

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 664
3155544

BETWEEN DEON HANEKOM
Applicant

AND HCL (NEW ZEALAND)
LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Rhys Walters, counsel for the Applicant
John Rooney and Matthew Austin, counsel for the
Respondent

Submissions received: 20 September 2023 from the Applicant
6 September 2023 from the Respondent

Determination: 9 November 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination dated 23 August 2023 I dismissed Deon Hanekom's claims of constructive dismissal, unjustified disadvantage, breach of good faith under s 4 of the Employment Relations Act 2000 (the Act) and estoppel.¹

[2] The question of costs was reserved and if the parties were not able to reach agreement, the Authority would make a costs determination. As directed, the parties have lodged written submissions on costs which have been considered.

Costs principles

[3] The Authority has the power under clause 15 of Schedule 2 of the Act to award costs. The principles and approach adopted by the Authority in respect of this power

¹ *Deon Hanekom v HCL (New Zealand) Limited* [2023] NZERA 472.

are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.² Those principles are as follows:

- a. The Authority has a discretion whether to award costs, and how much, but the discretion must be exercised in accordance with principle and not arbitrarily.
- b. The statutory jurisdiction toward costs is consistent with the Authority's equity and good conscience jurisdiction.
- c. Equity and good conscience are to be considered on a case-by-case basis.
- d. Costs are not to be used to punish or express disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- e. The Authority can consider whether all or any of the parties' costs were unnecessary or unreasonable.
- f. Costs generally follow the event (i.e., the unsuccessful party will normally be required to contribute to the costs of the successful party).
- g. *Calderbank offers* may be taken into account when setting costs.
- h. Awards will be modest.
- i. Frequently costs are judged against the notional daily tariff.
- j. The nature of the case can influence costs, which means the Authority may order those costs should lie where they fall.

[4] On 25 August 2023, the Authority released its consolidated Practice Direction which includes its approach to costs and the use of a notional tariff. The current daily tariff is \$4,500 for the first day of any matter and \$3,500 for any subsequent day. Various factors and principles may have the effect of increasing or decreasing the amount of costs awarded.³

Costs submissions

The company's submissions

[5] Of the *Da Cruz* principles noted above, Mr Rooney refers to Mr Hanekom's rejection of a reasonable offer made on a *Calderbank* basis and the way he conducted

² *PBO Ltd (formerly Rush Security Ltd v Da Cruz* [2005] 1 ERNZ 808.

³ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf> (at page 5).

his case which increased HCL (New Zealand) Limited's (HCL or the company) costs unnecessarily.

[6] The investigation meeting took the better part of two full days. HCL submitted that the starting point for costs is \$8,000 comprising \$4,500 for the first day and \$3,500 for the second day in accordance with the current tariff.

[7] HCL relies on a Calderbank offer of \$2,000 that it made to Mr Hanekom by letter of 22 July 2022 which was essentially a counteroffer to an earlier proposal for settlement by Mr Hanekom on 4 July. Mr Rooney submits that HCL's Calderbank offer was clear and provided Mr Hanekom a reasonable period of time to obtain advice about it. The offer was also made one month after the Authority had initially set the matter down for investigation meeting in November 2022. Although Mr Hanekom subsequently made a counter counteroffer of his own on 3 August, this was rejected by the company.

[8] It was further submitted that HCL incurred legal costs in excess of \$165,744 (plus GST and disbursements) from August 2022 to the filing of its legal submissions in May 2023. I note that this total figure includes HCL having to prepare for an investigation meeting in November 2022 that needed to be adjourned because Mr Hanekom had unilaterally cancelled his flight to Auckland on the morning of the investigation meeting. It was submitted that the adjournment resulted in additional and unnecessary legal costs of approximately \$25,000 being incurred by the company which needed to re-prepare for the rescheduled investigation meeting that was held approximately three months later on 22-23 February 2023. HCL seeks a significant uplift in costs as a result and seeks a total costs award of \$50,000 against Mr Hanekom.

Mr Hanekom's submissions

[9] Mr Walters submitted that Mr Hanekom had good reasons to decline HCL's Calderbank offer because he had been seeking information from the company about an alleged performance bonus document or policy. The Authority had directed HCL to respond to this particular issue in its written witness statements which were to be lodged and served by 28 October 2022. Because Mr Hanekom needed to file his witness statement first – on 23 September – it was reasonable of him to refuse the Calderbank offer.

[10] Mr Walters further submitted that the company's 'steely approach' to costs should not be adopted and that modesty and proportionality remain central considerations so as to not to create a chilling effect on employees from pursuing grievances at the first instance. Of the *Da Cruz* principles, Mr Walters refers me to costs not being used as a punishment or an expression of disapproval of an unsuccessful party's conduct and that cost awards will be modest.

[11] Mr Hanekom acknowledges that his cancelling of his flight on 23 November 2022 is a relevant consideration but asks that a sense of perspective is kept because a large part of the investigation meeting involved witnesses attending remotely by audio-visual link (AVL) and that his flight cancellation occurred in the context of a COVID-19 outbreak.

[12] Mr Walters says that Mr Hanekom's biggest mistake was unilaterally changing his flights before waiting to hear back from the Authority – a mistake for which he is keenly aware and apologetic. In any case, Mr Walters says that it would not have taken that much time for HCL to reschedule its witnesses and to refresh their memories for the investigation meeting.

Costs analysis

[13] The starting point is that costs should follow the event. The investigation meeting took the better part of two days with the second day finishing shortly after 3 pm. Rather than apportion the second day *pro rata*, for the purposes of setting costs, I have treated the second day as a whole day given that the majority of it had been taken up by the investigation. It is not in dispute that HCL was the successful party and that it is entitled to costs. The point of difference is with the quantum of any such award.

[14] HCL's starting point for costs is \$8,000 and this reflects the Authority's Practice Direction regarding costs and the use of a notional tariff of \$4,500 for the first day and \$3,500 for any subsequent day. However, a significant uplift of costs to \$50,000 is sought against Mr Hanekom because of his rejection of an unambiguous and reasonable settlement offer and his unilateral decision to cancel his flight to Auckland on 23 November 2022 which unnecessarily increased the company's legal costs.

[15] I find that it was premature of Mr Hanekom to have accepted HCL's Calderbank offer of \$2,000 which was made to him by letter of 22 July 2022. I take into account my second minute of 27 June 2022 to the parties which dealt with Mr Hanekom's belief that HCL had in its possession a performance bonus document that was relevant for his role and which could potentially resolve matters without an investigation meeting if such a document was provided in advance of the meeting. This all assumes of course that the policy document in fact exists and it is Mr Rooney's instructions that it does not and that everything that Mr Hanekom requested from HCL was provided.

[16] In order to progress matters to an investigation meeting in a cost effective and expeditious manner, I directed HCL to address this issue of an alleged performance bonus document for Mr Hanekom in its witness statements which were to be lodged and served with the Authority by 4 pm Friday 28 October 2022. Had Mr Hanekom accepted HCL's Calderbank offer of 22 July he would have forgone any chance of seeing what he believed to be in his former employer's possession.

[17] During the investigation meeting, HCL's witness, Pandurangan Ramaguru, referred to a hiring guidelines document which I requested a copy of to assess its relevance to Mr Hanekom's case. A redacted copy of that information was provided to Mr Hanekom and a permanent non-publication order was made because of its commercially sensitive nature. It cannot be said that Mr Hanekom outrightly refused to believe information that HCL had provided him when he did not learn about the hiring guidelines document until the investigation meeting. As it turned out, the document did not advance Mr Hanekom's case but even so, him accepting HCL's Calderbank offer in July 2022 would have been premature when potentially relevant information and evidence was still to be had. I may have reached a different view of HCL's Calderbank offer if it subsequently made another settlement offer to Mr Hanekom, but it did not.

Conduct of the proceedings

[18] I can still take into account whether the conduct of the proceedings was such that an uplift to the daily tariff is justified. Here, this is Mr Hanekom's unilateral decision to cancel his flight to Auckland which effectively forced me to adjourn the investigation meeting initially scheduled for 23-24 November 2022. To adjourn an

investigation meeting on the morning of its commencement incurs wasted costs as well as a duplication of work in needing to prepare once more.

[19] However, perspective and context is required and I take into account that I had advised the parties on the eve of the investigation meeting that I was monitoring for symptoms of COVID-19. Mr Hanekom's mistake was not waiting for me to confirm matters and as it turned out the investigation meeting could have proceeded as originally scheduled. I note that the investigation was adjourned for three months which is not long and would not have required a significant amount of re-work and preparation when the witness statements for HCL had been prepared and no additional witnesses were called by me or Mr Hanekom. I note also that the company's witnesses from India attended the investigation meeting remotely by AVL and as such there were no airfares or costs of accommodation wasted as a result.

[20] However, it was a presumptuous decision on Mr Hanekom's part that resulted in unnecessary costs, time and effort being incurred by HCL. That decision has had the effect of increasing its costs unnecessarily for which an uplift is required. However, awards will be modest and costs are not intended to punish or express disapproval at an unsuccessful party's conduct. I struggle to see how an award of costs of \$50,000 for a two-day investigation meeting can realistically be regarded as "modest" in the circumstances. I consider an uplift of costs of \$1,500 consistent with the principles of modesty and proportionality referred to by Mr Walters.

Other matters

[21] In my determination I made the observation that HCL ought to take some responsibility for its staff who did not review Mr Hanekom's letter of offer/employment agreement.⁴ That was a preliminary view only and since then I have had the benefit of reading the parties' costs submissions.

[22] Standing back from this employment relationship problem and considering all the information and evidence provided to me, even if staff had reviewed Mr Hanekom's offer of employment and individual employment agreement, there was an element of inevitability with the present proceedings. In the absence of the hiring guidelines

⁴ n 1 at [63].

document the potential relevance of which only became apparent very late in the piece, a downwards adjustment to costs is not warranted.

Orders

[23] The Authority orders Deon Hanekom to pay HCL (New Zealand) Ltd \$9,500 as a reasonable contribution to its legal costs no later than 4 pm Wednesday 6 December 2023.

Peter Fuiava
Member of the Employment Relations Authority