

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 149
3037472

BETWEEN ROBERT MAY
 Applicant

AND SOLIDBUILT CONSTRUCTION
 2017 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Erin Burke, counsel for the Applicant
 Andrea Twaddle and Cassie Death, counsel for the
 Respondent

Submissions] Received: 19 February 2019 from the Applicant
 5 March 2019 from the Respondent

Date of Determination: 12 March 2019

COSTS DETERMINATION OF THE AUTHORITY

- A. The respondent is to pay a contribution to the applicant’s costs in the sum of \$5,625 within 14 days of the date of this determination.**

First determination

[1] By way of a determination dated 17 October 2018¹, the Authority determined, on the papers, that material included in Mr May’s statement of problem was not in breach of the rules applying to without prejudice communications. Accordingly, Solidbuilt Construction 2017 Limited’s (Solidbuilt), application for the material to be redacted was refused by the Authority. Costs were reserved.

¹ [2018] NZERA Auckland 325

Substantive determination

[2] By way of a determination dated 5 February 2019², the Authority found that the applicant, Mr Robert May, was not dismissed by the respondent, he resigned voluntarily. The Authority found that Solidbuilt failed to pay Mr May for public holidays and holidays and in doing so breached the provisions of the Holidays Act 2003 (Holidays Act) and the Employment Relations Act 2000 (the Act). Solidbuilt was ordered to pay Mr May penalties in the sum of \$12,000.

[3] Costs were reserved. The parties were invited to exchange memoranda as to costs.

Submissions as to costs

[4] On behalf of Mr May, a memorandum was filed by his counsel, Ms Burke. The total fees incurred by Mr May, according to the memorandum and invoices submitted on his behalf amount to \$36,294 (including GST).

[5] Ms Burke seeks indemnity costs, or in the alternative, a significant uplift in costs. Ms Burke relies on the following reasons for seeking indemnity costs or a significant uplift in the Authority's daily tariff, namely:

- (a) A reasonable Calderbank offer³ at an early stage of the proceedings was made and rejected by Solidbuilt;
- (b) Solidbuilt's conduct unnecessarily increased Mr May's costs in bringing his claim. Ms Burke cites memoranda filed on behalf of Solidbuilt objecting to the inclusion of various documents, objecting to disclosure requests, seeking an extension for filing an amended statement in reply and various other issues which Ms Burke says required a response from her and increased the costs for Mr May;
- (c) Special damages in respect of Ms Burke's time and attendances in obtaining minimum entitlements owed by Solidbuilt to Mr May;
- (d) An award of costs to reflect Mr May's GST status.

² [2019] NZERA 54

³ *Calderbank v Calderbank* [1975] 3 All ER 333

[6] In her memorandum in reply, Ms Death submits that costs “should lie where they fall” because Solidbuilt was partially successful in opposing Mr May’s claims against it. It is submitted on behalf of Solidbuilt that in the alternative, any award for costs against Solidbuilt should be reduced as a result of its partial success.

[7] Solidbuilt dispute the claims made on behalf of Mr May that its actions and the actions of its Counsel increased Mr May’s costs which justify an award of indemnity costs or a significant increase in the Authority’s daily tariff.

Costs determination

[8] The Authority’s power to award costs against a party is set out in clause 15 of Schedule 2 of the Act which provides as follows:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[9] The Authority has a discretionary power to award costs which must be exercised on a principled basis.

[10] In *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁴, the Employment Court set out a range of principles to guide the Authority when assessing a costs application. The principles are well known and I do not intend re-stating them in this determination. I will refer to the relevant principles where applicable to the particular circumstances of the matter between the parties in this case.

[11] In this case, there was partial success by both parties. Mr May’s claim that he had been unjustifiably dismissed was not successful. This was a significant plank of his claim against Solidbuilt. Mr May sought 3 months loss of remuneration and compensation of \$40,000 against Solidbuilt.

⁴ [2005] 1 ERNZ 808

[12] With regard to the breaches by Solidbuilt of minimum standards, these were largely conceded by Solidbuilt, at an early stage, in its statement in reply to Mr May's statement of problem. The parties disagreed over the calculations of amounts due for wage arrears, annual leave and alternate holidays and for public holidays.

[13] I consider that Mr May should recover a contribution from Solidbuilt to costs incurred by him in bringing his claims.

An appropriate award of costs

[14] The question for the Authority is: what is an appropriate award of costs? The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day.

First determination

[15] The first investigation into the issue of whether material attached to the statement of problem was without prejudice, was dealt with as a preliminary matter by the Authority on the papers. The parties exchanged memoranda and submissions on what was largely a procedural matter. Costs were reserved. Mr May was successful.

[16] I consider that an award of \$1,125 in costs to be appropriate for what was largely a procedural matter.

Second determination

[17] The investigation meeting took a full day in the Authority. The starting point for costs in the Authority is \$4,500 for a one day investigation meeting.

[18] The Authority must then take into account whether there are any particular aspects of the case that would warrant modification to the rate. Mr May seeks indemnity costs of \$36,294 (including GST) or in the alternative an uplift in the Authority's daily tariff from \$4,500 to \$25,000.

Without prejudice communications

[19] From the correspondence exchanged between the parties and attached to their respective memoranda as to costs, both parties attempted to settle Mr May's claims at an

early stage. Both parties made without prejudice offers which could have avoided litigation. Unfortunately, agreement could not be reached.

[20] Both parties engaged in an adversarial approach to the claims in the Authority. Memoranda were exchanged and applications to the Authority for directions were repeatedly made which in my view added to the costs incurred by both parties.

[21] Mr May seeks special damages because of the difficulties he said he encountered in obtaining employment records from Solidbuilt. While this was frustrating and time consuming the evidence in my view is not sufficient to justify such a claim.

[22] The claims made by Mr May were relatively simple. He claimed he had been unjustifiably dismissed, Solidbuilt was in breach of minimum standards legislation and liable for penalties.

[23] The Authority is a forum for the resolution of disputes at a low level and in a speedy manner.

[24] The full Court in *Fagotti v Acme and Co Limited*⁵ considered the issue of costs in the employment jurisdiction. At para 107, the Court agreed with the following statement by Judge Inglis in *Stevens v Hapag-Lloyd (NZ) Limited*⁶;

...proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate, currently set at \$3,500) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority in the first instance, that is a choice they make including having regard to the generally applied daily rate...

[95] In my view it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority...

⁵ [2015] NZEMPC 135

⁶ [2015] NZEMPC 28

[25] I am not prepared to depart from the usual manner in which costs are dealt with by the Authority. Costs are to be moderate and non-punitive. I consider costs should be payable by Solidbuilt and I consider the appropriate amount to be \$4,500 for a one day investigation meeting in the Authority.

[26] Solidbuilt is ordered to make a contribution of \$5,625 in total in respect of the two investigations in this matter. Costs of \$5,625 are to be paid by Solidbuilt to Mr May within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority