

Discussion

[3] Applying the principle that costs follow the event, it is appropriate that Sfizio contribute to Ms Mawhinney's costs. At issue is the quantum of the award.

[4] The Authority's starting point in an assessment of costs is to apply the notional daily tariff (currently set at \$4,500 per first full day of investigation⁴).

[5] In this instance, the Authority's meeting was concluded within three quarters of a full day. A modicum of that time was occupied by discussions between the parties as to the possibility of settlement. A pro-rated application of the daily tariff equates to an approximate sum of 3,000. I must then consider whether there are any factors which warrant an uplift or reduction to the sum.

Are there grounds warranting an uplift to the tariff?

[6] I am unwilling to find Sfizio's initial refusal to attend mediation warrants an increase to an award in this matter. Attendance at mediation is an important mechanism that assists parties to resolve differences, but it is not a mandatory requirement under the Act. Further, Ms Mawhinney's submissions did not identify to what extent Sfizio's failure to attend mediation at first instance increased work undertaken (and therefore corresponding costs) that would otherwise not have been required to bring this matter to the Authority. I am therefore unable to quantify the impact of Sfizio's approach towards mediation as a factor that increased costs in any event.

[7] The second ground on which Ms Mawhinney urges the Authority to increase an award involves an offer to settle, made on Ms Mawhinney's behalf, to settle her claim five days before the Authority's investigation meeting was scheduled to begin. The email advised Sfizio that Ms Mawhinney:

"... would accept the following:

- *Payment of her unpaid wages*
- *\$2 000.00 pursuant to section 123 (1)(c)(i) ERA 2000*
- ***\$2 000.00**+ contribution to costs**

This offer will expire on the 15th of May 2018 at 5pm."

** My emphasis*

⁴ Where an investigation meeting lasts more than 1 day the daily rate is set at \$3,500 for subsequent days

[8] The email went on to briefly explain the offer is submitted on a *Calderbank*⁵ basis, and its effect if rejected. Having previously practiced law, I am satisfied Mr Gregorash was likely to have understood the costs implications.

[9] No evidence was produced to suggest Sfizio responded to the offer.

[10] In *Ogilvy & (NZ) Limited v Darroch*, the Court set out two criteria a *Calderbank* offer must satisfy to be effective.⁶ First, a modicum of time must be given to allow the recipient of an offer to consider (and take advice) before a decision as to whether to accept or reject it is required. Next, the offer must be clear and transparent: an offeree must understand what is being offered so as to be able to properly assess its position and response.

[11] I note the *Calderbank* offer did not specify the sum of unpaid wages sought but that amount may be adduced from the statement of problem. However the use of the symbol ‘+’ is more problematic. While it may be doubtful that the additional costs, referred to symbolically, would have exceeded the remedies ultimately awarded by the Authority, the failure to quantify the exact sum on which Ms Mawhinney was willing to forgo her claim means Sfizio had no certainty as to what exactly was being offered. It follows that I am unable to assess whether Sfizio’s rejection of the offer, as inferred by the omission to reply to it, was reasonable. In these circumstances the *Calderbank* offer is not a factor that can be taken into account to uplift costs.

Are there grounds warranting a decrease to the tariff?

[12] Neither parties’ use of public media platforms following Ms Mawhinney’s dismissal was relevant to the claims investigated by the Authority, and is not a factor the Authority should take into account in assessing costs.

Disbursements

[13] Ms Mawhinney claims disbursements of \$244.44 for printing, binding, stationary and the cost of the filing fee. Claims for disbursements are limited to disbursements in the true sense where payment of money is spent in order to obtain

⁵ While an offer by an applicant to a respondent on a *without prejudice save as to costs* basis is not a *Calderbank* offer per se, the Authority is able to take into account such offers made by applicants or respondents.

⁶ [1993] 2 ERNZ 943

goods or services from a third party, as opposed to the expense of office overheads⁷. The claim for office expenses is a component of her advocate's cost of practice and does not warrant a separate assessment.

Summary

[14] There were no complex procedural issues or matters of law that arose in the investigation, nor was the matter progressed before the Authority in anything other than in the usual and accepted ways. I have not been able identify any reasons to justify a departure from a straight forward application of the daily tariff pro-rated according to the length of a first day of an investigation meeting.

Orders

[15] Sfizio Limited is order to pay Helen Mawhinny the sum of \$3,000 as contribution towards costs to bring her claim before the Authority, plus reimbursement the filing fee: \$71.56.⁸

Michele Ryan
Member of the Employment Relations Authority

⁷ *Oldco PTI New Zealand Ltd v Houston* EmpC Auckland AC 18A/06, 6 June 2006.
⁸ Pursuant to the Employment Relations Act 2000, Schedule 2, clause 15.