

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 109
3205279

BETWEEN LIANA HENDRY
Applicant

AND TALLEY'S LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Michael O'Flaherty, counsel for the Applicant
 Graeme Malone, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 11 December 2023 from the Applicant
 17 January 2024 from the Respondent

Date of Determination: 26 February 2024

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 4 December 2023, I found that Liana Hendry had established personal grievances against Talley's Limited and awarded her remedies for these grievances.¹

¹ *Liana Hendry v Talley's Limited* [2023] NZERA 720.

[2] In my determination I reserved costs so that the parties could try to agree costs. The parties were unable to agree and now Ms Hendry seeks an order for costs.

Application for costs

[3] Ms Hendry seeks an award of costs of \$10,000 for an investigation meeting that took one day. This is more than the normal amount that would be awarded for a one day investigation meeting. Counsel for Ms Hendry says this increase is appropriate because Talley's failed to accept a Calderbank offer made by Ms Hendry, which was for an amount less than the remedies awarded in my determination.²

[4] Talley's accepts that the Calderbank letter is a relevant consideration for the question of costs in this case but says any adjustment based on the Calderbank offer should be less than the \$5,500 increase that Ms Hendry seeks.³

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 Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined in the Authority's practice note on costs.⁴

² A Calderbank offer is an offer made by one party 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 Talley's costs submissions were lodged and served outside of the timeframe I had set. Counsel for Ms Hendry objects to the submissions being considered by me. In the circumstances I am going to allow the submissions to be lodged and served late because, the delay is understandable given the time of year, there is no prejudice to Ms Hendry in allowing this and the submissions are helpful.

⁴ For further information about the factors considered in assessing costs, see:

www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

Costs for Ms Hendry

[6] The starting point is that costs should follow the event. As Ms Hendry was successful she is entitled to an award of costs.

Applying the daily tariff

[7] The normal practice of the Authority when setting costs, is to apply a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff.

[8] There is no basis to depart from this normal practice and it is the basis on which I will determine costs in this matter.

[9] The investigation meeting took one day and the starting point for costs is \$4,500 – based on the current daily tariff of 4,500.00 for the first day of an investigation meeting.

Adjusting the daily tariff

[10] The question that follows then is whether I should adjust the daily tariff amount based on the Calderbank offer made by Ms Hendry.

Calderbank offers

[11] Ms Hendry sent a Calderbank offer to Talley's on 23 March 2023. Talley's did not accept this offer and did not provide a reasonable basis for that refusal. The amount Ms Hendry offered to accept to settle her claim was for less than what she was awarded in my determination.

[12] Counsel both agree that Ms Hendry's Calderbank offer met the requirements for Calderbank offers and it is therefore a relevant consideration for adjusting the daily tariff. I agree with them.

[13] The starting point for any increase to the daily tariff for refusing a Calderbank offer is that the amount of increase will not be significant. This conclusion is based on what the Court of Appeal and the Employment Court have stated about the approach to dealing Calderbank offers and how those Courts have applied an appropriate uplift.⁵

[14] In this case the factor that weighs in favour of a slightly higher increase is that the Calderbank offer was made at an early stage and considerable costs were incurred after it had been rejected.

[15] Considering all of the circumstances, I agree with counsel for Talley's that an increase of the daily tariff to \$7,000 is appropriate.

Order

[16] Talley's Limited is to pay Liana Hendry \$7,000 as a contribution to her costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority

⁵ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; and *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135.