

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 17
5605965

BETWEEN GRAHAM HARMAN
 Applicant

A N D CANTERBURY HEAVY
 HAULAGE LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Linda Ryder, Counsel for the Applicant
 No representation for the Respondent

Submissions Received: 30 November 2016, from the Applicant
 No submissions from the Respondent

Date of Determination: 27 January 2017

COSTS DETERMINATION OF THE AUTHORITY

Within 28 days of the date of this determination, Canterbury Heavy Haulage Limited must pay Graham Harman \$11,321.56 in costs. This includes the filing fee.

The substantive determination

[1] On 7 November 2016, I issued a determination in which Mr Harman was successful.¹ After considering contribution, I awarded him \$8,000 in compensation and \$1,000 of the \$6,000 penalties I imposed on the respondent, Canterbury Heavy Haulage Limited (CHH).

[2] Mr Harman also claimed payment of unpaid wages and holiday pay. These claims were settled on the eve of the investigation meeting and I did not have to

¹ [2016] NZERA Christchurch 201

determine them. However, CHH only paid Mr Harman what it owed after he issued proceedings, and, in large part, just before the investigation meeting.

[3] CHH brought counter-claims against Mr Harman seeking a total of \$17,177.67 in damages. These claims were withdrawn three days before the investigation meeting.

[4] I reserved costs, and encouraged the parties to agree on costs.

The application for costs

[5] Mr Harman now claims total costs and expenses of \$17,188.53, which includes the filing fee (\$71.56) and photocopying costs (\$92.00).

[6] There have been no submissions received from CHH. Robert Thompson, who was the respondent's advocate at all times leading up and during the investigation meeting no longer acts for CHH.

The law

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000.

[8] The principles the Authority applies are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.² In *Fagotti v Acme & Co Limited*,³ the Employment Court recently affirmed these principles.

[9] Costs principles include:

- a. A discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case-by-case basis.

² [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

³ [2015] NZEmpC 135

- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. 'Without prejudice' offers can be taken into account.
- h. Awards of costs will be modest, and must be reasonable.
- i. Frequently costs are judged against a notional daily rate.⁴
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[10] The investigation meeting lasted two days.⁵ As I indicated in my determination, the daily tariff, at that stage, was \$3,500. Therefore, the starting point for my consideration is \$7,000.

Applicant's submissions

[11] Ms Ryder submits that there should be an uplift in the daily tariff for a number of reasons, which I outline below.

The way the respondent conducted the case

[12] Ms Ryder submits that the respondent's conduct significantly increased Mr Harman's costs. She submits that the respondent purposefully attempted to delay the proceedings for as long as possible.

⁴ The relevant rate is \$3,500 per day of an investigation meeting.

⁵ The investigation meeting was held over three days, which included hearing submissions. However, two of the days were part-days.

Provision of time and wages records

[13] For at least a part of Mr Harman's employment CHH did not maintain time and wages records that complied with its statutory obligations. I accept that CHH did not comply with Mr Harman's requests for his time and wages records.

[14] CHH also owed Mr Harman unpaid wages and holiday pay. The absence of records made it difficult for Mr Harman and his counsel to calculate how much CHH owed him. This obvious failure added slightly to unnecessary costs for time spent calculating what was owed and for calculating how the amounts paid had been calculated by CHH. I consider this factor in calculating an appropriate uplift in the daily tariff.

Mediation

[15] Ms Ryder submits that CHH failed to cooperate with the mediation service. On 22 October 2015, the parties were referred to mediation. The respondent did not make itself available for mediation until 1 February 2016. However, even at that date Mr Nortman, the director of CHH and the owner/operator of the business, was unable to attend the mediation and sent Ms Sutherland to attend the mediation. Ms Ryder submits that meant it was not a meaningful mediation process as Mr Nortman, the decision maker, did not take part.

[16] I do not consider that Mr Nortman's absence was a deliberate tactical ploy to unnecessarily prolong proceedings and add to Mr Harman's costs. Even if Mr Nortman had been present there is no guarantee there would have been a mediated settlement. In any event, the legal costs claimed are from after the mediation.

Adjournment

[17] The matter was set down for a two-day hearing on 11 and 12 May 2016. The applicant filed most of his witness statements on 11 April 2016, as directed by the Authority. The respondent was due to file its witness statements on 26 April 2016, but it did not file them. In addition, on 28 April, the respondent sought an adjournment of the hearing. The reason given was that Mr Nortman had hospital appointments scheduled on 11 and 12 May 2016. Mr Thompson also said that he was having trouble getting Mr Nortman's evidence finalised given Mr Nortman's constraints at the time caused by his throat cancer.

[18] Ms Ryder spent a certain amount of time replying in writing to the request for an adjournment, and attending a case management conference. Mr Harman is of the view that the reason for the request for the adjournment was not genuine. That is because another CHH former employee told Mr Harman that she had seen Mr Nortman driving a truck in North Canterbury on 3 May 2016.

[19] At the case management conference on 3 May 2016, Mr Thompson said Mr Nortman was having trouble speaking and making himself understood verbally. Even if Mr Nortman had been able to attend the investigation meeting for the first day that difficulty would have affected his ability to instruct Mr Thompson.

[20] I do not accept that the reasons given for the application for adjournment were false at the time. The fact that Mr Nortman was able to drive a truck on 3 May 2016 does not change his lack of ability to speak clearly and make himself understood. The letter from the hospital supplied by CHH establishes that he had surgery scheduled for the morning of 12 May 2016, and a pre-admission appointment scheduled for 5 May 2016 in the Otolaryngology Head and Neck Clinic.

[21] I appreciate that Ms Ryder then had to spend time reacquainting herself with the case in advance of the August dates of the investigation meeting. However, in light of the fact that I decided the adjournment was just and necessary, those costs should not be borne by CHH.

[22] The reason for the adjournment was genuine and was not aimed at unnecessarily putting Mr Harman to trouble or increasing his legal costs. Therefore, I do not increase the daily tariff based on this issue.

Conduct of the parties at the hearing

[23] Ms Ryder submits that the respondent's witnesses, particularly Ms Sutherland, increased the length of the hearing by not answering questions in a straightforward manner.

[24] As I noted in the substantive determination, Ms Sutherland was argumentative. However, this only increased the hearing time by a very small amount. I do not consider it was so significant as to require an uplift the daily tariff amount.

The importance of the case to the parties

[25] I accept that the case was an important one to Mr Harman. This, of itself, does not justify an increase in the daily tariff approach.

The counterclaims

[26] Ms Ryder submits that the counter-claims resulted in costs that are readily identifiable as being directly in response to those claims. The work done in response includes the statement in reply to the counter-claims, witness evidence in relation to the counter-claims, specific documents sourced and produced, and written submissions prepared in advance of the investigation meeting before the counter-claims were withdrawn.

[27] Mr Harman seeks indemnity costs of approximately \$4,025 towards what he submits were wasted costs. I am satisfied that amount was the result of a reasonable number of hours worked to defend the claims made against Mr Harman.

[28] I agree that the filing and then late withdrawal of these claims caused unnecessary cost but I do not consider indemnity costs are appropriate. I estimate that if the counter-claims had proceeded a further full day of the investigation meeting would have been necessary. However, that was not necessary.

[29] I consider an uplift in the daily tariff of \$2,000 is reasonable taking into account the counter-claims and the lack of statutorily required records for Mr Harman's time and wages and holiday and leave.

'Without prejudice save as to costs' offer

[30] On 1 April 2016, before either parties' witness statements were due to be filed Mr Harman made a 'without prejudice save as to costs' offer to settle all claims for a payment of \$10,000 compensation, and for legal costs of \$11,868 including GST.

[31] That offer was open for acceptance until 6 April 2016. CHH rejected the offer on 11 April 2016. Mr Harman incurred further costs of \$21,032.50 plus GST from 8 April 2016, the first consultation after the expiry of the offer.

[32] The Authority awarded a total payment of \$9,000 to Mr Harman and imposed further penalties of \$5,000 on CHH. The fact that Mr Harman was successful in his claims means that CHH is liable to contribute to his costs. The amount Mr Harman

achieved from the substantive determination is \$1,000 less than he offered to settle for. Assessing a client's level of likely compensation from the Authority is not an exact science. The amount Mr Harman offered to settle for was within a realistic band of likely compensation, and shows Ms Ryder accurately calculated what the likely payment of compensation would turn out to be.

[33] It is also relevant that if CHH had not paid Mr Harman what it owed by way of unpaid wages and holiday pay when it did I would have awarded unpaid wages and holiday pay of a few thousand dollars. So, even without considering the issue of costs, because of the outstanding wages and holiday pay, Mr Harman 'beat' the amount he offered to settle for. That is, the payments made after proceedings were commenced combined with my orders mean CHH paid Mr Harman significantly more, legal costs aside, than he had offered to settle for.

[34] In exercising my discretion, I also take into account that both parties incurred significant costs for representation after the offer was made. Had CHH accepted Mr Harman's offer to settle both parties would have been better off than they are now.

[35] I consider that an uplift in the daily tariff of \$1,500 is justified for those reasons.

Actual costs incurred

[36] The costs claimed are for work done after mediation. Mr Harman has incurred legal costs of \$22,237.50 excluding GST, excluding the two disbursements claimed, and the amount of \$1,995 plus GST incurred for the costs submissions.

[37] Ms Ryder submits:

Applying the general rule of two to three days preparation for every day in court, these costs are, in all circumstances reasonably incurred.

...

The authority is required to be fair and reasonable to both parties and a costs award is not to punish an unsuccessful party. However, a substantial cost award should be awarded because the respondent had a full and fair opportunity to resolve the problem at a preliminary stage before substantial costs were incurred.

[38] I have taken account of the rejected "Calderbank" letter above. Clearly, I am required to be fair to both parties. However, that does not mean that I must consider the actual costs incurred to be reasonable. The Employment Court has regularly

cautioned that parties should be cautious not to build a level of costs that is out of step with the likely result from the Authority.

[39] The Authority does not award costs based on 2-3 days of preparation for one day of hearing, as Ms Ryder is aware. They are awarded based on a daily tariff, that may be varied up or down, per day of the investigation meeting. The tariff will rarely meet legal costs of 2-3 days of preparation per day. The Authority is not a court. What may be a reasonable principle to apply to matters in the Employment Court has no utility in considering costs in the Authority.

[40] Recently in *Booth v Big Kahuna Holdings Limited*⁶ Judge Inglis wrote:

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...⁷

[41] Judge Inglis' further like comments in *Stevens v Hapag-Lloyd (NZ) Ltd*⁸ were cited with approval by the Full Court of the Employment Court in *Fagotti v Acme & Co Ltd*:⁹

...Proceedings in the Authority are intended to be low level, costs effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's assessment of an appropriate notional daily rate...) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to ... apply significant legal resources to the pursuit or defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate ...¹⁰

⁶ [2015] NZEmpC 4

⁷ *Booth*, at [15]

⁸ [2015] NZEmpC 28

⁹ [2015] NZEmpC 135, at [107]

¹⁰ *Stevens*, *ibid*, at [94]-[95], footnotes omitted.

[42] Bearing in mind the realistic assessment, made by Ms Ryder in early April 2016, of what Mr Harman may have gained from the Authority, I consider the costs incurred, after deducting the \$4,025 to respond to the counter-claims, to have been on the high side, in all the circumstances.

[43] The respondent is not liable to pay for the \$92 photocopying fee charged to Mr Harman. That is an administrative cost for Goldstein Ryder's business and a matter between Mr Harman and Ms Ryder, as the invoice to him makes clear.

Costs on costs submissions

[44] There is no hard and fast rule on whether costs for the preparation of costs submissions will be awarded. It is not common. In this case, I signalled clearly in my substantive determination that costs should be awarded to Mr Harman and that the parties should seek to agree. CHH's non-engagement in a discussion on costs means that Ms Ryder had to make written submissions to the Authority. Therefore, I consider a contribution of \$750 towards the costs incurred by making such submissions to be reasonable.

Conclusion

[45] Having had regard to the principles set out in *Da Cruz* and *Fagotti*, I consider that a contributory award towards the Applicant's actual costs of \$11,250 is reasonable. CHH must also reimburse Mr Harman the \$71.56 filing fee.

Christine Hickey
Member of the Employment Relations Authority