

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 190  
5588572

BETWEEN                      KLEBER FUKUBARA  
   Applicant  
  
A N D                              BLUE STONE ROOM LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:              Kate Dillon, Counsel for Applicant  
   Roland Doyle, Director of Respondent  
  
Date of Determination:      13 June 2016

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**COSTS DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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- A.      Blue Stone Room Limited is ordered to contribute \$3,500 towards Mr Kleber Fukubara's costs which are to be paid within 14 days of the date of this determination.**

**The substantive determination**

[1]      In an oral determination of the Authority issued on 24 May 2016, with a written record on 25 May 2016<sup>1</sup>, the Authority determined that:

- (a)      Mr Kleber Fukubara was unjustifiably constructively dismissed from his employment by Blue Stone Room Limited (Bluestone);
- (b)      Mr Fukubara was awarded the following sums in remedies:
  - (i)      \$5,000 compensation for humiliation, loss of dignity and injury to feelings in respect of his unjustifiable dismissal pursuant to

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<sup>1</sup> [2016] NZERA Auckland 162

s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act);

- (ii) Reimbursement of two weeks wages pursuant to s128 of the Act based on Mr Fukubara's gross annual income of \$60,000 gross;
- (iii) Unpaid wages of \$184.50 gross;
- (iv) Unpaid holiday pay amounting to \$2,718.78 gross;
- (v) Unpaid public holiday amounting to \$197.50 gross;
- (vi) Unpaid sick leave amounting to \$1,153.85 gross.

### **Costs determination**

[2] On 30 May 2016, Ms Dillon filed a memorandum as to costs after she says she attempted unsuccessfully to resolve the issue of costs with Mr Doyle. Mr Doyle filed his memorandum as to costs in reply on 10 June 2016.

[3] Ms Dillon sought costs on behalf of the applicant, in accordance with the Authority's normal daily tariff being \$3,500 in respect of each day of an investigation meeting. Ms Dillon referred to a "without prejudice save as to costs" settlement offer made on behalf of Mr Kleber on 15 March 2016, in support of the application for costs.

[4] Mr Doyle opposes Mr Kleber's claim for costs on the basis that a challenge to the Authority's substantive determination has been filed in the Employment Court. Mr Doyle further argues if the Authority does not in effect stay its decision as to costs, any costs should be limited to a half day in the Authority, amounting to \$1,750 in costs.

### **The Authority's power to award costs**

[5] The Authority's power to award costs arises from Schedule 2, clause 15 of the Act. This confers a wide discretion on the Authority to award costs on a principled basis.

[6] The Full Employment Court decision in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>2</sup> sets out the principles that apply to awards of costs in the Authority. The principles are so well established that there is no need for them to be repeated.

[7] The general principle is that costs follow the event, and I see no reason to depart from that in this case. Mr Kleber was successful in his claim and should be awarded costs.

[8] However, the following principles highlighted in *PBO* are particularly relevant to this case, namely:

- There is a discretion as to whether costs should be awarded and as to the amount.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account when inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event.
- "Without prejudice except as to costs" offers can be taken into account.

[9] It is apparent from the documentation filed in the Authority regarding costs by both parties, that Mr Kleber attempted to resolve the matter by way of a "without prejudice save as to costs" offer. The offer was made over 2 months prior to the investigation meeting.

[10] Mr Kleber achieved a better result by proceeding with his investigation than the "without prejudice save as to costs" offer made to Bluestone.

[11] Mr Kleber's attempt to resolve matters before the investigation meeting, is an issue which I will be taking into account when exercising my discretion as to costs.

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<sup>2</sup> [2005] ERNZ 808, para.44

[12] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*<sup>3</sup> observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. This approach has been affirmed by the Employment Court recently in *Fagotti v. Acme & Co Ltd*<sup>4</sup>. I adopt that approach.

[13] The normal starting point for costs in the Authority is \$3,500 per day. The investigation meeting took almost 1 full day. This would equate to almost \$3,500 in costs based on the Authority's normal daily tariff.

[14] Mr Kleber attempted to resolve issues by way of a "without prejudice save as to costs offer" before the investigation meeting. However, the offer was rejected. I consider in the circumstances an award of costs of \$3,500 to be appropriate.

[15] Accordingly, I order costs of \$3,500 to be paid by Bluestone to Mr Kleber within 14 days of the date of this determination.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**

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<sup>3</sup> [2011] NZEmpC 13

<sup>4</sup> [2015] NZEmpC 135