

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 106
3165601

BETWEEN RUBEN SPOTSWOOD
Applicant

AND CONCRETE STRUCTURES
(NZ) LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Alex Kersjes, advocate for the Applicant
Kevin Badcock, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further information received: 23 January 2024 and 20 February 2024 from the Applicant
14 February 2024 and 22 February 2024 from the Respondent

Determination: 26 February 2024

COSTS DETERMINATION OF THE AUTHORITY

The determination

[1] On 11 January 2024 I issued a determination in which I found that Mr Spotswood was unjustifiably dismissed from his employment and made orders for the payment of compensation.¹ The issue of costs was reserved, and the parties have not been able to agree on costs.

Submissions for Mr Spotswood

[2] It is submitted for Mr Spotswood that he was wholly successful in pursuing his claims and that a costs award should in the amount of \$8,000 plus disbursements. Mr

¹ *Ruben Spotswood v Concrete Structures (NZ) Limited* [2024] NZERA 9.

Spotswood claims that his total costs amount to \$10,485.96, including disbursements of \$71.56 for the filing fee.

[3] Mr Spotswood submits that the starting point in terms of the Authority's daily tariff should be \$4,500 on the basis that the investigation meeting did not consume a full day, but that provision was made for written submissions after the investigation meeting.

[4] Mr Spotswood seeks an uplift from that starting point, submitting that he was required to respond to unsuccessful applications made by Concrete Structures (NZ) Limited ("Concrete Structures") and on the basis that an effective *Calderbank* offer was unreasonably rejected by Concrete Structures.

[5] Ms Spotswood submitted, in relation to Concrete Structures' claims that Mr Spotswood caused increased costs relating to the late adjournment of the investigation meeting initially scheduled, that there is no basis for costs to be reduced. Mr Spotswood contends that Concrete Structures' concerns related to travel costs of counsel, that the Authority does not allow disbursements for out of town counsel where such is not a necessity, and that Mr Spotswood should not be penalised for Concrete Structures' decision to use out of town counsel.

Submissions for Concrete Structures

[6] Concrete Structures submitted that the appropriate starting point in terms of the Authority's tariff approach should be \$3,375 based on a one-day investigation meeting with a reduction of 25 percent on the basis that findings of contributory conduct were made.

[7] It further submitted that the purported *Calderbank* offer came too late to have any effect, being three days prior to the initially scheduled investigation meeting, and that no uplift should be applied on that basis. In the alternative, Concrete Structures submitted that any uplift should be limited to no more than 10 percent given the late stage of the offer.

[8] Concrete Structures submitted that no increase in costs is warranted in relation to applications made by it following the late request for adjournment by Mr Spotswood. It submitted that Spotswood made no submissions in response to the applications, the applications being for compliance in the nature of an unless order and for penalty for

delay or obstruction, and that the applications were made as a direct result of Mr Spotswood's own actions.

[9] Concrete Structures submitted that Mr Spotswood's actions in causing the adjournment of the investigation meeting that was scheduled to take place on 2 May 2023 should result in a costs award in its favour, with the net result being that Mr Spotswood should pay costs of \$2,052.70 to Concrete Structures. That claim proceeds on the basis that Concrete Structures should be entitled to a contribution relating to wasted costs of \$4,415.20, and an additional \$1,350 relating to the preparation of the costs memorandum.

[10] In relation to the above, Concrete Structures claims \$2,700 as six hours of preparation for the investigation meeting that did not proceed, \$675 as half of the travel time, and \$182.50 as half of the mileage related to counsel's travel.

Discussion and analysis

[11] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.²

[12] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that *Calderbank* offers may be taken into account in setting costs, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.³

[13] The daily tariff is to be taken as a starting point.⁴ Principled adjustments may, if necessary, be made having regard to the particular characteristics of a case.

[14] Mr Spotswood was successful in pursuing his claims. Therefore, the starting presumption is that it is entitled to an award of costs.

[15] The substantive proceeding involved a one-day investigation meeting. An application of the daily tariff approach would see a contribution of \$4,500.

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

⁴ Practice Direction of the Employment Relations Authority, issued 1 February 2024.

No reduction for contribution

[16] While findings were made as to contribution as detailed in the substantive determination, I do not consider that a basis for a downwards adjustment to the daily tariff. Costs are not intended to punish, and Mr Spotswood was successful in pursuing his claims. I do not consider the issue of contribution in terms of s 124 of the Employment Relations Act 2000 to be a matter relevant to the issue of costs.

Calderbank offer

[17] An offer of settlement for \$6,000 (and in addition contribution to representation fees of \$4,000 plus GST) was made on 26 April 2023, prior to the investigation meeting scheduled for 2 May 2023 that was ultimately adjourned. The offer contained no clear period during which it would remain open for acceptance, although was made in the context that the investigation meeting would be proceeding on 2 May 2023.

[18] I accept the submissions of Concrete Structures in relation to the timing of the offer. The offer was made a matter of days before the scheduled investigation meeting, rather than being made at an early stage prior to significant costs being incurred. The timing of the offer is also somewhat curious given Mr Spotswood's affidavit evidence that he tested positive for COVID-19 the same day the offer was made, notwithstanding the subsequent delay in the Authority being advised.

[19] I consider that the Calderbank offer made was in clear terms and was otherwise reasonable. However, I am not satisfied that, having regard to the timing, Concrete Structures were provided a reasonable opportunity to consider and respond to the offer. On that basis I do not consider the purported *Calderbank* offer was effective and I decline to take the offer into account. I would in any event have declined to take the offer into account on a discretionary basis given its timing and having regard to the costs already incurred at the time it was made.

Other adjustments sought by Mr Spotswood

[20] I decline to make an upwards adjustment to the daily tariff on account of the applications made by Concrete Structures relating to the adjournment of the initially scheduled investigation meeting. Ultimately, I am not satisfied that those applications resulted in any increased and unnecessary costs on the part of Mr Spotswood. Perhaps

sensibly, Mr Spotswood declined to make comprehensive submissions in relation to those applications.

[21] Such as any minimal increase in costs might have been attributable to those applications on the basis of attendance at a case management conference, I am not satisfied that warrants any uplift given the case management conference was in part required given Mr Spotswood had not complied with previous directions regarding the provision of information relevant to the basis for the adjournment request, those directions having been made on the basis of commitments provided on Mr Spotswood's behalf.

Claims relating to the late adjournment

[22] I decline to make any award to Concrete Structures relating to disbursements relating to travel of counsel. I also decline to make any adjustment or award based on costs associated with the preparation of costs submissions. I accept the submissions made on behalf of Mr Spotswood in relation to those matters.

[23] In the substantive determination I addressed the penalty claim made by Concrete Structures relating to Mr Spotswood's late request for an adjournment to the investigation meeting that was scheduled to take place on 2 May 2023.⁵ I noted that Mr Spotswood's actions in delaying notification were not prudent and that they may be relevant to the issue of costs. However, I noted that it was the illness as opposed the notification that ultimately resulted in adjournment.

[24] Whilst the adjournment was necessary, the delay in notification was significant and resulted unnecessarily additional costs being incurred. Those unnecessary costs would have been avoided had Mr Spotswood taken the appropriate and perfectly reasonable step of ensuring the Authority was advised of the issue in a timely manner. Instead, the adjournment was only sought after business hours the day prior to the investigation meeting and after travel had been completed.

[25] I consider that a modest adjustment to the tariff is appropriate in the circumstances. However, I decline to do so based on travel costs or travel time relating to out-of-town counsel. I consider some downwards adjustment is appropriate on the basis of wasted preparation time and time that could not otherwise reasonably be

⁵ Above n 1, at [61] to [65] and by way of background at [4] to [6].

utilised for other purposes, and for the time and costs associated with the urgent case management conference that was required. However, I do not consider that the nine hours of preparation time claimed is reasonable having regard to the transferability of much of that preparation.

[26] Having considered all of the relevant matters, I find that a downwards adjustment to the tariff of \$500 is appropriate in all the circumstances.

Orders

[27] For the above reasons I order Concrete Structures (NZ) Limited to pay Mr Spotswood:

- (a) \$4,000 as a contribution towards the costs he incurred; and
- (b) \$71.56 being the filing fee.

[28] Payment is to be made within 28 days of this determination.

Rowan Anderson
Member of the Employment Relations Authority