

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 366
3009131

BETWEEN TITIIMAEA ELISARA
Applicant

AND ALLIANZ NEW ZEALAND
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Catherin Stewart for Applicant
Harry Waalkens QC for Respondent

Submissions received: 30 October 2017 from Applicant
18 October 2017 from Respondent

Determination: 23 November 2017

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A. Mr Elisara is ordered to pay a contribution of costs to Allianz New Zealand Limited in the sum of \$15,000 within 28 days of the date of this determination.

[1] In a determination dated 20 September 2017¹ I held Mr Elisara's dismissal to be justified and declined his application seeking a declaration that Allianz New Zealand Limited had breached its obligations of good faith.

[2] I reserved costs, indicating that if the parties were unable to resolve that issue, both parties would have the opportunity to file cost memoranda and evidence. These have now been received by the Authority for consideration.

¹ [2017] NZERA Auckland 290.

Should daily tariff be adjusted?

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. In my Notice of Direction dated 10 May 2017 I reminded the parties that costs awards were \$4,500 for the first day of hearing and \$3,500 for each subsequent hearing day.²

[4] As held recently by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.³ As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁴ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

[5] An assessment of costs will normally start with the notional daily tariff. The investigation meeting took one day. Allianz seeks an uplift in the daily tariff to \$9,000 to be applied to the day of hearing and also to five days preparation time to reflect:

- a) the way in which the matter was conducted which unnecessarily increased costs for Allianz;
- b) the serious and wide ranging scope of the allegations made by Mr Elisara which broadened the issues Allianz had to respond to including the evidence it had to call;
- c) the complexity of the matter.

Conduct unnecessarily increasing costs

[6] Prior to the investigation meeting Mr Elisara applied to the Authority for the disclosure of a confidential record of settlement between Mr Chapman and Allianz. Mr Elisara told me this information was relevant to his claim that he had been subject to disparate treatment.

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

³ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

⁴ (2006) 7 NZELC 98,128; [2005] ERNZ 808; (2005) 3 NZELR 1 (EMC).

[7] Mr Chapman (through Allianz) opposed the disclosure of the record of settlement unless non-publication orders were in place to safeguard the confidentiality of the terms of settlement. In accordance with his instructions, Allianz applied for interim non-publication orders. This application was opposed by Mr Elisara and after receiving correspondence from both parties on the application I held a case management call to address the application.

[8] The outcome was that the parties agreed a copy of the record of settlement would be disclosed only to the Authority to assess whether the content of the record of settlement would provide substantive support to Mr Elisara's claim of disparity and, if so, a further case management call would be convened.

[9] I received a copy of the record of settlement and determined that it would be of no assistance to Mr Elisara.

[10] Mr Elisara's opposition to the orders sought by Allianz was unreasonable. His consent to the interim orders would have resolved the disclosure issues relating to the confidential record of settlement, avoided unnecessary correspondence, and removed the need for attendance at a case management call. His actions had the result of increasing costs unnecessarily for Allianz who had attempted an early and pragmatic solution to the issue. A small uplift of \$1,750 in the daily tariff will be made to recognise the unnecessary additional costs.

Serious and wide ranging scope of the allegations

[11] The allegations made by Mr Elisara were considerable in number and required a substantial amount of evidence to be lodged by both parties. Mr Elisara took a "belts and braces" approach to his application which required a similar response from Allianz.

[12] Parties are entitled to adopt such an approach.⁵ That was Mr Elisara's choice. However, it left Allianz with little option but to fully respond to each allegation and claim. The Authority is statutorily designed to be an investigative, non-technical, low level and readily accessible forum with modest costs.⁶

⁵ Above n 3.

⁶ Ibid.

[13] The “belts and braces” approach taken by Mr Elisara led to an increase in costs for Allianz which was unreasonable. A small uplift of \$1,750 in the daily tariff will be made to recognise this conduct by Mr Elisara.

Complexity of the matter

[14] The statement of problem lodged in the Authority was some 400 pages in length including attachments. The statement of problem was accompanied by two applications including one for urgency and affidavit evidence. After the investigation meeting both parties lodged and served extensive legal submissions in accordance with a timetable set at the end of the investigation meeting.

[15] The statement of problem identified a large number of concerns about the way in which Allianz carried out its investigation and process of dismissal and sought significant remedies. While this is not uncommon in cases of unjustified dismissal involving a senior employee and while it is something the Authority deals with on a regular basis the approach taken by Mr Elisara was unnecessary.

[16] Both parties presented their cases effectively and this resulted in efficient use of my time. This is evidenced by the fact that the investigation occupied only one day. Further, in order to keep costs low, I offered, and the parties agreed, that the interim and substantive applications would be dealt with at the same time to avoid the necessity of two separate hearings and two sets of submissions.

[17] The Authority has increased costs to take into account preparation time in other matters. It is appropriate to do so in this case to recognise the time and costs associated with the considerable preparation undertaken by Allianz prior to the investigation meeting and which was of considerable assistance to the Authority. I consider it appropriate to allow two days preparation for the one day hearing. The tariff to be applied will be \$3,500 per day which equals \$7,000.

Calderbank offers

[18] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal:⁷

⁷ As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.⁸

[19] The Employment Court in *Mattingly v Strata Title Management Limited* held:⁹

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a *de novo* challenge, having regard to the circumstances of the particular case.

[20] At the conclusion of the investigation meeting I invited the parties to consider whether they might resolve the matter before the agreed date for lodging submissions.

[21] Allianz relies on a Calderbank offer it made after the investigation meeting on 12 July to support its submission that there ought to be an uplift in costs. A Calderbank offer is intended to avoid the costs associated with trial. This is consistent with Regulation 6 of the Employment Court Regulations which states that when exercising its discretion to award costs the Court may have regard to any offer made a reasonable time before the hearing.

[22] Given the timing of the Calderbank offer I have not taken it into account. It is commendable that the parties took up my invitation to attempt to resolve matters, however, they had already expended significant costs in preparation for and attendance at the investigation meeting making the purpose of a Calderbank offer redundant.

[23] Allianz also relies on a Calderbank offer it made on 6 October which it made in an effort to resolve the issue of costs between the parties. The Calderbank offer has been provided to support Allianz's submission for a further adjustment in costs.

[24] The offer sought a payment of \$55,000 from Mr Elisara as a contribution to the costs of more than \$100,000 incurred by Allianz in its defence of Mr Elisara's claims. The offer was rejected.

⁸ Ibid at [18].

⁹ [2014] NZEmpC 15; [2014] ERNZ 1 at [27]

[25] As I have already pointed out, legal costs incurred in the preparation for and attendance at an investigation meeting should be modest. I am not satisfied a further adjustment to the costs is appropriate given the extent to which Allianz has been successful in this application.

Disbursements

[26] Allianz seeks reimbursement of its disbursements covering the airfares and accommodation for three witnesses travelling from Australia amounting to \$5,891.45.

[27] Allianz operates its business in New Zealand. Mr Elisara was managed by Managers based in Australia. The three witnesses attending the investigation meeting were all involved in Mr Elisara's employment and/or the disciplinary process leading to Mr Elisara's dismissal.

[28] All employees employed in New Zealand have a statutory right to challenge decisions of their employer they believe to be unjustified and which impact on their conditions of employment or the continuation of their employment. Attending to these challenges, including attendance at the Authority is a reality of doing business in New Zealand.

[29] The costs associated with the attendance of the witnesses for Allianz are a business expense and no orders will be made to require these costs to be borne by Mr Elisara.

Determination

[30] I have agreed that adjustments should be made to the daily tariff to take into account conduct unnecessarily increasing costs and for the "belts and braces" approach taken by Mr Elisara making a total of \$8,000. In addition, I have agreed there should be an upwards adjustment of \$7,000 to recognise the thorough preparation of its case by Allianz which was of significant assistance. This equates to a total costs contribution of \$15,000.

[31] Mr Elisara is ordered to pay a contribution of costs to Allianz New Zealand Limited in the sum of \$15,000 within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority