

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 62
3093692

BETWEEN GHT
 Applicant

AND AWN
 Respondent

Member of Authority: Peter van Keulen

Representatives: Josh Lucas, counsel for the Applicant
 Amy Keir, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 20 January 2022 from the Applicant
 8 February 2022 from the Respondent

Date of Determination: 28 February 2022

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 23 December 2021, I found that AWN had acted in an unjustifiable way causing disadvantage to GHT's employment and I ordered AWN to pay \$24,000.00 in compensation.¹ I also reserved costs so that the parties could try to agree costs. The parties have been unable to agree costs and GHT has applied for an order for costs.

¹ *GHT v AWN* [2021] NZERA 581.

Application for costs

[2] Counsel for GHT seeks costs of \$7,750.00 plus GST and disbursements for an investigation meeting that lasted one and a half days. This amount is more than the normal amount that would otherwise be awarded for a one and a half day investigation meeting. Counsel says this increase is appropriate because AWN failed to accept a Calderbank offer, which was for an amount less than the remedies awarded in my determination.²

[3] Counsel for AWN acknowledges that the principles on which the application for costs is advanced are correct but says there are two important factors that also require consideration:

- (a) GHT's statement of problem had additional claims, that she was not successful on or did not advance in the investigation meeting. Counsel says costs should be reduced to reflect the time spent on these unsuccessful claims.
- (b) AWN did engage with GHT over her Calderbank offer and this shows that AWN took reasonable steps to try and resolve GHT's claims, including maintaining correct positions on GHT's unsuccessful claims.

Analysis

Costs in the Authority

[4] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³ and other relevant Employment Court and Court of Appeal decisions.⁴ I have applied these principles when determining this costs application.

² A Calderbank offer is an offer made by one party to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

⁴ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; and *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

Costs for GHT

[5] The starting point is that costs should follow the event. GHT was successful in her claim so she is entitled to an award of costs.

Applying the daily tariff

[6] The next question is whether I should follow the normal practice of the Authority when setting costs; applying the daily tariff, which is simply awarding a set amount for each day of the investigation meeting. The daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for every subsequent day of an investigation meeting.

[7] In this case it is appropriate to apply the daily tariff.

Adjusting the daily tariff

[8] The question that follows then is whether I should adjust the daily tariff so that I award more or less for each day than the current prescribed amounts based on the arguments of counsel; that is the effect of the Calderbank offer made by GHT and the effect of AWN's mixed success.

Calderbank offers

[9] In the course of attempting to negotiate a settlement the parties exchanged various Calderbank offers. The result of the exchange was that AWN did not accept GHT's final offer. The amount of that final offer was for less than what GHT was awarded in my determination.

[10] I am satisfied that the last offer met the requirements for Calderbank offers and despite AWN engaging in negotiation over the various offers it ultimately refused the last Calderbank offer. And, the failure to accept that offer was not reasonably explained i.e. there was no reasonable basis to refuse the offer.

[11] For these reasons the Calderbank offer is relevant to the question of increasing the daily tariff. As I have said before when dealing with an increase to the daily tariff for refusing a Calderbank offer, any uplift will not be significant. This conclusion is based on what the

Court of Appeal⁵ and the Employment Court⁶ have stated about the approach to dealing Calderbank offers and how those Courts have applied an appropriate uplift.

[12] In *Davide Fagotti v. Acme & Co Ltd* the Full Bench of the Employment Court's analysis was that a \$1,000.00 increase to the daily tariff was appropriate where a party unreasonably rejected a Calderbank offer.⁷ I adopt that approach and will increase the daily tariff by \$1,000.00 per day.

Mixed success

[13] The daily tariff amount can also be adjusted to reflect the limited success of the party receiving the costs award and this is the submission advanced by counsel for AWN.⁸

[14] I accept that in this case GHT's mixed success is sufficient enough to warrant a reduction in costs. And I consider it appropriate to adopt the approach taken by the Employment Court in *William Coomer v JA McCallum and Son Limited*, that is, reflecting any reduction in costs by limiting the application of the daily tariff to the first day, as submitted by counsel for AWN.⁹

Conclusion

[15] The daily tariff is to be applied to one day of the investigation meeting – reflecting AWN's mixed success. However, the tariff rate for one day is to be increased by \$1,000.00 to reflect GHT's failure to accept the Calderbank offer made by AWN.

[16] The daily tariff is currently \$4,500.00 for the first day of the investigation meeting, so AWN is awarded \$5,500.00 for costs.

Disbursements

[17] GHT is entitled to the following disbursements:

- (a) The filing fee of \$71.56.

⁵ *Blue Star Print Group (NZ) Ltd v. Mitchell*, above n4.

⁶ *Davide Fagotti v. Acme & Co Ltd*, above n 4.

⁷ *Davide Fagotti v. Acme & Co Ltd*, above n 4.

⁸ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

⁹ *William Coomer v JA McCallum and Son Limited*, above n 8.

(b) Hearing fees of \$153.33.

GST

[18] Counsel for GHT has also requested that GST be added to the award of costs, relying on case law from the Employment Court.¹⁰ Whilst I acknowledge that submission and recognise there have been cases in the past where the Authority has added GST to an award of costs, the exercise of the Authority's discretion to award costs under cl 15(1) of the Act as that relates to the addition of GST has evolved; the Authority's current approach is that the daily tariff is an all-inclusive, GST neutral figure. As a result, GHT's claim for GST to be added to the daily tariff amount is declined.

Order

[19] AWN is to pay GHT \$5,500.00 as a contribution to her costs in this matter. AWN must also pay GHT disbursements of \$224.89.

Peter van Keulen
Member of the Employment Relations Authority

¹⁰*Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 159.