

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 131
5430572

BETWEEN DAVIDE FAGOTTI
Applicant

AND ACME & CO LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Barbara Bucket, Counsel for Applicant
Samantha Turner and Simon Clark, Counsel for
Respondent

Submissions Received: 7 October and 7 November 2014 from the Applicant
23 October 2014 from the Respondent

Determination: 18 December 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 22 July 2014 I found Mr Fagotti to have a personal grievance for unjustifiable dismissal. I also found ACME & Co Limited (ACME) had bargained unfairly with Mr Fagotti for his individual employment agreement in providing him with that agreement on the day he started his employment at its café, Prefab. I directed ACME to pay Mr Fagotti remedies comprising lost remuneration of \$2,098, compensation of \$5,000 for hurt and humiliation arising from his unjustified dismissal, and compensation for unfair bargaining of \$1,500. I reserved the issue of costs.

[2] The parties were unable to resolve costs between themselves and have made submissions on the matter.

[3] Mr Fagotti seeks full indemnity costs totalling over \$20,000, including GST. He also seeks a contribution to his costs for making application to the Authority on

this matter. In the alternative, Mr Fagotti seeks two-thirds of actual and reasonable costs plus GST or, as a third alternative, a higher than usual level of costs.

[4] ACME opposes Mr Fagotti's costs application and submits that costs should lie where they fall. In its view, there were no complex legal issues raised by the case which involved a simple claim that relied on uncomplicated points. Other reasons for making no costs award are, in ACME's view, that Mr Fagotti did not succeed in all his claims; that the respondent acted in good faith and was found by the Authority to have mistakenly, but genuinely, believed it was entitled to rely on the trial period provision of Mr Fagotti's employment agreement to dismiss him. ACME also referred to the good faith it had demonstrated in attending mediation and in making three "*very reasonable offers of settlement which the applicant chose to reject*".

[5] In relation to Mr Fagotti's claim for indemnity costs, ACME referred to *Bradbury v. Westpac Banking Corp*¹, citing the Court of Appeal which held that indemnity costs were "*exceptional and require exceptionally bad behaviour*" in litigation.

[6] The principles relevant to costs award for Authority investigations are well known. They are set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². One of those principles is that costs generally follow the event, which normally results in a successful party being entitled to a contribution towards its costs from the unsuccessful party. Costs for each case are considered in the light of the particular circumstances and are frequently judged against a notional daily tariff which, currently, is \$3,500. Where a party's conduct has increased costs unnecessarily, that is a factor that may be taken into account in the award.

[7] Mr Fagotti was generally successful in his claims and it is appropriate that he receive the benefit of an award of costs. His only unsuccessful claim was that ACME's unfair bargaining with him over his employment agreement constituted a personal grievance for disadvantage. As I have already noted, however, Mr Fagotti was awarded compensation for the unfair bargaining that occurred.

[8] Both parties have referred to *Calderbank* offers that each respectively made to the other over the period from September 2013 to May 2014. Mr Fagotti submits it

¹ [2009] NZCA 234

² [2005] 1 ERNZ 808

was unreasonable of ACME to decline four offers made by him to resolve the matter and says this justifies an increase in the costs awarded to him.

[9] The last approach Mr Fagotti made to ACME to resolve his personal grievance on a *without prejudice save as to costs* basis was on 21 May 2014. The financial components of the offer were:

- \$5,000 compensation under s 123 of the Employment Relations Act 2000 (the Act); and
- \$12,500 contribution to costs.

[10] ACME submits Mr Fagotti would have been in a better financial position than he currently is if he had accepted its last *Calderbank* offer to him which it made on 31 October 2013, several months before the Authority's investigation meeting. It says that Mr Fagotti incurred more than \$18,000 in further legal costs after he had rejected that offer. This left him in deficit once his legal costs were deducted from the sum awarded by the Authority whereas he would have been in surplus if he had accepted its *Calderbank* offer.

[11] ACME's offer of 31 October 2013 comprised:

- \$2,500 under s.123 of the Act; and
- a contribution towards costs of \$3,500 plus GST.

[12] I disagree with ACME's rationale. I consider it pertinent that Mr Fagotti was awarded \$4,598 more in total by the Authority than ACME offered as compensation. That is more relevant than Mr Fagotti's ultimate overall financial outcome. When ACME's offer of a contribution to costs is included its *Calderbank* offer is in total \$2,098 lower than the amount awarded by the Authority. That is significant and I decline to take ACME's offers into account in assessing an appropriate amount of costs to award to Mr Fagotti.

[13] Mr Fagotti made considerable efforts to resolve the matter several months before the Authority investigation meeting, making four offers on a *without prejudice save as to costs* basis between 20 September 2013 and 21 May 2014. The second of those offers was made by letter from his lawyer to ACME's lawyer dated 1 October 2013 and indicated Mr Fagotti would accept \$6,000 in compensation and \$3,500 plus

GST in costs as financial recompense for his grievance. ACME's response of 31 October 2014, which I have referred to above, met the costs that were sought at that time, but offered \$3,500 less in compensation.

[14] The costs incurred by both parties would have been considerably less if ACME had taken a more pragmatic approach to Mr Fagotti's offer to resolve the matter in October 2013. I find this justifies an uplift to the daily tariff. It does not, however, justify Mr Fagotti's claim for indemnity costs. There was no "*exceptionally bad*" behaviour by ACME that would warrant such an award.

[15] I note also that the costs Mr Fagotti incurred were in excess of what could be considered reasonable for an investigation meeting that occupied a little less than a full day. As the matter was set down for a full day and preparation would have been made accordingly, I take the daily tariff of \$3,500 as a starting point. For the reason noted I consider an uplift of \$1,000 to be justified.

[16] Counsel for Mr Fagotti requested an additional award of costs in relation to the costs incurred in making application for costs. No cogent reasons were provided for the request and I decline to make such an award.

Order

[17] I order ACME & Co Ltd to pay Mr Fagotti the sum of \$4,500 in costs and to reimburse him for the \$71.56 Authority filing fee.

Trish MacKinnon
Member of the Employment Relations Authority