

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 181  
3048513

BETWEEN        SAMUEL HAGGITT  
                         Applicant

A N D            FERGUSON BUILDERS LIMITED  
                         Respondent

Member of Authority:        Peter van Keulen

Representatives:            Applicant in person  
                         Robert Ferguson, representative for the Respondent

Investigation Meeting:        On the papers

Submissions Received:        6 April 2020 from the Applicant  
                         25 March 2020 and 15 April 2020 from the Respondent

Date of Determination:        5 May 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     In a determination dated 2 March 2020<sup>1</sup>, I dismissed all of Samuel Haggitt's claims against Ferguson Builders Limited. I also reserved costs so that the parties could try to agree costs. The parties have not been able to agree costs and Ferguson Builders seeks costs.

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<sup>1</sup> *Samuel Haggitt v Ferguson Builders Limited* [2020] NZERA 98.

## **Application for costs**

[2] Ferguson Builders seeks an award of costs as it was successful in defending all of Mr Haggitt's claims. Ferguson Builders also says the costs amount should reflect that Mr Haggitt unreasonably rejected a Calderbank offer.<sup>2</sup>

[3] Mr Haggitt says he is prepared to pay costs to Ferguson Builders and has tried to agree the costs payable along with other money he accepts he owes Ferguson Builders and Robert Ferguson, of Ferguson Builders. Mr Haggitt says a sum was agreed for the money he owes plus costs but then the parties were unable to agree a plan for payment of those costs and an agreement was never finalised.

## **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. *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>3</sup> and other relevant Employment Court and Court of Appeal decisions<sup>4</sup> 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 Ferguson Builders*

[5] The first applicable principle is that costs should follow the event. Therefore, I will award costs in favour of Ferguson Builders as it was successful in defending Mr Haggitt's claims.

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<sup>2</sup> 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.

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

<sup>4</sup> *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

### *Applying the daily tariff*

[6] The next applicable principle is that the quantum of the costs to be awarded should be calculated by reference to 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.

[7] Applying the daily tariff to assessing the quantum of costs is the standard approach in the Authority. And in this case I am satisfied that it is appropriate to award costs to Ferguson Builders based on the daily tariff.

[8] The investigation meeting in this matter took one day. The daily tariff for the first day of an investigation meeting is \$4,500.00.

### *Adjusting the daily tariff*

[9] The final set of principles to consider applies to the issue of whether the daily tariff can be adjusted. Considering the principles, I conclude that the only relevant factor for adjusting the daily tariff is the Calderbank offer referred to by Ferguson Builders.

[10] Ferguson Builders made a Calderbank offer on 24 May 2019. This was a valid Calderbank offer.<sup>5</sup> Mr Haggitt did not accept it and, as he did not provide any explanation for this, I conclude that the Calderbank offer was unreasonably rejected by him.

[11] Following Court of Appeal<sup>6</sup> and the Employment Court<sup>7</sup> cases dealing with the application of the Calderbank principles I believe the unreasonable rejection of the Calderbank offer justifies uplifting the daily tariff by \$1,000.00.

### *Conclusion*

[12] I award costs to Ferguson Builders based on the daily tariff for one day of investigation meeting adjusted by \$1,000.00 for the unreasonable rejection of the Calderbank offer.

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<sup>5</sup> *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943

<sup>6</sup> *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385

<sup>7</sup> *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28

[13] It is clear that any payment of this cost award will need to be made by instalments and I encourage the parties to come to a suitable arrangement.

**Order**

[14] Mr Haggitt is to pay Ferguson Builders Limited \$5,500.00 as a contribution to its costs in this matter.

Peter van Keulen  
Member of the Employment Relations Authority