

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 160
3041094

BETWEEN HST
 Applicant

A N D KAG
 Respondent

Member of Authority: Peter van Keulen

Representatives: Deborah Hendry counsel for the Applicant
 Jay Lovely counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 31 January 2020 from the Applicant
 25 February 2020 from the Respondent

Date of Determination: 22 April 2020

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 28 January 2020¹, I determined that KAG had acted in an unjustified manner causing disadvantage to HST and as a result I ordered KAG to pay

¹ *HST v KAG* [2020] NZERA 33.

\$14,000.00 to HST for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). I dismissed all of HST's other claims.

[2] I also reserved costs so that the parties could try to agree costs. The parties have not been able to agree costs and HST seeks costs.

Application for costs

[3] Counsel for HST seeks an award of costs of \$23,000.00 plus disbursements. In support of this counsel says I should apply the daily tariff with a modest uplift to reflect KAG's conduct of this case and the unreasonable rejection of a Calderbank offer.²

[4] Counsel for KAG says that costs should lie where they fall (i.e. each party should bear its own costs) as:

- (a) HST was only partially successful in her claims and her unsuccessful arguments increased the time taken in the investigation meeting; and
- (b) HST's counsel led lengthy and unnecessary evidence which increased the time taken in the investigation meeting.

Analysis

Costs in the Authority

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. In *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³ and other relevant Employment

² A Calderbank offer is an offer made by one party, normally a respondent, 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

Court and Court of Appeal decisions,⁴ the Employment Court and the Court of Appeal have set out the principles I should apply and the approach I should adopt when exercising my discretion to award costs under clause 15 of Schedule 2 of the Act.

Costs for HST

[6] The first principle I should consider is that costs should follow the event, unless there is some accepted reason why this should not happen, such as a successful party failing to better a Calderbank offer made or a party only having very limited success.

[7] In this case, HST had mixed success, only being successful with her unjustified disadvantage claim. However, applying *William Coomer v JA McCallum and Son Limited*⁵, I am satisfied that HST was sufficiently successful for the purposes of costs and therefore she is entitled to an award of costs.

[8] For completeness I record that I am not satisfied that HST's limited success plus her conduct of this case is such that she should not be awarded any costs at all as counsel for KAG has submitted.

Applying the daily tariff

[9] Turning to quantum of the costs to be awarded for HST, my starting point is to consider applying the daily tariff. The daily tariff is a set amount for each day of the investigation meeting, which is then used to calculate quantum based on the actual time spent in the investigation meeting for the case.

[10] Applying the daily tariff to assessing the quantum of costs is the standard approach in the Authority. However, I can depart from applying the daily tariff in certain circumstances where, for example, indemnity costs may be appropriate.

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, *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127

⁵ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156

[11] In this case there is no basis for awarding costs other than by applying the daily tariff. I am satisfied that it is appropriate to award costs to HST on the basis of daily tariff.

Length of the investigation meeting

[12] The investigation meeting in this matter was held over a number of days spread over a period of time, some of those days being part days. I have considered the actual time spent in the investigation meeting over the relevant days and calculate the time to equate to four days of meeting. Therefore, applying the daily tariff of \$4,500.00 for the first day and \$3,500.00 for every subsequent day, my initial calculation is that costs should be \$15,000.00.

Adjusting the daily tariff

[13] The daily tariff can be adjusted for various reasons. The factors relevant to the consideration of the increase or decrease of the daily tariff in this case include the parties' conduct of the case and the Calderbank offer referred to by counsel for HST.

Calderbank offer

[14] I can deal with the Calderbank offer relatively easily; given the circumstances of the offer, including the timing of it and its terms, I am not satisfied that it complies with principles of a Calderbank offer or that KAG unreasonably rejected it. I will not adjust the daily tariff in light of the Calderbank offer.

KAG's conduct of the case

[15] Counsel for HST also submits that KAG's conduct of this case warrants an uplift in the daily tariff. In raising this point counsel refers to two aspects, KAG ignoring various attempts to settle and counsel for KAG asking for numerous adjournments during the investigation meeting.

[16] Without prejudice discussions are only relevant insofar as it is captured in Calderbank correspondence. As I have already ruled out the Calderbank offer having any impact on

increasing the daily tariff there is nothing further for me to consider in respect of without prejudice discussions.

[17] Turning to KAG's counsel's conduct of this matter I am satisfied that his conduct was entirely appropriate and professional. In particular, his requests for adjournments were appropriate and made in response to additional evidence being introduced by HST's counsel in the course of the investigation meeting on short notice and without witness statements being provided in advance.

[18] There is nothing in KAG's counsel's conduct of this matter that warrants an increase in the daily tariff.

Applicant's conduct of the case

[19] In contrast, there is one aspect of HST's conduct of this case that impacts on reducing the daily tariff; the additional and largely unnecessary evidence from two witnesses dealing with wider allegations of management within KAG and then specifically dealing with the circumstances of how the two witnesses left KAG. In my determination I recorded that most of this evidence was not necessary nor was it appropriate.⁶ This evidence took up a considerable amount of time in my investigation and this does warrant a reduction in the daily tariff of \$1,250.00 per day.

GST

[20] Counsel for HST has also requested that GST be added to the award of costs, relying on case law from the Employment Court.⁷ However, 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 is different; the Authority's current approach is that the daily tariff is an all-inclusive, GST neutral figure. Consequently, counsel's claim for GST on HST's costs is declined.

⁶ *HST v KAG* [2020] NZERA 33 at [12].

⁷ *Knapp v Locktite Aluminium Specialities Limited* [2015] NZEmpC 124.

Conclusion

[21] I award costs to HST based on the daily tariff for four days of investigation meeting being \$15,000.00, which is then adjusted down to \$10,000.00.

Disbursements

[22] HST is also entitled to be paid for the disbursements she has incurred in this matter, being the filing fee of \$71.56 and hearing fees of \$459.99.

Order

[23] KAG is to pay HST \$10,000.00 plus disbursements of \$531.55 as a contribution to her costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority