



- (a) an uplift from the usual daily tariff to \$9,000 based on the applicant's refusal of a "without prejudice except as to costs" (Calderbank) offer made on 21 September 2020; and
- (b) an additional \$1,000 having regard to a failure by Mr Ismail to engage with attempts made to settle the issue of costs.

[4] Mr Ismail has not engaged with HeartLab as to the issue of costs, nor have submissions been lodged on his behalf with the Authority.

### **Costs principles**

[5] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.<sup>2</sup>

[6] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account in setting costs, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.<sup>3</sup>

[7] The daily tariff is usually taken as a starting point,<sup>4</sup> although not used in a rigid manner, with principled adjustments made having regard to the to the particular characteristics of a case.

### **Consideration**

[8] The substantive proceeding involved a one-day investigation meeting. An application of the daily tariff approach would see a contribution of \$4,500.

[9] The Calderbank offer was made on 21 September 2020, some considerable time prior to the investigation meeting and before witness statements were lodged. The offer was made in a timely manner having regard to the relevant steps in the Authority's investigation and significant costs were subsequently incurred by HeartLab.

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>3</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

<sup>4</sup> Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

[10] The offer was left open for acceptance until 24 September 2020, a period of at least three clear business days. I consider the terms of the proposed settlement offer were clear and that Mr Ismail was provided a reasonable opportunity to consider and respond to the offer.

[11] HeartLab submitted that Mr Ismail did not respond to the settlement proposal and that he did not otherwise engage in efforts to try and resolve the matter. I accept the submissions made by HeartLab and conclude that Mr Ismail failed to engage and that HeartLab subsequently expended a significant sum, well in excess of the daily tariff, in defending his claim.

[12] Acceptance of the offer by Mr Ismail would have resulted in his receiving a sum of \$12,500 plus GST (if any) and would have saved HeartLab from incurring significant costs. Mr Ismail, being unsuccessful, ultimately did not receive any award.

[13] I accept that some uplift is appropriate in this case and there can be little doubt that the costs incurred by HeartLab would have been significantly reduced had it not been for the rejection of what was a reasonable settlement offer. I do not consider that, taking into account that awards for costs should be modest, a doubling of the daily tariff is appropriate. However, I do consider an uplift of an amount equivalent to an additional half day, being \$2,250, is appropriate.

[14] Whilst there may have been a lack of engagement from Mr Ismail in relation to the issue of costs, I do not consider that a basis for any additional award of costs.

### **Orders**

[15] For the above reasons I order Mr Ismail to pay HeartLab Limited the sum of \$6,750 as a contribution towards the costs it incurred in defending his claim.

[16] Payment is to be made within 28 days of this determination.

Rowan Anderson  
Member of the Employment Relations Authority