IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 354
3275259

BETWEEN	U-FLY NEW ZEALAND LIMITED Applicant
AND	CODY O'NEILL First Respondent
AND	LEARN TO FLY NZ LIMITED Second Respondent
AND	WANAKA HELICOPTERS LIMITED Third Respondent

Member of Authority:	David G Beck
Representatives:	Robert Bryant counsel for the Applicant Kirsten Maclean, counsel for the first, second and third Respondents
Investigation Meeting:	On the papers
Submissions Received:	24 April 2024 from the Respondents 13 May 2024 from the Applicant
Date of Determination:	17 June 2024

COSTS DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] In a determination of 29 February 2024, I declined an application by U-Fly New Zealand Limited (U-F) for interim injunctive relief to prevent Cody O'Neill, a flight instructor, from working with a competitor company in breach of a restraint of trade

provision, being initially identified as Learn to Fly New Zealand Limited (LTF) and/or a closely allied company, Wanaka Helicopters Limited (WHL).[1]

[2] The application was not straightforward. I held that although U-F had an arguable case, other factors led to a finding the balance of convenience and overall justice did not weigh in favour of granting the interim orders sought. It was a finely balanced decision. While I found it was arguable the restraint did not prevent Mr O'Neill working for WHL in an administrative role/ground crew role, there was some evidence to suggest he was undertaking contracting work for LTF in an extended role. I observed that it was a reasonable contention raised by U-F 's counsel that "there had been some "manoeuvring" (by WHL and LTF) to avoid or skirt" Mr O'Neill's obligations when seeking to secure his services. [2] However, I also observed it was arguable the restraint's length was excessive.

[3] As a result of the determination, a teleconference on 24 March was scheduled. In the interim, Mr O'Neill made an application to the Authority to pursue a personal grievance against U-F claiming he had been constructively dismissed. Prior to the teleconference U-F's counsel confirmed by a memorandum of 18 March that they had withdrawn their restraint enforcement proceedings against the three respondents.

[4] The matter of how costs are to be allocated from the unsuccessful interim injunction matter was reserved to allow the parties to explore agreement but with none being reached the respondents, who throughout engaged the same counsel, have applied for costs.

The application for costs

[5] The respondents' counsel seeks costs in the amount of the Authority's notional daily rate of $4,500.00. The investigation meeting took one hour and was held by audio visual link. Due to the nature of injunctive proceedings the matter was dealt with by the parties preparing and filing prior submissions and affidavit evidence with counsel using the relatively brief investigation meeting to expand upon their respective legal submissions.

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[1] *U-Fly New Zealand Limited v Cody O'Neill, and Learn to Fly Limited and Wanaka Helicoptors Limited* [2024] NZERA 120.
[2] Ibid at [33].

[6] While suggesting the starting point for the Authoirty applying their usual daily rate would be $2,250.00, the respondents' counsel submitted other factors justified an uplift. These in summary were that:

i) Counsel took instructions from three parties.

ii) The legal matters to address required detailed preparation.

iii) U-F had adopted an uncompromising and/or unreasonable approach against Mr O'Neill.

iv) Alternative resolution options were ignored.

v) The injunction was based upon anticipatory loss with no evidence of actual loss/damages being proffered by U-F.

vi) The "marginality" of their success is not relevant even at an injunctive stage as the relief sought was not granted.

[7] U-F's counsel predominantly submitted costs in the circumstances should lie where they fall or be set at a maximum of $1,500.00 given the length of the investigation meeting and the modest approach to costs the Authority is known for. In support of this counsel suggested the respondents' degree of success was speculative as the matter had not been fully dealt with due to U-F withdrawing their application for substantive relief.

[8] In addition, counsel noted no evidence had been provided to demonstrate how the costs were apportioned between the respondent parties and that the respondents' conduct of their defence to the interim application was unreasonable and led to U-F incurring unnecessary costs.

[9] Counsel also provided a "without prejudice save as to costs" offer made by U-F on 19 March to resolve costs in the amount of $1,500.00 inclusive of GST.

Assessment

The Authority's costs approach

[10] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000.

[11] An issue is whether I should adjust the notional daily rate the Authoirty normally applies downwards after considering U-F's submissions.

[12] In assessing this matter, I initially dispose of the suggestion that the respondents' success was 'mixed' in the context of how this was dealt with in *William Coomer v JA McCallum and Son Limited* that noted:

> 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. [3]

[13] Here, the respondents successfully resisted an interim application. This success was not partial and any speculation on how the matter would fall at a substantive stage does not assist the Authority's costs approach on this matter. What is at issue is the respondents were successful and although the investigation meeting was short, the Authority recognises that in interim proceedings significant preparation time of legal submissions is required.

[14] Further, a Calderbank offer relating to costs does not assist as it only demonstrates the parties attempted to resolve costs on a matter where costs have been incurred. The latter is the focus of a costs application.

Applying the daily rate

[15] As outlined in the determination,[4] the Authority's approach is to apply a notional daily rate and only adjust this if persuaded that particular circumstances or other factors require an upward or downward movement.[5]

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[3] *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].
[4] Ibid at [103].

[16] The discretion it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [6] including 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. [7]

Assessment

[17] Taking all the factors identified in submissions into account and applying the Authority's discretion I consider that a fair costs award in favour of the respondents to reflect the interim nature and relative complexity of the proceedings be $3,000.00 and that should be apportioned equally between Mr O'Neill and Wanaka Helicopters Limited (given that Learn to Fly NZ Limited is a closely allied entity).

Orders

[18] U-Fly New Zealand Limited is to pay Cody O'Neill a contribution to his costs in the amount of $1,500.00 and Wanaka Helicopters Limited a contribution to their costs in the amount of $1,500.00.

David G Beck
Member of the Employment Relations Authority

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[5] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1
[6] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.
[7] Section 160(2) Employment Relations Act 2000.