

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 39
3016276

BETWEEN MICHAEL BAIRD
First Applicant

AND KING ORCHARDS LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Alex Kersjes, Advocate for the Applicant
Andrew Gallie, Counsel for Respondent

Submissions Received: 3 April 2018 and 9 May 2018 from Applicant
7 May 2018 from Respondent

Determination: 11 May 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] On 15 January 2018 I issued a determination in which I concluded Mr Baird had a personal grievance in that he had been unjustifiably dismissed.¹ He also raised penalty claims with which he was unsuccessful having chosen not to pursue them in submission after he was advised during the investigation meeting they were almost certainly doomed to fail.²

[2] Costs were reserved and Mr Baird now seeks a contribution toward those he incurred in establishing his personal grievance. In doing so he accepts the Authority will normally use a daily tariff approach when addressing a costs claim.³ From there adjustment may then occur depending on the circumstances,

[3] While his actual costs were around \$6,000 including disbursements Mr Baird seeks \$4,500 given that is the currently applied daily tariff and, according to his

¹ [2018] NZERA Wellington 1

² Above n 1 at [19] to [21]

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

submission, the investigation *took almost one full day*⁴ and then required the subsequent preparation of written submissions. He also seeks reimbursement of the disbursements (\$284.14) in addition to the tariff.

[4] By way of response King Orchards Limited (King) says the claim is excessive and submits costs should lie where they fall.

[5] In support of its position King says Mr Baird was only partially successful given the result with the penalty claims and submits the unmeritorious pursuit of these claims unreasonably increased its costs. Here it is noted these claims were never formally withdrawn and remained live throughout. Notwithstanding my guidance during the investigation they therefore had to be addressed by King in submission.

[6] King also criticises Mr Baird for the way in which he responded to its attempts to settle the matter. It says the quantum sought was unreasonable and this was reflected in a Calderbank letter Mr Baird proffered on 1 February 2017 in which he sought \$9,440.⁵ That was considerably more than he eventually attained.

[7] King made an offer of \$1,500 prior to the investigation meeting though it did characterise this as an *opening offer*. To that Mr Baird responded with a further Calderbank in which he sought the increased sum of \$11,500. Issue is also taken with an accompanying statement which referred to possible press interest and which is characterised as a threat.

[8] By way of reply Mr Baird challenged assertions regarding the effort required to address the penalties. He also takes issue with the proximity of the November offers to the investigation asserting, correctly, that the bulk of preparation has occurred and notes that in the event the full tariff is awarded the final outcome would not be disproportionate to the offer he proffered.

[9] The first point to note is that costs follow the event. So given the issue regarding penalties what was the event?

[10] The situation of mixed success has recently been examined by the Employment Court in *Coomer v JA McCallum and Son Limited*.⁶ There the Court observed:

⁴ Applicants submission dated 3 April 2018 at [5]

⁵ The two weeks wages he was eventually awarded plus \$5,000 compensation and \$3,000 towards costs

⁶ [2017] NZEmpC 156

*Determining which party has been successful can be problematic. 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.*⁷

[11] The Court then considered various precedents and outlined the issues to be considered.

[12] Ultimately I stand back and look at things *in the round* as the Court suggested appropriate in *Coomer*.⁸ Having done so I conclude Mr Baird must be considered the successful party. The key claim and that which triggered these proceedings was that he had been unjustifiably dismissed. He successfully established that to be the case.

[13] That then raises the issue of how much. The first question is what is the tariff as on this I disagree with Mr Baird's calculation? The tariff is considered all-encompassing and time spent on the submission is included. In any event I have no idea what additional effort the subsequent filing required given the parties ostensibly came prepared to deliver them on the day. To that I add the fact the investigation actually ended early afternoon and the actual time taken was half that available over a full day. The tariffs starting point is therefore around \$2,250.

[14] The second question is whether or not it should be increased or decreased.

[15] An increase is not sought and will be considered no further. Turning to a decrease. The prime argument tendered in support of the suggestion I decrease the tariff is Mr Baird did not respond reasonably to offers to settle. I remain to be convinced given the evidence I have suggests serious attempts to settle did not commence until less than a fortnight from the investigation. By then a significant portion of the cost had been incurred. I also have to say that while Mr Baird's position exceeded that attained the offers made by King fell short. I also accept that after my comments about it being highly unlikely the penalty claims could succeed they took little time or resource even if not formally withdrawn. King's substantive submission dedicates only one paragraph to the issue.

[16] Having considered events, the outcome and the submissions on costs I consider this a situation in which the tariff should be applied on a basis pro-rata the time taken.

⁷ n 7 at [37]

⁸ n 7 at [43]

Conclusion and orders

[17] For the above reasons I order the respondent, King Orchards Limited, pay the applicant, Michel Baird, the sum of \$2,250.00 (two thousand, two hundred and fifty dollars) as a contribution toward the costs Mr Baird incurred in successfully pursuing his personal grievance claim.

M B Loftus
Member of the Employment Relations Authority