IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 25
5416650

	BETWEEN	DAVID RODKISS Applicant
	A N D	CARTER HOLT HARVEY LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Nicole Ironside, Counsel for Applicant Daniel Erickson, Counsel for Respondent
Submissions received by Authority:	6 January 2014 from Applicant 22 January 2014 from Respondent
Date of Determination:	11 February 2014

COSTS DETERMINATION OF THE AUTHORITY

A The respondent is to pay to the applicant costs in the sum of $6710 and disbursements in the sum of $378.22.

The application for costs

[1] The Authority in its determination dated 28 November 2013 found in favour of the applicant that he was unjustifiably disadvantaged but did not find that he was unjustifiably constructively dismissed. An award of compensation was made pursuant to s.123 (1)(c)(i) of the Employment Relations Act 2000 (the Act).

[2] Costs were reserved. Counsel attempted to resolve the issues of costs however agreement was unable to be reached. The Authority has now received submissions from counsel on behalf of the applicant and respondent.

The applicant's submission

[3] The applicant refers to the leading case on costs in the Authority, *PBO Ltd (formerly Rush Security) v. Da Cruz* [2005] 1 ERNZ 808 and the daily tariff for costs which is recognised in the Authority as $3,500. Ms Ironside submits that, based on the daily tariff, the applicant would be entitled to the sum of $7,000 for the two day investigation meeting on 19 and 20 August 2013.

[4] She submits the Authority should also take into account the successful opposition by the applicant to the company's application to exclude evidence and award a reasonable contribution of $1,750 towards costs.

[5] The applicant's actual costs were $26,500 of which $3,050 Ms Ironside says were for time relating to the respondent's application to exclude evidence. By way of disbursements, the applicant seeks the sum of $306.66 for hearing fees together with the filing fee of $71.56. He further seeks an increase to any award of $500 for the cost of preparation of the costs submission.

[6] Further, Ms Ironside submits that the applicant made attempts to settle his personal grievance and avoid the cost of the investigation by making a *Calderbank* offer early in the proceedings which the respondent rejected and made no counter-offer to resolve the matter.

The respondent's submissions

[7] Mr Erickson submits that the daily tariff should be reduced to take account of the fact that the applicant was only partially successful because the applicant's unjustified constructive dismissal claim was dismissed together with a majority of his claims of unjustified disadvantage. He submits that it is apparent from the way the case was presented that the primary focus for the applicant was on his claim of constructive dismissal and that the Authority had reduced the daily tariff in cases where the applicant fails in their primary claim to reflect the modest extent of the success.

[8] Mr Erickson also submits that the Calderbank offer is irrelevant as it proposed financial remedies in excess of the amount awarded and that further correspondence should not have been before the Authority as it was *without prejudice* but does not purport to be *without prejudice except as to costs*. He submits that there is no basis

for an additional award of costs in respect of the successful opposition to the admissibility of evidence as the issue was dealt with at the investigation meeting itself.

[9] He submits that the applicant is not entitled to costs in respect of preparation of a costs memorandum as the respondent was entitled to reject the proposal and that each party should bear their own costs in respect of the preparation of costs memoranda.

[10] The respondent accepts that the applicant is entitled to be reimbursed for the filing fee of $71.56 and hearing fees of $306.66.

Determination

[11] The usual principle is that costs follow the event. The applicant was successful although not with all of his claims.

[12] The discretion as to whether costs are awarded and, if so in what amount is to be exercised in accordance with principle and not arbitrarily. There is reference in *PBO* to the basic tenets when considering costs. These include that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful parties conduct although conduct which increases costs unnecessarily can be taken into account in increasing or decreasing an award. Without prejudice [save as to costs] offers can be taken into account and awards are generally modest and the nature of the case can influence costs. The Authority can consider whether all or any of the parties costs are unnecessary or unreasonable. Costs are usually awarded on the basis of a daily tariff now recognised as $3,500.

[13] I do not give weight to the settlement offer in the nature of a *Calderbank* offer by the applicant in the exercise of my discretion because it was for an amount well in excess of that ultimately awarded. I also do not place weight in the exercise of my discretion on the respondent's response to that in those circumstances and do not need to address the concern therefore raised by Mr Erickson that the letter he sent in response headed *without prejudice* has been included.

[14] One of the issues in this case is that the applicant was not successful in all of his claims before the Authority. Mr Erickson referred the Authority to four Authority

cases where there has been a reduction to the daily tariff where the applicant had failed with a primary claim.

[15] In three of the determinations, *Moore v Electrix* [2014] NZERA Auckland 12, *Van As v Auckland Airport Kiwi Hotel Limited* [2013] NZERA Auckland 195 and *Watkins v Canterbury District Health Board* [2012] NZERA Christchurch 159 the unsuccessful claim occupied the majority or at least a significant portion of the investigation by the Authority. In the fourth determination referred to in *Spratt v Clan Construction Limited* [2013] NZERA 11 the only success for the applicant was a finding that notice was underpaid and the claim that Mr Spratt had been unjustifiably dismissed was not upheld. There was a reduction to the daily tariff by two thirds.

[16] I do not find the present matter on all fours with the determinations referred to. That is because the evidence about the allegation of unjustified constructive dismissal only occupied a small proportion of the investigation. The focus was on events that occurred earlier some but not all of which were found to have unjustifiably disadvantaged the applicant. Final written submissions from the applicant provided after the investigation meeting involved a detailed approach to alleged breaches many of which were unsuccessful. The respondent in final submissions chose sensibly to concentrate on the main claims and did not address each subset of unjustified actions alleged to have caused disadvantage. The respondent did however address the unsuccessful claim of unjustified constructive dismissal in submissions and were successful in defending that grievance.

[17] There should be some deduction from the daily tariff because the applicant was not completely successful and I assess that deduction in the circumstances from the starting point of $3,500 costs per day at $700 per day.

[18] The next issue is whether there should be an increase to the daily tariff because the applicant successfully opposed an application by the respondent that some evidence was inadmissible. This matter was one of importance to both parties. The applicant was successful in his opposition and the evidence was found to be admissible. There is no good reason why costs should not follow the event.

[19] Although the issue of admissibility was dealt with at the outset of the investigation meeting Ms Ironside had prepared in advance of that meeting a letter dated 13 June 2013 to Mr Erickson (R in the applicant's bundle of documents). In

the letter Ms Ironside set out in some detail her view as to why the evidence was admissible and in para 16 asked that the respondent withdraw its application to have some of the evidence redacted. She advised that if the respondent is not willing to do so then she placed the respondent on notice that the applicant would be seeking costs on an indemnity basis in relation to the hearing and determination of the preliminary issues. The issue of admissibility was discussed at a telephone conference as well. I have set this out to demonstrate that costs in relation to the issue of admissibility were incurred prior to the investigation meeting.

[20] Ms Ironside submits that total costs opposing the respondent's application are $3,050 of which she claims on behalf of the applicant $1750. At Ms Ironside's hourly rate of $280 that is 6.25 hour's work. A fair and reasonable contribution I find would be 3.25 hour's work or the sum of $910. The basis on which the evidence was alleged to be inadmissible was factually confined and not legally complex. I do not find the application by the respondent was made in circumstances that call for indemnity costs. I make an adjustment upwards on the basis of $910 to the daily tariff of $5600 on to arrive at a figure of $6,510.

[21] I have considered Mr Erickson's submission that the parties should bear their own costs in respect of preparation of the costs memoranda. I find that the applicant should be entitled to a contribution for the expense of preparing a costs memoranda but in reaching that view no criticism can be levelled at either party for not reaching agreement as to costs. This was not a straightforward matter. I make an adjustment upward in the sum of $200 for the costs submissions to arrive at a final figure for costs in the sum of $6,710.

[22] The applicant is entitled to reimbursement for hearing fees in the sum of $306.66 and the filing fee of $71.56.

[23] I order Carter Holt Harvey Limited to pay to David Rodkiss costs in the sum of $6710 and disbursements in the sum of $378.22.

Helen Doyle
Member of the Employment Relations Authority