

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 84
5602072

BETWEEN DARRELL GARRETT
 Applicant

AND RICHMOND FUNERAL HOME
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Jills Angus Burney, Counsel for Applicant
 Andrew Scott-Howman, Counsel for Respondent

Submissions Received: 28 July and 24 August 2017 from Respondent
 18 August 2017 from Applicant

Determination: 30 August 2017

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] On 22 May 2017 I issued a determination in which I dismissed Mr Garrett's claim he had been unjustifiably dismissed by the respondent, Richmond Funeral Home Limited (Richmond). I also dismissed claims Mr Talbot had been unjustifiably disadvantaged and was owed unpaid wages.¹

[2] Costs were reserved and Richmond, as the successful party, now seeks a contribution toward those it incurred defending the claims. Attempts to negotiate a resolution on costs have been unsuccessful.

¹ [2017] NZERA Wellington 40

[3] Normally the Authority will apply a daily tariff when addressing a costs claim.² At the time this claim was lodged the normal starting point was \$3,500 per day and from there adjustment might be made depending on the circumstances.

[4] The investigation took a day with comprehensive submissions being prepared and forwarded at a later date. Applying the tariff, and assuming about half a day for the presentation of submissions, that would see an award slightly in excess of \$5,000 but Richmond submits a greater contribution is warranted.

[5] In support of its view it refers to a letter it sent on 26 February 2016. The letter contained an analysis of the claims and having acknowledged the parties undoubtedly had differing views of the underlying facts suggested an earlier Calderbank offer would, even if Mr Garrett was successful, undoubtedly exceed anything he might hope to receive. It reiterates the offer, which was for over \$22,500, as one that was still available.

[6] The offer was rejected and a counter, which would still have required litigation, proposed. Here I also note the portion of the claim with which Mr Garrett wished to proceed, the wage arrears, was something the letter identified as having almost no chance of success with that assertion being supported with what turned out to be an accurate analysis as to why.

[7] Richmond submits this should be taken into account and, it is implied, the letter be treated as a Calderbank and all costs incurred after it was sent be recompensed. Richmond seeks \$18,192.39.

[8] Richmond does not seek recompense in respect to costs it incurred prior to the letter.

[9] In the alternate, and should this approach not be accepted, it is submitted a significant uplift be applied to the tariff. Further argument is tendered in support of this contention with an assertion that while not punitive Richmond's views recognise significant cost was incurred by a small business.

[10] By way of response Ms Angus Burney submits the letter of 26 February is not a Calderbank and it is therefore unfair I take it into account. Issue is also taken with

² refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

the letters content with a suggestion, given it was open, it was an inappropriate attempt to influence the Authority. It is also noted the situation had changed as when the offers were first discussed Mr Garrett was yet to resign.

[11] It is submitted the case was addressed efficiently and there was nothing in the conduct of either party which unduly increased costs and therefore warrants an increase in the tariff. It is asserted that notwithstanding the outcome Mr Garrett's claim were genuine.

[12] I have noted the party's submissions and in particular the argument the letter of 26 February was not a Calderbank and should not be treated as one. I agree. I do however note it formed a real and reasonable attempt to settle which could, and perhaps should, have meant costly litigation was later avoided. There should be some recognition of that attempt to settle.

[13] That said I also have to be cognisant of the principle an award of costs should be modest³ especially where, as here and was said by Ms Angus Burney, there was nothing untoward about the way the party's conducted the actual litigation.

[14] Having considered the submissions, the circumstances and the principles which apply to an award of costs I conclude an increase to the tariff is warranted but not nearly to the extent sought by Richmond.

Conclusion

[15] I order the applicant, Darrell Garrett, pay the respondent, Richmond Funeral Home Limited, the sum of \$7,000.00 (seven thousand dollars) as a contribution toward the costs Richmond incurred in successfully defending Mr Garrett's claims.

M B Loftus
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* at [44]