



### **What is the starting point for assessing costs?**

[3] In costs applications the Authority uses a notional daily tariff based approach to costs.<sup>2</sup> The current notional daily tariff is \$3,500. This matter involved two days of investigation meeting time. The starting point for assessing costs is therefore \$7,000.

### **Are there any factors that warrant adjusting the notional daily tariff?**

[4] The applicant seeks an order that costs lie where they fall. Costs generally follow the event. The nature of the case may influence costs and result in an order that costs lie where they fall in certain circumstances.<sup>3</sup> This is not a case where it is appropriate to order costs to lie where they fall.

[5] The respondent submits factors supporting an increase were the urgency of the matter, directed mediation, refusal of a reasonable *Calderbank* offer, nature of the applicant's claims, nature of the applicant's evidence and the claim being for an ulterior commercial purpose amounting to an abuse of process.

[6] The respondent invoices include preparation and attendances at mediation between 28 November and 1 December 2014. I accept the applicants submission there is no basis for costs to be increased due to attendance at mediation. Attendance is statutorily required unless dispensed with under s159 of the Act. The direction to mediation was for the purposes of ensuring the parties obtained a mediation date sooner rather than later. Both parties attended mediation as directed. There is no evidence of behaviour around mediation that warrants any increase.

[7] There is also no basis for the involvement and charging of two Counsel. I accept the applicant's submission the matter was not overly complex. The evidence, submissions and witnesses were capable of being managed by one Counsel, especially in the speedy, cost effective and less technical forum of the Authority. Second Counsel took no discernable active role in proceedings. While the use of Junior Counsel to assist but not duplicate work at a lower charge out rate would be appropriate, two Counsel involved was a matter of choice not necessity. Some invoices note a discount for "double-up attendances" which I can only assume indicates either the client or Counsel's view these costs should not be privately met.

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<sup>2</sup> *Mattingly v Strata Title Management Ltd* [2014] NZEMPC 15 at [16].

<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808 (Emp C) at [35].

[8] The granting of urgency is a factor the Court has indicated warrants uplifting costs awards.<sup>4</sup> Here the urgency granted was in respect of early attendance at mediation and the filing of a statement in reply in November 2014. The actual meeting did not occur until March 2015. Filing of evidence occurred within the usual timeframes. The meeting had been set down for 3 days but was completed within 2 days. At most a minimal uplift may be warranted.

[9] Non-compliance with timetabling orders does warrant a modest reduction in costs awarded. Balanced against the uplift for urgency no further adjustment is required.

[10] I do not accept the applicants submission the principles relevant to *Calderbank* offers are not applicable in the Authority. Costs are discretionary.<sup>5</sup> The Court of Appeal specifically rejected the argument the principles of *Calderbank* offers should be adjusted or ignored in employment cases.<sup>6</sup>

[11] In order to be effective a *Calderbank* offer ought to be clear as to its terms, and the recipient should be allowed a reasonable time to consider the offer.<sup>7</sup> The respondent's *Calderbank* offer was made on 1 December 2014. It consented to "the injunctions sought" conditional upon non-publication unless in breach and an offer to pay \$12,500 plus GST in two equal instalments and was open for acceptance until 4 pm 4 December 2014. It is assumed the injunctions referred to were those set out in the statement of problem. The applicant counteroffered accepting the above terms but also seeking an increased payment of \$18,000 plus GST and a further 18 month period of restraint against the respondent, his company, its directors, principals or agents contacting or supplying 10 named businesses. The counteroffer was open for acceptance for a period of 24 hours and "non-negotiable."

[12] The respondents offer was both clear as to its terms and allowed a reasonable time to consider acceptance. It was at a made at the preliminary stage of the proceedings when only the statement of problem and statement in reply together with an affidavit from each party had been filed. The bulk of preparation for hearing occurred thereafter. By contrast the applicant's counter-offer gave an unreasonable

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<sup>4</sup> *Marshment v Sheppard Industries Limited* [2012] NZEmpC 93 at [25].

<sup>5</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808 (Emp C) at [35].

<sup>6</sup> *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

<sup>7</sup> *Aoraki Corp Ltd v. McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA).

amount of time for acceptance and it also failed to achieve more than either *Calderbank* offer at hearing.

[13] Greater weight will be given to the making of such an offer if the party has unreasonably proceeded with a claim that could have been readily settled and has then recovered less or not significantly more.<sup>8</sup> A “steely” approach to *Calderbank* offers is required because the scarce resources of the Authority should not be burdened by litigants who choose to reject a reasonable settlement offer, proceed with litigation and then fail to achieve any more than was previously offered.<sup>9</sup>

[14] Given the respondent’s *Calderbank* offer gave the applicant the remedies it unsuccessfully sought from the Authority, I take the view it unreasonably rejected the offer made and could have readily settled. Keeping in mind costs awards in the Authority are to be moderate, the daily tariff shall be increased to \$7,000.

[15] The remaining matters appear to be disapproval of the applicant’s case and evidence in chief as opposed to conduct which increased costs. Costs are not to be used as a form of punishment or disapproval of the applicant’s behaviour.<sup>10</sup> Those matters were taken into account when determining liability. The fact the applicant’s case was unsuccessful is reflected in the daily tariff.

[16] Although the applicant was successful with its breach application, no penalty was awarded given the respondent’s acceptance of the breach at an early stage. I make no adjustment as a consequence.

[17] There is a request for “costs on costs” to reflect settlement attempts. Given the costs award was less than the settlement offer of \$28,500 no further costs are awarded. The daily tariff encompasses costs submissions in any event.

[18] Caffe Coffee (NZ) Limited is ordered to pay Sune Farrimond \$14,000 towards his legal costs.

**TG Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>8</sup> *Ogilvy & Mather (NZ) Limited v. Darroch* [1993] 2 ERNZ 943 (EmpC).

<sup>9</sup> *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [19] and [20].

<sup>10</sup> *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808 (Emp C) at [35].