

Attention is drawn to the
non-publication order
at paragraph [18]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 167
3128195

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|---------|-----------------------------------|
| BETWEEN | PHC Applicant |
| AND | DGJL LIMITED First Respondent |
| AND | CBML LIMITED Second Respondent |
| AND | WRY Third Respondent |

Member of Authority: Michael Loftus

Representatives: Digby Livingston and Miranda Dunn, counsel for the
Applicant
Matt Belesky, counsel for the Respondents

Submissions Received: 6 April 2022 from the Applicant
20 April 2022 from the Respondent

Date of Determination: 29 April 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] On 10 March 2022 I issued a determination in which I concluded PHC had a personal grievance as she had been unjustifiably dismissed.¹ I also concluded she was due unpaid wages.

¹ [2022] NZERA 85

[2] Costs were reserved and as the successful party PHC now seeks a contribution toward those she incurred in pursuing her claims.

[3] Normally the Authority will apply a daily tariff when addressing costs with the current starting point being \$4,500 for the first day and \$3,500 for each day thereafter.² From there adjustment may occur depending on the circumstances.

[4] The investigation saw the parties in attendance for a full day but the respondents say less. My notes say we finished at 4.55pm which I consider a full day for the purpose of determining costs. That, however, saw the completion of evidence but not submissions. As a result they were prepared and proffered later. This had the effect of extending the length of the investigation and I would suggest a day and a half appropriate. Applying the tariff that would see a contribution the order of \$6,250.

[5] PHC, however, seeks the greater sum of \$12,000 plus disbursements of \$181.96. The disbursements are detailed and include the Authority's filing fee, printing, copying and parking fees incurred by her representative when attending the investigation.

[6] In making her claim PHC submits the starting point should be that the investigation took two days (\$8,000) on the basis that:

- (a) It was originally scheduled for two days due to the matters complexity and while it transpired the evidence was heard in one day that did not diminish the effort required. In any event the investigation effectively continued into a second day as submissions could not be accommodated on the first and had to be prepared later.
- (b) The evidence was substantial with over 1500 pages of documents and submission totalling 56 pages; and
- (c) PHC's actual costs were significantly greater than either the tariff or what is being sought.

[7] Again, and in response to PHC's first point, I record my conclusion the investigation took a day and a half.

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[8] It is then submitted a further justification for an uplift is a pending matrimonial property settlement. This is said to mean PHC is effectively subsidising anything paid by the respondents as she has a 50% interest in WRY's property which includes 100% ownership of both DGJL and CBML. In the same way it is argued she has actually funded their defence and while it is accepted some impact is unavoidable this is a factor that should, PHC submits, be recognised.

[9] The respondents are of the view they should be liable for costs in the amount of \$4,500, being the tariff for the day of attendance. They are happy the filing fee be added.

[10] Beyond that the respondents say the claim is unreasonable and, furthermore, there should be some recognition of, and reduction for, them having to respond to the costs application having made a reasonable offer in that respect – namely the position they enunciate above.

[11] In support they refer to the principles in *PBO* and *Fagotti* before submitting the absence of a valid calderbank from either party would remove any justification for an increase to the tariff. Finally it is submitted “the small nature of the business is relevant” and a significant uplift in costs would compromise its viability and the continuing employment of some 10 to 20 staff.

[12] To put it frankly, there is nothing in either submission that encourages me to depart from the tariff.

[13] The respondents' submission regarding the lack of calderbanks fails to convince – there are a number of other factors that might justify a departure from the tariff. Similarly there is no evidence to support the suggestion the business' viability is at risk. Finally I have to say, given my conclusion the investigation took over a day, that the respondent's offer regarding costs fell short of reasonable and does not warrant a reduction of the tariff.

[14] Similarly PHC's submission an increase is warranted fails to convince. The argument relies totally upon a view she will be disadvantaged with respect to the division of matrimonial property. That is not the domain of the Authority but instead that of the Family Court. I have little doubt from what I heard that that discussion will be both contested and acrimonious. I'll leave it to the proper authority to determine.

[15] Turning to the disbursements. The Authority's filing fee is, in my view, a given as the respondents conceded. The others I have some qualms about. Parking in the Wellington CBD is not a cost I would normally consider given considerable case law which says you pick a representative that can perform the function without additional travel costs. A relatively low amount of photocopying and printing constitutes the type of costs the global approach envisaged by the tariff is considered to include.

Conclusion and Orders

[16] For the above reasons I conclude the tariff applies and the time taken was a day and a half.

[17] As a result, and bearing in mind no finding or order was made against WRY, I order DGJL and CBML, jointly and severally, pay PHC the sum of \$6,321.56 (Six thousand, three hundred and twenty one dollars and fifty six cents).

[18] For reasons explained in the substantive decision there is an order prohibiting the publication of anything that might identify the parties.³ That order remains in place.

Michael Loftus
Member of the Employment Relations Authority

³ Above n 1 at [5] and Clause 10 of schedule 2 of the Employment Relations Act 2000