

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 88  
5463636

BETWEEN                      AXEL CABIG  
   Applicant  
  
A N D                              WAITOHI DAIRY LIMITED  
   Respondent

Member of Authority:      Peter van Keulen  
  
Representatives:              Jonathan Everist, Counsel for Applicant  
   John Wayne Howell, Counsel for Respondent  
  
Submissions Received:      Written submissions for Applicant received on 24 May  
   2017  
   Written submissions for Respondent received on 24  
   February 2017  
  
Date of Determination:      31 May 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]      In a determination dated 18 July 2016<sup>1</sup> I dismissed Mr Cabig's claims for breach of contract and unjustified action causing disadvantage. However, I did find that he had a wage arrears claim against Waitohi Dairy Limited (Waitohi) and I ordered Waitohi to pay him \$2,493.43.

[2]      In my determination, I reserved costs in the hope that the parties would be able to reach agreement on costs.

[3]      Waitohi now seeks costs. Counsel for Waitohi says costs should follow the event and as Waitohi successfully defended two of Mr Cabig's three claims, I should award costs to it. It also says that the quantum should be calculated by applying the

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<sup>1</sup> [2016] NZERA 116

daily tariff and the principles associated with this, suggesting that I should award it two thirds of the daily tariff together with disbursements.

[4] Counsel for Mr Cabig says I should dismiss the application for costs, as it is inappropriate in the circumstances as both parties had an element of success and as Waitohi lodged the application outside of the period I set for submissions on costs to be made.

### **Principles**

[5] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup>. The principles and the approach to be adopted by the Authority have been reaffirmed recently by the Full Court in *Davide Fagotti v. Acme & Co Ltd*<sup>3</sup>.

[6] Based on clause 15 and *Da Cruz*, *Fagotti* and other relevant Employment Court and Court of Appeal decisions<sup>4</sup>, the approach to be adopted by the Authority includes:

- a. An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily;
- b. The decision to award costs is consistent with the equity and good conscience jurisdiction of the Authority but equity and good conscience should be considered on a case-by-case basis in terms of the award of costs;
- c. Costs will generally follow the event but in some instances this will not be the case.

[7] If the Authority decides to award costs in favour of one party then the starting point for quantum is the daily tariff. The standard approach is to take the daily tariff and consider whether that tariff should be applied on an increased, decreased or standard basis dependent on a number of factors.

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<sup>2</sup> [2005] 1 ERNZ 808

<sup>3</sup> [2015] NZEmpC 135

<sup>4</sup> *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305, *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

[8] In this case I am satisfied that I should not make an award of costs for either party so I do not need to discuss these factors.

### **Discussion**

[9] Mr Cabig raised three claims:

- a. a breach of contract claim for failing to provide benefits he said had been agreed in the offer of employment;
- b. a personal grievance for unjustified action causing disadvantage for failing to provide benefits he says were terms of his employment or, in the alternative, misleading him in negotiations over the terms of his employment as they related to those benefits; and
- c. wage arrears for a failure to pay minimum wage for all of the hours worked.

[10] Mr Cabig was successful in only one of his three claims, or as Waitohi puts it, it successfully defended two of his three claims. In short, Waitohi submits that two wins out of three means I should award costs to Waitohi.

[11] I do not accept that this analysis applies to mean that Waitohi was successful and I should award costs to Waitohi on the basis that costs should follow the event.

[12] I accept counsel for Mr Cabig's submission that I should dismiss Waitohi's application for costs.

[13] In exercising my discretion to award costs and applying the principles of equity and good conscience to this matter, I determine that costs should lie where they fall and I make no award of costs for either party.

Peter van Keulen  
Member of the Employment Relations Authority