

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 566
3138801

BETWEEN MIKE KENNEDY
 Applicant

AND FIELD NELSON HOLDINGS
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person
 Richard Upton, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 6 October 2022 from the Applicant
 22 September 2022 and 28 October 2022 from the
 Respondent

Date of Determination: 2 November 2022

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 26 August 2022,¹ I dismissed Mike Kennedy’s claim against Field Nelson Holdings Limited (FNH). In that determination I reserved costs so that the parties could try to agree costs. The parties were unable to agree and now FNH seeks costs.

¹ *Mike Kennedy v Field Nelson Holdings Limited* [2022] NZERA 421.

Application for costs

[2] Counsel for FNH seeks an award of costs of \$4,500.00. Counsel seeks this amount, based on applying the daily tariff with an uplift. Counsel says an increase to the daily tariff is appropriate because Mr Kennedy failed to accept a Calderbank offer, which was clearly better than the outcome for him as he was not successful with his claims.²

[3] Mr Kennedy accepts that a cost award for FNH is likely; he says he was not aware of the possibility of being held liable for paying part of FNH's costs if he was not successful but accepts this now and takes full responsibility for what may be ordered. Mr Kennedy does however ask that any award be reduced to the minimum possible or nothing at all given his personal circumstances – being unemployed and having significant outgoings and debt for things such as child support.

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 Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined on the Authority's website.³

Costs for FNH

[5] The starting point is that costs should follow the event; as FNH was successful in defending Mr Kennedy's claims it is entitled to an award of costs.

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

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

Applying the daily tariff

[6] The next question is whether I should follow the normal practice of the Authority when setting costs, which is applying 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. The current daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for every subsequent day of an investigation meeting.

[7] There is no reason to depart from this normal practice in this case; I will apply the daily tariff to my assessment of costs to be awarded.

[8] The investigation meeting lasted one half day so my starting point is \$2,250.00.

Adjusting the daily tariff

[9] The question that follows then is whether I should adjust the daily tariff so that I award more or less for the half day of the investigation meeting rather than the current prescribed amount. The issues here are the effect of Calderbank offers made by FNH and Mr Kennedy's ability to pay any cost award.

Calderbank offers

[10] In the course of this matter FNH made two Calderbank offers to Mr Kennedy. I am satisfied that the offers met the requirements for Calderbank offers. Mr Kennedy did not accept any of the offers and the failure to accept the offers appears to be based solely on quantum, so in my view there was no reasonable basis to refuse the offers. And, the last point to note is that because Mr Kennedy's claim was not successful he did not obtain a better result in the Authority than what was available to him in the Calderbank offers.

[11] For these reasons the Calderbank offers are relevant to the question of increasing the daily tariff. As I have said before when dealing with an increase to the daily tariff for refusing a Calderbank offer, any uplift 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.⁴

[12] In *Davide Fagotti v. Acme & Co Ltd* the Full Bench of the Employment Court's analysis was that a \$1,000.00 increase to the daily tariff was appropriate where a party unreasonably rejected a Calderbank offer.⁵ I adopt that approach and will increase the daily tariff by \$1,000.00.

Mr Kennedy's financial situation

[13] Mr Kennedy says he will have difficulty in paying any cost award given that he is unemployed and has significant outgoings including child support. This is relevant and justifies a reduction in the daily tariff. However, I acknowledge that a reduction in costs because of a party's impecuniosity should not be applied without some balance, that is the principles of equity and good conscience must also account for the countervailing interests of the successful party and broader public policy considerations.⁶ This means a total reduction is not appropriate, Mr Kennedy must pay something toward FNH's costs notwithstanding his financial position.

[14] In the circumstances, noting that the financial information provided is somewhat limited, I will only apply a modest reduction to the daily tariff. I consider a reduction of \$500.00 to be appropriate.

Conclusion

[15] As set out above, applying the daily tariff to this matter the starting point for a costs award is \$2,250.00. This sum is then increased by \$500.00 (\$1,000.00 added for the refusal to accept the Calderbank offers with \$500.00 then deducted for Mr Kennedy's financial situation). So, Mr Kennedy must pay \$2,750.00 as a contribution to FNH's costs.

⁴ *Blue Star Print Group (NZ) Ltd v. Mitchell*, above n4; and *Davide Fagotti v. Acme & Co Ltd*, above n 4.

⁵ *Davide Fagotti v. Acme & Co Ltd*, above n 4.

⁶ *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)* [2004] 2 ERNZ 274; *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 (EmpC); and *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

Order

[16] Mike Kennedy is to pay \$2,750.00 to FNH within 28 days of the date of this determination, as a contribution to FNH's costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority