

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 38
3169603

BETWEEN MOHAMAD AFZAL DHALA
Applicant

AND FUTUREED AUSTRALIA
NEW ZEALAND PTY
LIMITED
First Respondent

AND AMEER MOHAMMED
YOUSUF KHAN
Second Respondent

Member of Authority: Sarah Blick

Representatives: David Fleming, counsel for the applicant
No appearance for the respondents

Investigation Meeting: On the papers

Submissions and information received: 28 June 2023, 4 and 5 July 2023 and 26 October 2023
from the applicant
27 October 2023 for the respondents

Determination: 25 January 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an earlier determination, the Authority found Mohamad Afzal Dhala was unjustifiably disadvantaged and unjustifiably dismissed by FutureEd Australia PTY Limited (FutureEd).¹ Remedies were awarded in relation to the grievances. Penalties were imposed on the respondents for breaches of a record of settlement, and on FutureEd for a breach of the Wages Protection Act 1983 (WPA). This determination deals with Mr Dhala's claims to recover, as damages, fees he paid for employment and

¹ *Dhala v FutureEd Australia PTY Limited* [2023] NZERA 580.

immigration law services and costs incurred prior to the Authority application. It also deals with costs relating to the Authority application.

The Authority's process

[2] Despite having been represented by counsel during a significant portion of the Authority's case management processes, the respondents ultimately did not take part in the Authority's investigation meeting.

[3] The Authority's earlier determination was issued on 5 October 2023. Although information had been received in relation to the damages claim, the outcome on damages was reserved pending any further application for costs following the issue of that determination. The parties were then given the opportunity to resolve any issue of costs as well as the issue of special damages between themselves. Costs and damages were not resolved, and on 26 October 2023 Mr Dhala lodged an application for costs relating to the Authority application.

[4] On 27 October 2023 Mr Khan, the second respondent and director of FutureEd, emailed the Authority saying he disagreed with the Authority's earlier determination. The Authority responded advising that the respondents had a right to challenge the determination in the Employment Court within 28 days of the determination and provided a link to the Authority's website which includes advice about what to do when you are unhappy with an Authority determination. The Authority also confirmed the respondents had the opportunity to respond to the application for costs within 14 days. No response regarding costs (or anything else for that matter) was received from the respondents.

[5] The Authority later confirmed to the parties that no reply had been received from the respondents in relation to costs, and that it was in a position to issue a further determination addressing the application for damages and Authority costs.

[6] The Authority is left in the position of determining the special damages claim and application for costs based on Mr Dhala's memoranda and information lodged in support, and its earlier findings.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination are whether or not one or both of the respondents should be ordered to pay costs incurred as special damages, and whether costs of representation in the Authority application should be awarded.

Background

[9] The circumstances of the breaches found by the Authority are set out in detail in the earlier determination. In summary, the Authority found FutureEd failed to pay Mr Dhala in accordance with his employment agreement as varied by the terms of a record of settlement entered into between FutureED and Mr Dhala on 23 February 2021 (ROS 2). Those failures to pay Mr Dhala affected Mr Dhala to his disadvantage because it left him struggling to meet his obligations. Compensation of \$5,000 under s 123(1)(c)(i) of the Act was awarded. Three months lost wages was awarded.

[10] Mr Dhala also pursued a disadvantage grievance on the basis FutureEd failed to provide him with reasonable assistance with visa applications. Although the Authority generally accepted the proposition that a fair and reasonable employer could be expected to provide assistance to an employee in obtaining or renewing a visa entitling them to work for their employer, it was not satisfied a fair and reasonable employer in FutureEd's situation at the relevant time could be expected to assist in providing factually incorrect information to Immigration New Zealand (INZ) about tasks Mr Dhala was or was not performing and the state of the employment relationship. Mr Dhala's personal grievance on that ground was not established.

[11] The Authority ultimately found Mr Dhala was unjustifiably dismissed and awarded \$20,000 in compensation under s 123(1)(c)(i) of the Act, and despite lost wages being sought in excess of three months, the Authority was not persuaded there was a basis to do so.

[12] Under ROS 2 FutureEd was required to reinstate Mr Dhala to his role, offer 30 hours per week or pay him for that number of hours. FutureEd failed to comply with those terms. It was also required to pay compensation amounts under s 123(1)(c)(i) through instalment payments, which were paid late on at least two occasions. The Authority found FutureEd failed to pay Mr Dhala's wages on time in breach of s4 of

the WPA. Penalties were awarded in respect of the breaches. The Authority awarded penalties against FutureEd of \$4,000 for breaches of ROS 2 and s 4 of the WPA (totalling \$8,000). A penalty of \$2,000 was awarded against Mr Khan for breaching ROS 2.

[13] The Authority declined a penalty claim for a breach of good faith and one sought during the Authority's investigation claiming the respondents' delayed or obstructed the investigation.

Special damages

Damages sought

[14] Mr Dhala is seeking costs incurred as damages in respect of legal work he says had to be done as a result of FutureEd's breaches. He says the claim is limited to costs incurred after the signing of ROS 2 on 23 February 2021, and does not include costs incurred in respect of the Authority application.

[15] Mr Dhala identifies two categories of damages:

- (a) Employment law costs dealing with actions of FutureEd and/or its director Mr Khan;
- (b) Immigration costs incurred dealing with processes that would not have been necessary had the respondents met their obligations toward him.

[16] The total amount claimed is \$21,738.99. This amount is comprised of:

- (a) \$3,210.26 for employment law services;
- (b) \$1,550.00 for immigration law services provided a law firm (firm A);
- (c) \$16,978.73 for immigration law services provided by another law firm (firm B).

[17] In support of the damages claim, Mr Dhala has provided a spreadsheet summarising employment law services and invoices for that work, immigration invoices from firms A and B, and totals of what are said to be all costs incurred by Mr Dhala.

[18] Through counsel Mr Dhala confirms that no claim is made in respect of immigration applications made, or immigration law services provided prior to the signing of ROS 2.

General principles

[19] 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.²

[20] The purpose of special damages is not punitive. 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.³ 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.⁴ The Authority has on a number of occasions awarded legal costs as damages.

Legal fees for employment law services

[21] The evidence was clear that Mr Dhala was proactive in trying resolving employment relationship problems directly with FutureEd without the assistance of counsel. In my view, given the ongoing issues arising with compliance with ROS 2, it was reasonably necessary for him to then engage counsel regarding non-compliance with ROS 2. The Authority is satisfied that employment law costs were incurred as a result of the respondents' breaches of ROS 2 and of the WPA.

[22] There is evidence Mr Dhala's counsel warned FutureEd that Mr Dhala may take steps to enforce ROS 2 and as such the respondents were on notice of the breaches and that litigation would follow if FutureEd failed to comply with ROS 2. The respondents

² *Medic Corporation Ltd v Barrett (No2)* [1992] 3 ERNZ 977 at 983-984.

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

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

were legally represented by experienced employment counsel throughout the relevant period claimed. As such they reasonably ought to have been on notice about potential consequences of ongoing breaches of ROS 2. Despite this, ROS 2 and the WPA continued to be breached. Had FutureEd complied with ROS 2 the Authority proceedings could have been avoided.

[23] The Authority also notes that the circumstances were such that a compliance order with the settlement agreement could have reasonably been sought from the Authority at an early stage of the non-compliance with ROS 2, but was not. This may have been due to Mr Dhala's stated "delicate" immigration situation. Mr Dhala chose to continue dealing with FutureEd directly because obtaining residence was of paramount importance to him. As noted in the Authority's earlier determination, a main focus of counsel's communications with FutureED was on it providing immigration assistance to Mr Dhala. The Authority expressed concern about the wisdom of parties utilising employment Mediation Services to achieve a preferred immigration outcome as was the case here. It seems to me that had the parties genuinely wished to continue in their employment relationship rather than enter into a "holding pattern" pending a successful residence visa application, the employment relationship would likely have ended earlier.

[24] In saying that, on balance, it is possible to draw a proper line between damages and costs relating to the Authority application. Taking the above into account, including that only reasonable and necessary costs ought to be recoverable, both FutureEd and Mr Khan should pay a contribution of \$1,500 towards legal costs incurred by Mr Dhala for employment law services.

Legal fees for immigration law services

[25] In closing submissions, when addressing an award of special damages, it was submitted that the additional immigration costs were sought as either damages or as a personal grievance remedy under s123(1) of the Act. The Authority notes in the statement of problem such costs were only sought as damages. Given the alternative of costs being sought as a personal grievance remedy was not raised until that late stage, the Authority does not consider it appropriate to consider them on that basis.

[26] A copy of an invoice from law firm A dated 10 March 2021 for \$1,550 is not accompanied with sufficient detail as to what it relates to. There is insufficient

information before the Authority upon which to found a damages claim for that amount. The claim to recover that amount is declined.

[27] In relation to the fees identified in the invoices of law firm B, the Authority is satisfied that at least some of the other immigration costs incurred would not have been necessary had the respondents met their obligations to Mr Dhala. In saying that, I cannot discount that Mr Dhala's employment, had he been properly reinstated, would in any event not been a substantial match to the ANZSCO code claimed or that points for skilled work experience would have been awarded. As such, the Immigration and Protection Tribunal (the Tribunal) appeal process may have needed to be followed regardless.

[28] Further, the Tribunal found that Immigration New Zealand's (INZ) decision to decline Mr Dhala's application for residence was incorrect on grounds of fairness. The Tribunal accepted Mr Dhala's submission that he ought to have been given the opportunity to respond to INZ's findings that his tasks did not substantially match the relevant ANZSCO occupation. Mr Dhala was not given that opportunity. In this regard, appeal costs were incurred due to a failure by INZ, not the respondents' breaches.

[29] Finally, there is no information before the Authority which would satisfy it that the legal costs of \$6,600 in relation to the Tribunal appeal were entirely reasonable and necessary in the circumstances. I am however satisfied that some immigration costs at the end of Mr Dhala's employment are related to the respondents' breaches.

[30] Taking all of the above into account, both FutureEd and Mr Khan should pay a reasonable contribution of \$7,000 towards costs incurred for immigration law services and the application fees paid by Mr Dhala and his family in relation to his wife's residence application lodged shortly after Mr Dhala was dismissed.

Costs

[31] In determining the issue of costs regard has been had to the principles in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* which have been confirmed by the Employment Court in *Fogotti v Acme & Co Ltd*.⁵ When considering costs, the starting

⁵ *PBO Ltd (formerly Rush Security Limited) v Da Cruz* [20056 ERNZ 808; *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

point is the Authority's daily tariff of \$4,500 for the first day of an investigation meeting.

Discussion

[32] The investigation meeting involved just over a half day investigation meeting.

[33] Mr Dhala has been substantially successful and is entitled to a consideration of costs relating to the Authority application.

[34] Mr Dhala says his costs in relation to the Authority application totalled \$6,662.59, which comprise the following:

- (a) \$6,073.50 in relation to the substantive investigation meeting
- (b) \$333.50 in relation to the costs memorandum;
- (c) \$255.59 in disbursements.

[35] Mr Dhala seeks an uplift to the daily tariff to \$6,000.

[36] He says he was legally aided in respect of the Authority proceedings. He is limited to actual costs spent on legal aid plus any actual disbursements incurred not covered by legal aid.

[37] Mr Dhala submits that assessing costs on the basis of the relatively short time spent in the investigation meeting would be inappropriate as:

- (a) although the investigation meeting took less than a day, that was because of the non-attendance of the respondents;
- (b) the actual length of the investigation meeting bore no relationship to the complexity of the issues or the time needed to prepare evidence and submissions;
- (c) the respondents' conduct, including failing to provide information when requested to do so, seeking adjournments of two scheduled investigation meetings on short notice, failing to attend directions conferences with the Authority, failing to confirm that they would not attend the actual investigation meeting, put Mr Dhala to significantly increased costs.

[38] The Authority accepts the respondents' conduct meant additional hours would have needed to be spent liaising with and communicating with Mr Dhala and the

Authority. The Authority expressed to the parties that Mr Khan appeared to be exhibiting a pattern of delay in seeking adjournments, and I do consider there was an element of that present. Ultimately, once counsel for the respondents no longer had instructions, the respondents largely chose to ignore the Authority's communications.

[39] The matter was originally assessed as warranting a two-day investigation meeting. The Authority accepts the facts and issues were relatively complex.

[40] I consider it appropriate to base the level of costs on the normal tariff in the Authority and to take a half day investigation meeting as the starting point. I consider it appropriate to give weight to the fact costs would have increased as a result of the respondents' conduct, and counsel would have been required to prepare for a defended investigation meeting in case the respondents did appear. I determine that the starting point of \$2,500 should be uplifted. The respondents are ordered to pay Mr Dhala the sum of \$5,000 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

Outcome

[41] Within 21 days of the date of this determination FutureEd Australia New Zealand Pty Limited and Ameer Mohammed Yousuf Khan are jointly and severally liable to pay Mohamad Afzal Dhala the following:

- (a) \$1,500 in costs for employment law services prior to the Authority application as special damages; and
- (b) \$7,000 in immigration costs as special damages;
- (c) \$5,000 in costs relating to the Authority application.

Sarah Blick
Member of the Employment Relations Authority