

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 195
3024632

BETWEEN TONY WOOD
 Applicant

AND NZ CUPOLEX LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: T Oldfield, Counsel for the Applicant
 No appearance for the Respondent

Costs Submissions 7 May 2018 from Applicant
Received: None from respondent

Date of Determination: 20 June 2018

COSTS DETERMINATION

- A. NZ Cupolex Limited is ordered to pay to Tony Wood a total of \$1,196.56 made up of:**
- i) The sum of \$1,125 towards Mr Wood's legal costs;**
 - ii) The sum of \$71.56 for the filing fee paid by Mr Wood to lodge his Statement of Problem;**
- B. Payment of the sum of \$1,196.56 is to be paid within 14 days of the date of this determination.**

Employment Relationship Problem

[1] On 23 April 2018 I issued a determination in which I found that NZ Cupolex had breached Mr Wood's individual employment agreement by failing to pay his contractual entitlements to commission. I further found that Mr Wood had not

suffered an unjustified disadvantage to his employment, was not owed a bonus, and that NZ Cupolex had not breached its obligations of good faith.

[2] NZ Cupolex was ordered to pay to Mr Wood the sum of \$38,422.39 net as payment for his outstanding commission entitlements up to 1 February 2018 together with interest on that sum. NZ Cupolex was also ordered to pay a penalty for its breach of Mr Wood's individual employment agreement.

[3] I reserved costs and set a timetable for submissions. The parties were encouraged to resolve costs by agreement. If that was not possible, then Mr Wood had 14 days to file a costs memorandum.

[4] Mr Wood filed cost submissions on 7 May 2018. No submissions were filed by NZ Cupolex.

The Law

[5] The Authority's power to award costs arises from Schedule 2, Clause 15 of the Employment Relations Act 2000. This confers a wide discretion on the Authority to award costs on a principled basis.

[6] The principles to be applied by the Authority are well settled. They are outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.¹ These principles were affirmed by the Employment Court in *Fagotti v Acme & Co Limited*.²

[7] Costs principles include:

- a) A discretion on whether to award costs and if so what amount.
- b) The discretion must be exercised in accordance with principle and not arbitrarily.
- c) The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d) Equity and good conscience must be considered on a case-by-case basis.

¹ [2005] ERNZ 808 at page 819.

² [2015] NZEmpC 135.

- e) Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct that increased 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) Without prejudice' offers can be taken into account.
- h) Awards of costs will be modest, and must be reasonable.
- i) Frequently costs are judged against a notional daily rate.
- j) Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k) The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[8] Recently in *Booth v Big Kahuna Holdings Limited* Judge Inglis stated:³

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

[9] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day.⁴ The investigation meeting lasted half a day. The starting point in this matter is therefore \$2,250.

Should the daily rate be adjusted?

Uplift?

[10] Mr Wood applies for an uplift of the daily tariff from \$2,250 to \$6,750.

³ [2015] NZEmpC.

⁴ Practice Note 2, Costs in the Employment Relations Authority.

[11] Three grounds are advanced in support of Mr Wood's application for increased costs. The first and third grounds are essentially the same. They relate to NZ Cupolex' failure to participate in the investigation meeting and its failure to provide wage and time records and financial statements. Mr Wood submits these failures increased his costs because he had to calculate what he was owed for commission, lead evidence on this and produce various documents to the Authority. Secondly, Mr Wood submits that NZ Cupolex had no defence to Mr Wood's claim. He was put to the expense of bringing a claim to obtain a determination.

[12] I consider the amount being sought on behalf of Mr Wood, which represents triple the ordinary daily tariff, is too high. The matter before the Authority was not a complex matter and only took a half day. The steps Mr Wood was required to take were within the normal parameters of an investigation meeting and were envisaged by the Authority when setting its daily tariff.

[13] The task of calculating what commission was owed by NZ Cupolex to Mr Wood was not an onerous task. Mr Wood provided the Authority with a gross figure that he said was owed for commission. In addition, he produced an email exchange between himself and NZ Cupolex, where NZ Cupolex specified the commission owed, and a demand letter sent by his Solicitors to NZ Cupolex. The amounts in the correspondence matched, in net terms, the figure he was asking the Authority to award him for lost wages. These two documents were attached to the Statement of Problem.

[14] The production of documentation by Mr Wood was minimal. The Statement of Problem attached 12 documents that comprised of Mr Wood's individual employment agreement, 2 letters and 9 pages of emails. Following the investigation meeting Mr Wood provided copies of additional documentation but that primarily related to his unsuccessful claims.

[15] On the foregoing basis, I decline to order an uplift in the daily tariff.

Reduction?

[16] I consider a reduction in the daily tariff is fair and reasonable taking into account that Mr Wood was only partially successful in his claim.

[17] A large part of the investigation meeting was consumed by the Authority's investigation into Mr Wood's claim for unjustified disadvantage that related to an alleged suspension, his claim for an unpaid bonus, and a claim for breach of good faith. Mr Wood was unsuccessful in respect of each of these claims. Had these claims not been made then the investigation meeting would have taken no more than a quarter day.

[18] In these circumstances, I consider a sum of \$1,125, representing a quarter of the normal daily tariff, is appropriate. In setting this sum I have been mindful that costs should be reasonable and awards modest. A costs award should not be used as a punishment or an expression of disapproval.

Disbursements

[19] Mr Wood claims a service fee of \$253 for service of his amended Statement of Problem on NZ Cupolex. In addition he claims a sum of \$71.56 being the filing fee that he paid to the Authority.

Service Fee

[20] I do not consider Mr Wood's claim for recovery of the service fee to be a disbursement reasonably recoverable from NZ Cupolex.

[21] The service fee was incurred by Mr Wood because of a last minute request to file an amended Statement of Problem by 4 April 2018. On 3 April 2018 I issued a minute as follows:

The Applicant has had ample time to particularise his claim. The Member has granted an indulgence to the Applicant by allowing him to amend his claim at the eleventh hour. No explanation has been provided as to why his remedies were not particularised earlier.

A respondent is normally allowed 14 days to provide a Statement in Reply. The Member has abridged this time to 7.5 days from service (anticipated to occur on 4 April 2018). Service by way of email is not acceptable where the Respondent has not engaged with the Authority.

Notwithstanding the above, the Member is agreeable to the Amended Statement of Problem being filed by the Applicant by 5 pm on 4 April 2018 *on the condition* that it is personally served on the Respondent by that time too. An affidavit of service must be filed with the Authority confirming this has occurred. If this is unachievable then the investigation meeting set down for 13 April 2018 is vacated. Taking into account Mr Oldfield's availability the investigation meeting will take place on 30 April 2018 commencing at 9.30 am.

[22] Had an amended Statement of Problem been filed earlier by Mr Wood then personal service would not have been necessary. In addition, it is noteworthy that the amendments made were to incorporate a claim for hurt and humiliation and for an unpaid bonus. Mr Wood was unsuccessful in both of these claims.

Filing Fee

[23] It is appropriate that NZ Cupolex pay to Mr Wood the filing fee of \$71.56 that he paid to the Authority.

Determination

[24] NZ Cupolex is ordered to make a contribution towards Mr Wood's costs in the sum of \$1,125. In addition, it is ordered to pay Mr Wood a sum of \$71.56 being the Authority's filing fee. These sums must be paid within 14 days of the date of this decision.

Jenni-Maree Trotman
Member of the Employment Relations Authority