

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 188  
3022772

BETWEEN JUSTYN LYNCH  
Applicant

AND TALLEY'S GROUP LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Luke Acland, counsel for the applicant  
Graeme Malone, counsel for the respondent

Costs submissions received: From the applicant on 1 and 24 October 2018  
From the respondent on 24 October 2018

Determination: 13 December 2018

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] On 31 August 2018, I issued a determination finding Talley's unjustifiably dismissed Mr Lynch. I ordered Talley's to pay Mr Lynch a total of \$33,842.86 consisting of \$19,466.62 nett for lost wages, \$376.24 interest on lost wages and \$14,000 in compensation for hurt and humiliation.<sup>1</sup> He now applies for costs.<sup>2</sup>

*Mr Lynch's submissions*

[2] Mr Lynch claims indemnity, or increased, costs of \$5,071.50 including GST and costs of \$500 for preparing written costs submissions.

[3] Talley's has already paid Mr Lynch the daily tariff of \$4,500 for the one-day investigation meeting.

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<sup>1</sup> [2018] NZERA Christchurch 127.

<sup>2</sup> A separate process has been set by the Authority to determine whether Mr Lynch was paid appropriately over the time he was employed by Talley's.

[4] The reasons Mr Lynch seeks indemnity, or increased, costs are:

- On 21 February 2018 Mr Lynch made a Calderbank offer to Talley's that he would settle for \$15,500 gross (\$10,385 nett) as a contribution to lost wages, \$20,000 compensation for hurt and humiliation and legal costs of \$4,500 including GST. That is a total of \$30,385.00 nett in remedies;
- On the same day, Talley's refused that offer and counter-offered a payment of \$3,000 compensation without admission of liability;
- Mr Lynch declined that offer and after that incurred costs up to and including the investigation meeting of \$4,410 + GST, being \$5,071.50. Mr Acland has charged him a further \$500 to prepare costs submissions;
- On 3 September 2018, Mr Acland wrote to Mr Malone stating that Mr Lynch was prepared to take a costs contribution of the tariff rate \$4,500 so long as that and the ordered monetary amounts were paid to Mr Lynch within 10 days. Mr Lynch wrote that if costs could not be agreed on a pragmatic basis Mr Lynch would make an application for increased costs based on the 21 February 2018 Calderbank offer and costs for preparing costs submissions. That offer was open until Wednesday, 12 September 2018.
- Although Mr Malone on Talley's behalf agreed on 3 September 2018 that it was fair that it pay the tariff amount the payments ordered and the costs contribution were not paid within the 10 days offered. Therefore, Mr Lynch now applies for increased or indemnity costs.

*Talley's submissions*

[5] Talley's has paid Mr Lynch a contribution of \$4,500 towards his costs already and submits that was the appropriate amount. It submits that indemnity fees are not appropriate for the following reasons:

- The proceedings are not complex and were able to be accommodated well within one day. Mr Lynch's brief of evidence was small. Therefore, an award "of \$4,500 is already generous."

- It was not unreasonable for Talley’s to have declined the offer at the time given that it knew Mr Lynch was working on his family’s farm but he had provided no details of the income he was earning.
- An application for costs was unnecessary when Mr Malone had responded to Mr Acland the same day that Talley’s would pay the requested \$4,500.
- Talley’s agrees it did not pay the ordered amounts within the 10 days requested but submits it was reasonable to take time to consider whether to challenge the Authority’s determination.

### **The applicable law**

[6] The Authority’s jurisdiction to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000.

[7] The principles the Authority applies are well-settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.<sup>3</sup> In *Fagotti v Acme & Co Limited*,<sup>4</sup> the Employment Court re-affirmed these principles.

[8] Costs principles the Authority considers include:

- a. 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.
- 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.

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<sup>3</sup> [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

<sup>4</sup> [2015] NZEmpC 135.

- 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, which is currently \$4,500 for the first day of an investigation meeting, and \$3,500 for subsequent days. This is usually the starting point for considering the amount of costs.
- j. Costs generally follow the event; that is, the unsuccessful party is likely to be ordered to pay a reasonable contribution to the successful party's costs.
- k. The nature of the case can also influence costs. That means that the Authority may order that costs lie where they fall in certain circumstances.

## Issues

[9] I will consider the following issues in exercising my discretion on costs:

- (i) Should Talley's pay Mr Lynch indemnity costs?
- (ii) Is the daily tariff the appropriate starting point?
- (iii) Should I order any uplift in the daily tariff?
- (iv) Should Talley's pay costs for the costs submissions?

*Should Talley's pay Mr Lynch indemnity costs?*

[10] Indemnity costs are not awarded in New Zealand's legal system unless the other party's behaviour meets the standard set out in the Court of Appeal case of *Bradbury v Westpac Banking Corporation*<sup>5</sup>. The Court stated that the general proposition is that:

- increased costs may be ordered where there is failure by the paying party to act reasonably; and

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<sup>5</sup> [2009] NZCA 234.

- indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[11] I have given careful consideration to Talley's conduct of its defence in these proceedings and I conclude that there is no basis to award indemnity costs.

*Is the daily tariff the appropriate starting point?*

[12] The daily tariff is the appropriate starting point for my consideration of costs.

*Should the daily tariff be increased because of the Calderbank offer?*

[13] An effective Calderbank<sup>6</sup> offer that was bettered by the remedies granted by the Authority does not necessarily increase an award of costs, but it is a factor that can be considered.

[14] The Calderbank offer was an effective one. It dealt with all aspects of the remedies Mr Lynch sought and included his costs. There was sufficient time for Talley's to consider it and take advice on it.

[15] Talley's did not accept the offer and did not give reasons for rejecting it at the time. However, it now submits that it was reasonable to reject it because it did not know what Mr Lynch was earning in his new job. I do not consider that was a reasonable ground for rejecting the offer at the time because Talley's rejected the offer outright rather than seeking the specifics of Mr Lynch's new income to provide a basis for settlement negotiations.

[16] Talley's has ended up having to pay more after the investigation than Mr Lynch asked for in February 2018. In addition, both parties have incurred costs for representation since then. Mr Lynch's cost of representation after the offer to settle was rejected was \$4,410 (GST exclusive), before any cost for preparing costs submissions.

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<sup>6</sup> I accept that a Calderbank offer is generally one that a respondent makes to compromise proceedings. However, in this jurisdiction it is reasonable to take offers to settle into account no matter which side they originate from.

[17] Whilst the Court of Appeal<sup>7</sup> and the Employment Court<sup>8</sup> advocate adopting a “steely approach” to Calderbank offers, this does not necessarily apply to quantum. A number of factors must be considered in terms of quantum, where costs awards in the Authority remain modest.

[18] In *Fagotti* the Full Bench of the Employment Court’s analysis was that an uplift in respect of the daily tariff against a party who unreasonably rejected a Calderbank offer was appropriate. In this case, I believe Talley’s unreasonable rejection of the Calderbank offer justifies uplifting the daily tariff by \$500.00.

[19] I note that it is not the Authority’s current practice to increase the daily tariff to allow for GST on legal fees charged.

*Should Talley’s pay costs for the costs submissions?*

[20] The Authority does not generally award costs on costs and there are no factors in this case that persuade me to depart from that practice.

## **Order**

[21] Having already paid \$4,500 in costs to Mr Lynch, Talley’s must pay Justyn Lynch a further \$500 contribution towards his costs before 4 pm on Friday, 21 December 2018.

Christine Hickey  
Member of the Employment Relations Authority

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<sup>7</sup> *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385.

<sup>8</sup> *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135.