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A v R Limited (Auckland) [2018] NZERA 291; [2018] NZERA Auckland 291 (14 September 2018)

Last Updated: 19 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 291
3003611

BETWEEN A Applicant

A N D R LIMITED Respondent

Member of Authority: Rachel Larmer

Representatives: Michael Smyth and Charlotte Foster, Counsel for the
Applicant

Ken Anderson, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 07 August 2018 from Applicant

No submissions from Respondent

Date of Determination: 14 September 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1]

Mr A was successful in his unjustified dismissal personal grievance claim.¹

[2]

The Authority encouraged the parties to resolve costs by agreement but failing that set a timetable for costs submissions to be filed.²

[3]

Costs have not been agreed so Mr A now applies for a costs award in his favour. R Limited has not filed any costs submissions.

[4]

Mr A's actual costs were \$19,807.20 (including GST). He also seeks reimbursement of the Authority's filing fee of \$71.56. Although Mr A was

¹ [2018] NZERA Auckland 232.

² *Supra*, paragraphs [211] – [214].

represented by two counsel (Mr Smyth took over Mr A's case later in the matter), the costs application submitted to the Authority relates solely to Mr Smyth's invoices.

[5]

Mr Smyth seeks either indemnity costs or if that is not granted then an uplift to the Authority's usual notional daily tariff.

[6]

This matter involved a two day investigation meeting. Therefore the notional daily tariff in respect of this matter is \$4,500 for the first day and \$3,500 for the second day, giving a notional starting tariff of \$8,000.

[7]

The costs principles for an award of costs by the Authority are so well established I do not need to set them out again in full here. I acknowledge that I have had regard to the factors set out in *PBO Limited v Da Cruz*³ when assessing costs in this matter.

[8]

I consider it appropriate to adopt the Authority's usual notional daily tariff approach to assessing costs in this matter. This requires the notional starting tariff of \$8,000 to be adjusted to reflect the particular factors of this case.

[9]

Neither party identified any factors which would warrant the notional daily tariff being decreased, and I am not aware of any. Accordingly, the notional starting tariff is not decreased.

[10]

However there are a number of factors that warrant an increase being made to the notional starting tariff of \$8,000 to reflect the fact that the manner in which R Limited elected to conduct itself regarding this matter unnecessarily increased Mr A's actual legal costs.

[11]

The first factor is that R Limited failed to disclose all relevant documents and unsuccessfully challenged the admissibility of relevant evidence disclosed by Mr A.

[12]

The second factor is that Mr A made a successful application to the Authority for disclosure of relevant documents from R Limited.

[13]

The third factor is that the first investigation meeting date was adjourned at R Limited's request due to the unavailability of one of its witnesses. This resulted in

³ [\[2005\] NZEmpC 144](#); [\[2005\] ERNZ 808](#)

Mr A incurring additional costs due to the need to duplicate preparation as a result of the late notification of the request for an adjournment.

[14]

The fourth factor is that while the investigation lasted two days, these were longer than normal days and further written submissions were required subsequent to the investigation meeting.

[15]

The fifth factor is that there was some legal complexity involved in terms of the inter-relationship between ACC and remedies potentially available under the [Employment Relations Act 2000](#) which required extra time to address.

[16]

The sixth factor is that Mr A made a *Calderbank* offer by letter dated 26 January 2018 that was unreasonably rejected by R Limited. Mr A's *Calderbank* offer responded to R Limited's previous *Calderbank* offer to him.

[17]

Mr A offered to settle on terms that were less favourable to him than what he ultimately achieved from the Authority's substantive determination. Had R Limited accepted that offer, which was made approximately 10-11 weeks prior to the substantive investigation meeting, then both parties would have avoided to additional incurring legal costs from 26 January 2018 onwards.

[18]

Mr A's *Calderbank* offer indicated he would be prepared to accept \$20,000 distress compensation plus \$10,000 towards his actual legal costs. Mr A did not insist on an acknowledgement of liability from R Limited.

[19]

The compensatory award sought by Mr A in his *Calderbank* offer was \$5,000 less than that awarded to him by the Authority in its substantive determination. The legal costs that Mr A offered to settle for were also significantly less than the legal costs that have been awarded to him in this costs determination.

[20]

Mr A's *Calderbank* offer specifically put R Limited on notice that if it was not accepted and if Mr A obtained remedies from the Authority that were greater than his settlement offer, then he would be seeking an uplift to the notional daily tariff when costs were being assessed and/or would be seeking an award of indemnity costs.

[21]

I note that Mr A's request for costs reimbursement of \$19,807.20 is not in fact equivalent to indemnity costs because the amount Mr A has claimed relates solely to the actual costs invoiced to him by Mr Smyth. It does not include the legal costs Mr A incurred with his previous counsel.

[22]

I am satisfied that this matter requires an uplift of 2.5 times the notional daily tariff, giving total overall costs of \$20,000. That amount must then be adjusted downwards to reflect the actual costs incurred by Mr Smyth, which were \$19,807.20.

[23]

Mr A cannot be awarded more than his actual costs incurred, and the Authority was not provided with evidence about the extent of the costs incurred with Mr A's

first solicitor.

[24]

Mr A is also awarded \$500 costs towards his legal costs in connection with this costs application.

[25]

Accordingly, within 28 days of the date of this determination, R Limited is ordered to pay Mr A:

- (a) \$19,807.20 towards his actual legal costs on the substantive matter; (b) \$71.56 to reimburse his filing fee;
- (c) \$500 towards his legal costs for this costs application.

Rachel Larmer

Member of the Employment Relations Authority

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