

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 490  
3137902

BETWEEN

**SAMUEL DAY**  
First Applicant

AND

**THE LAST WAVE LIMITED**  
Respondent

Member of Authority: Antoinette Baker

Representatives: Alex Kersjes, advocate for the Applicant  
Anna Oberndorfer, advocate for the Respondent

Submissions received: 05, September 2022 for the Applicants  
20 & 23 September 2022 for the Respondent

Date of Determination: 28 September 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Costs**

[1] The respondent (LW) has applied for a contribution to its costs from Mr Day in relation to defending the application Mr Day brought claiming unjustified dismissal. In my determination dated 23 August 2022 (my determination) I dismissed Mr Day's application after a two day investigation meeting. The issue of costs was reserved.

[2] LW lodged submissions for costs and Mr Day replied. Although not part of my direction LW then lodged submissions in reply. The latter has only been considered where relevant.

## **Costs principles**

[3] Clause 15, Schedule 2 of the Act empowers the Authority to order costs to any party as the Authority thinks reasonable. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.<sup>1</sup>

[4] The Authority uses a notional daily tariff<sup>2</sup> as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter. This tariff may then be adjusted upwards or downwards according to the circumstances of each case considering things like a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.<sup>3</sup>

## **LW's submission**

[5] LW submits that the starting point is the tariff for the two-day investigation meeting but that this should be increased to either the actual costs the respondent incurred to defend the claim being \$23,849.62 or alternatively the actual costs incurred after a Calderbank letter being \$22,699.62. It has provided a statement summary showing the costs incurred.

[6] LW submits that Mr Day pursued a claim that had no chance of success and that while costs are not meant to punish an unsuccessful party "this does not mean that Applicants ought to be alleviated of responsibility for causing unnecessary cost in pursuing baseless and vexatious claims." LW has provided a Calderbank letter sent to Mr Day offering consideration in exchange for Mr Day withdrawing his claim before LW had to incur any significant costs. In not taking this opportunity LW says this supports an uplift to the tariff. LW also says an adjournment was granted for two applicant 'expert witnesses' whose evidence had not been necessary and that it had to go to the unnecessary expense of preparing

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<sup>1</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

<sup>2</sup> The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 for the first day and \$3,500.00 for each additional day.

<sup>3</sup> As above at 1.

for more witnesses than would otherwise have been necessary due to the way Mr Day presented his claim.

### **Mr Day's submission**

[7] Mr Day submits that while costs should follow the event and that he acknowledges the usual tariff approach, there is nothing to support an uplift or the awarding of what he submits are indemnity costs claimed by LW. He submits there should be a reduction to the tariff resulting in an award of \$4,500.00 because of the addition of the 'late' expert witness and that his claim had merit. He submits he will have financial difficulty meeting a costs award.

[8] Mr Day submits the Calderbank letter from LW was not presented with sufficient time given to consider and reply and that he had the right to respond with his own 'expert' evidence when the respondent lodged this type of evidence first.

### **Assessment**

[9] I agree that LW should have an order for a contribution to its costs. The matter was heard across two investigation days. I accept LW's submission that a starting point should be \$8,000.00. While it is submitted for Mr Day that a contribution should be \$4,500.00, I am not satisfied that I have sufficient reason before me to reduce this starting point.

[10] I will now consider whether an increase to \$8,000.00 should be awarded.

### *Mr Day's financial situation*

[11] Mr Day's submission is supported by one payslip showing he earns a very modest hourly rate. That payslip shows a part time number of hours worked in that particular week. However, I find it likely Mr Day may have a challenge to pay any significant uplift to the \$8,000.00 tariff. Mr Dear in the substantive investigation in his evidence focused on his concerns about the financial impact of dismissal on Mr Day's family situation which now includes a young baby. I find it likely that Mr Day's circumstances have not changed greatly since then. The ability to pay costs is a factor that weighs against an uplift.

*Was the claim frivolous and without merit?*

[12] I accept Mr Day's submission that his claim was not "frivolous". While I found Mr Day an unreliable witness, the unsuccessful outcome of his claim has already addressed this. Mr Day was entitled to have the disputed facts of his claim tested and then considered in the investigation process. Mr Day's claim involved things that did not turn on his reliability as a witness including whether LW had actual available procedures and policies in place and why it provided notice and a positive reference which on the face of it was inconsistent with a finding of serious misconduct. While Mr Day was unsuccessful in his claim these things at least were not unreasonable to have brought to be investigated.

[13] I do not find that Mr Day's claim was without merit for investigation to the extent that I should award an uplift to the tariff.

*Unnecessary costs*

[14] While LW says it was put to unnecessary costs in the way Mr Day chose to bring his claim by including matters that personally criticised colleagues, the evidence of these witnesses took little of the investigation time and their evidence was helpful in considering what may have likely occurred. I do not find this supports an uplift to the tariff.

[15] Both parties called 'expert' witnesses. The extent to which these witnesses were not considered helpful is set out in my determination. There was some evidence from the respondent's expert that was helpful. While LW may have incurred additional time to consider Mr Day's two 'expert' witness statements I agree with Mr Day's submission that LW commenced this line of evidence. I am not satisfied that there would have been extensive extra time involved in considering Mr Day's 'expert' evidence and if anything, the second day tariff award would already take this into account.

*Calderbank letter dated 24 February 2022*

[16] The letter dated 24 February 2022 from LW’s newly instructed advocate to Mr Day’s advocate (the Calderbank letter) proposed to pay \$1,000.00 plus GST towards Mr Day’s costs; that Mr Day withdraw his claim in the Authority; that LW would provide a certificate of service and record the termination as a resignation; and that the parties agree to non-disparagement and confidentiality obligations. By the date of the Calderbank letter Mr Day had lodged his evidence on 28 January 2022 according to the timetable in the Directions of the Authority dated 07 September 2021.

[17] Mr Day submits that there was insufficient time for him to properly consider a response to the Calderbank letter. It was sent on Friday 24 February 2022 at 4.39pm with a response due by midday on Monday 27 February 2022. I agree.

[18] The Employment Court <sup>4</sup> has observed that while ‘Calderbank’ offers are “front and centre” for the Court when considering costs, the Authority’s discretion is broader and sits within the context of a jurisdiction “intended to be low level, cost effective, readily accessible and non-technical”. That case involved the Court considering as disproportionate an application for costs asking for an uplift of \$20,000.00 to the then one day Authority tariff of \$3,500.00.

[19] Considering all of the above including Mr Day’s likely financial situation and that he is ordered to pay a not insignificant amount of \$8,000.00 to LW as a contribution to its costs, I am not satisfied that an uplift to the notional tariff is appropriate.

*Should costs be awarded for incurring costs on this application?*

[20] Mr Day submits that the application to claim the costs on this application is seeking “costs on costs”. I agree and I have not added this cost to the order.

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<sup>4</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

**Order**

[21] Samuel Day is ordered to pay The Last Wave Ltd the single sum of \$8,000.00 as a contribution to its costs.

Antoinette Baker  
Member of the Employment Relations Authority