

- he was the successful party and costs should follow the event; and
- he made three effective settlement offers which were unreasonably rejected by XGL.

Xenia Group Limited's response

[3] XGL says costs should lie where they fall because:

- a common bundle would have assisted the parties' and the Authority in the investigation of this employment relationship problem;
- it made a settlement offer to Mr Santra on 2 November 2022;
- its use of a time bank system is non-contentious;
- XGL has incurred significant costs in unsuccessfully defending this claim; and
- a 12-month stand down period imposed consequent to the penalty awarded for breach of employment standards has removed its ability to recruit migrant workers.

Costs principles

[4] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

Costs analysis

[5] Mr Santra was the successful party. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted he has incurred actual costs in respect of this matter. He should receive a contribution to costs incurred. It is not accepted this is a case where an award of indemnity costs is warranted – the nature of conduct to justify such an award is not present.³ Nor is it accepted this is a case where costs should lie where they fall. Both parties were represented throughout and, at its heart, this was a matter about employment standards and the interpretation and application of the parties' employment agreement.

[6] In assessing an appropriate award of costs the notional daily tariff is a starting point.⁴ The investigation meeting for this matter took two days. The applicable daily tariff is \$4,500.00 for the first day and \$3,500.00 for every day thereafter - \$8,000.00 is therefore the starting point.

[7] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff. There are no factors to warrant a decrease. Mr Santra did not decline a settlement offer which, had he accepted would have meant he was better off.

[8] An increase in the daily tariff is however warranted. Mr Santra made without prejudice save as to costs offers (WPOs) to XGL on 21 February 2022, 1 March 2022 and 7 September 2022. The offers are all effective – they are timely, would individually have resulted in a better outcome for XGL and made clear they will be used in a costs setting if required. If any of the offers had been accepted considerable costs would have been avoided by the parties.

[9] What may be an appropriate increase in the tariff involves consideration of a reasonable contribution to costs reasonably incurred. On the information received by the Authority the total costs incurred by Mr Santra after the first settlement offer was \$33,782.05. Weighing all the relevant factors in assessing an appropriate uplift in the daily tariff including that Mr Santra was not wholly successful in his claim and raised

³ *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438, at [21].

⁴ Practise Note 2 Costs in the Employment Relations Authority, 29 April 2022.

penalty claims well after the last WPO a reasonable contribute to costs reasonably incurred is \$10,000.00.

Outcome

[10] Within 21 days of today's date Xenia Group Limited is ordered to pay Baburam Santra \$10,000.00 without deduction being a contribution to costs.

Marija Urlich
Member of the Employment Relations Authority