

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 398

3198019

BETWEEN

CRAIG MCISAAC
Applicant

AND

C3 LIMITED
Respondent

Member of Authority: Davinnia Tan

Representatives: Applicant in person
Patrick Anderson, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: No submissions from Applicant
9 June 2023 from Respondent

Determination: 27 July 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] Craig McIsaac lodged a statement of problem with the Authority on 7 November 2022 claiming that he was unjustifiably dismissed from his employment with C3 Limited (C3). Mr McIsaac sought remedies in the form of compensation for hurt and humiliation, lost wages and costs.

[2] An investigation meeting was scheduled for 6 July 2023 in Nelson.

[3] On 27 May 2023, Mr McIsaac's representative advised the Authority he was no longer representing him.

[4] On 1 June 2023, Mr McIsaac notified the Authority he wished to withdraw his application. Accordingly, the Authority informed parties that the file was closed on 1 June 2023 and that no further action would be taken. This was five weeks prior to the scheduled investigation meeting.

[5] C3 now seeks an order for costs against Mr McIsaac.

Submissions for C3

[6] C3 submits that a starting point of \$4,500 is appropriate (being the daily tariff based on the estimated hearing time of one day had this matter proceeded to the investigation meeting), and an uplift of \$1,000 on the following basis:

- a. A Calderbank offer, not to seek costs against Mr McIsaac should he withdraw his application (with C3 reserving the right to rely on the settlement offer in support of an application for increased costs), was made by C3 on 2 May 2023, which expired on 5 May 2023 at 4pm;
- b. The late withdrawal on 1 June 2023 meant that C3 was put to unnecessary expense of briefing witnesses, preparing witness statements and a paginated bundle of documents and other preparatory steps in advance of the hearing.

[7] In support of its submissions, C3 referred to the three witness statements it had lodged and served, which included reviewing relevant documentation, meeting witnesses, briefing and drafting their evidence. C3 also referred to it having lodged and served a witness summons and a memorandum seeking directions on 26 May 2023. C3 also lodged a paginated bundle of documents on 29 May 2023 for the investigation meeting pursuant to the directions of the Authority prior to Mr McIsaac's withdrawal on 1 June 2023.

[8] C3 submits that this unnecessary expense could have been avoided had the offer been accepted.

[9] Mr McIsaac did not provide any submissions in response.

Principles

[10] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Employment Relations Act 2000 (the Act) which states:

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.

[11] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹ as confirmed in *Fagotti v Acme and Co Limited*². The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment, and as the Court of Appeal has stated several times, a “steely approach” is to be adopted when considering Calderbank offers.³

[12] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.⁴

[13] The daily tariff is usually taken as a starting point, although is not to be used in a rigid manner, with principled adjustments made having regard to the to the particular characteristics of a case.⁵

¹ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

² *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 114.

³ *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA) at [53] and *Blue Star Print v David Mitchell* [2010] NZCA 385 at [20].

⁴ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁵ Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

[14] In the present case, C3 seeks an increased costs award with a starting point of \$4,500 and an uplift of \$1,000.

Analysis

[15] I find that C3, having regard to the late withdrawal of the proceedings, is entitled to an award of costs.

[16] The investigation meeting in this matter was scheduled for one day on 6 July 2023. I accept that between the date C3's offer to Mr McIsaac expired, being 5 May 2023; and the date of notice of Mr McIsaac's withdrawal on 1 June 2023, C3 incurred costs in preparation for the investigation meeting. This included producing witness statements to the Authority, lodging and serving a witness summons and a bundle of documents for the purposes of the investigation meeting.

[17] I consider its Calderbank offer relevant in these circumstances, noting that C3 expressly reserved its right to produce correspondence on its offer in support of an application for increased costs in the event the offer was not accepted. Mr McIsaac did not accept this offer.

[18] Although Mr McIsaac has not responded to C3's submissions on costs, I consider it relevant that four days prior to withdrawing his application, Mr McIsaac was no longer represented. It is unclear whether this was a significant consideration for Mr McIsaac in choosing to exercise his right to withdraw. Nevertheless, it is within Mr McIsaac's right to withdraw his application.

[19] As identified by counsel for C3, the Court in *Eden v Rutherford & Bond Toyota Ltd*⁶ has expressly noted that there is "no time limit for withdrawing proceedings that will affect precisely the question of costs. As a matter of common sense, however, the closer in time that proceedings are withdrawn before a hearing, the greater will probably have been the time put

⁶ *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43 at [8].

into their preparation by the other party and, therefore, the costs which the other party will have incurred reasonably and which may be the subject of an order.”

[20] I refer to other Authority determinations where proceedings were withdrawn three and 21, days prior to the relevant investigation meeting.⁷ Costs awards were in the sum of \$2,250 and \$2,000 respectively. In a more recent determination,⁸ proceedings were withdrawn after business hours, the night before the investigation meeting, and included a late submission of witness statements, resulting in the respondent unreasonably incurring additional costs. In that determination, the Authority ordered a costs award in the sum of \$2,900, with the starting point as being one-fifth of the daily tariff, at \$900. Uplifts were then made for relevant conduct.

[21] Counsel for C3 has referred to the Authority’s determination in *Ramsay-Cardno v Pallet Company (Hawkes Bay) Ltd*,⁹ where the Authority considered an appropriate starting point of \$3,375, and an uplift of \$1,405, taking into account the refusal of the applicant’s “timely offer to settle” following a substantive award in favour of the applicant. However, I consider that the current circumstances do not necessarily equate to an unreasonable rejection of the offer given that the substantive matter was not the subject of an investigation meeting. There was no successful, or unsuccessful party. As such, in terms of the daily tariff, I consider the appropriate starting point as being half of the daily tariff, that being a sum of \$2,250.

[22] In terms of timing, I do not consider five weeks prior to an investigation meeting excessively late. However, I do acknowledge the costs and expenses incurred by C3 in its preparatory work for the investigation meeting which were provided to the Authority pursuant to its directions, which could have been reasonably avoided. As such, I consider an uplift appropriate, that being an additional sum of \$500.

⁷ *Davis v MDL Civil and Engineering Limited* [2022] NZERA 271 and *Stewart Financial Group v McDonald* [2020] NZERA 362.

⁸ *Youyi Zhang v Cue International (NZ) Pty. Ltd* [2023] NZERA 382.

⁹ *Ramsay-Cardno v Pallet Company (Hawkes Bay) Ltd* [2022] NZERA 366.

Orders

[23] For the reasons above, I order Craig McIsaac to pay C3 Limited, within 28 days of this determination, a total of \$2,750 as a contribution towards its costs of preparation.

Davinnia Tan
Member of the Employment Relations Authority