

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 283
3188059

BETWEEN MARIA ESCUDERO
 Applicant

AND OAK GROVE DENTAL LIMITED
 Respondent

Member of Authority: David G Beck

Representatives: Madeline Thomas and Gareth Abdinor, counsel for the
 Applicant
 Dr Osvaldo Reyes Gonzalez for the Respondent

Investigation Meeting: On the papers

Submissions Received: 30 May 2023 from the Applicant
 24 and 30 May 2023 from the Respondent

Date of Determination: 31 May 2023

COST DETERMINATION OF THE AUTHORITY

The determination

[1] Following an investigation meeting held on 10 March 2023, the Authority found that:

- a. Maria Escudero was unjustifiably dismissed from her employment with Oak Grove Dental Limited.
- b. Oak Grove Dental Limited must pay Maria Escudero the sums below:
 - (i) \$5,685, 20 gross lost wages inclusive of holiday pay pursuant to s 123(1)(b)
 - (ii) \$12,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
 - (iii) Pursuant to s 123(2) of the Employment Relations Act 2000, the two sums above are to be paid in six equal monthly instalments of \$2,947. 51 with the first payment falling due on or before the 30 June 2023 and thereafter five further payments due on the last day of each following month. ¹

[2] I reserved costs and encouraged the parties to reach an agreement. No agreement was achieved. The investigation meeting took one day with timetabled submissions thereafter. I now consider the submissions of each party to assist in exercising the Authority's inherent discretion to determine costs.

Submissions from the parties

[3] A submission for Mrs Escudero concentrated on a claim for costs in the amount of \$10,350. In support of this uplift for costs above the usual Authority notional daily rate approach, a rejected Calderbank offer was cited. This was made on 13 February 2023 seeking lost wages of \$5,264, a compensatory payment of \$10,000 and \$4,500 plus GST for costs. The current Authority notional daily rate approach is \$4,500 for an investigation meeting of one day. ²

[4] By contrast, Dr Gonzalez indicated he was not contesting the Authority's exercise of discretion but asked that consideration be given to his business potentially running at a loss and that any award be ordered to be paid by instalments.

¹ *Maria Escudero v Oak Grove Dental Limited* [2023] NZERA 244.

² For further information about the factors considered in assessing costs see:

www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

Costs principles

[5] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ including those 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.⁴ These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*. The principles include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.⁵

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁴ Section 160(2) Employment Relations Act 2000.

⁵ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

The settlement offer

[6] The making of a settlement offer, in the form of a ‘Calderbank’ offer or ‘without prejudice except as to costs’ may be a relevant factor where such does better the award made by the Authority. The Authority has a low-level jurisdiction hence a focus on notional daily rate -based costs. However, there is authority to suggest a ‘steely’ approach is sometimes required in the broader public interest.⁶

[7] Here the Calderbank offer disclosed whilst being made at a later stage of the proceedings, was a realistic and fairly accurate prediction of the outcome of litigation and would have provided a small discount to the respondent had they accepted such. In addition, the respondent chose to prolong matters without there being any merit to their defence causing the applicant unnecessary further costs.

Assessment

[8] The Authority’s notional daily rate approach has often been endorsed by the Employment Court as being consistent with the principles and objectives of the Employment Relations Act 2000.⁷

[9] Taking all the factors identified in submissions into account, I consider that it is equitable to find that Mrs Escudero in successfully pursuing her claims, is entitled to a costs uplift of \$1,000 on the notional daily rate and overall, a cost contribution for the one-day investigation meeting of \$5,500. However, given the original compensatory amounts were made as instalment payments pursuant to s 123(2) of the Employment Relations Act 2000 over six months, I deem it appropriate that a similar approach is taken.

⁶ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

⁷ See for example *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpoC 28.

Award

[10] I order Oak Grove Dental Limited to pay Maria Escudero the sum of \$5,500 as a contribution to her legal costs in six equal instalments of \$916.66 with the first instalment falling due on 30 June 2023 and each of the five instalments thereafter on the last day of each following month.

David G Beck

Member of the Employment Relations Authority