied other matters identified by Mr Parker warrant further uplifts.

[54] The uplift sought by Mr Parker for a GST component is not warranted.

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<sup>6</sup> *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400.

[55] In relation to Mr Parker's claim for costs in respect of costs submissions, the Authority does not generally award costs on costs, and I am not satisfied there is sufficient reason to make an exception in this case.

[56] Mr Parker is entitled to reimbursement of the Authority application fee of \$71.56.

[57] The fee charged for the expert psychologist witness' preparation and appearance before the Authority is awarded.

[58] In exercising my discretion on costs, I have kept in mind the modest approach to costs in the Authority. Having considered the submissions and information received and guided by other applicable Authority principles and equity and good conscience, this results in a costs award of \$21,500. Costs are apportioned between Magnum and Mr Field, with Magnum liable for the lion's share, as outlined below.

#### **Summary of orders**

[59] Magnum Hire Limited must pay David Parker within 14 days of the date of this determination the following:

- (a) \$100,000 bonus entitlement;
- (b) \$8,000 in annual holiday pay;
- (c) Interest from 21 May 2016 on (a) and (b);
- (d) \$718.75, being the cost of Mr Parker's psychologist's preparation and appearance before the Authority
- (e) \$20,500 in costs.

[60] Liam Field is to pay David Parker \$1,000 in costs within 14 days of the date of this determination.

Sarah Blick  
Member of the Employment Relations Authority