

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 526
3254079

BETWEEN BRIDGET TRELEAVEN
Applicant

AND MRZW LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Dave Cain, advocate for the Applicant
Lennon Xi, advocate for the Respondent

Submissions Received: 12 August 2024 from the Applicant only

Date of Determination: 3 September 2024

DETERMINATION OF THE AUTHORITY

[1] I issued a determination on 23 July 2024¹ finding that the respondent (M) had unjustifiably constructively dismissed Ms Treleaven. I ordered \$15,000.00 in compensation and \$7,800 gross in lost wages. I further ordered a deduction made from pay to be repaid to Ms Treleaven (\$63.00) and two penalties against M (both for \$500.00) for failing to produce records when requested and for breach of the employment agreement (failure to provide notice), to be wholly paid to Ms Treleaven.

[2] The parties were asked to resolve costs between themselves. Costs have not been resolved. Ms Treleaven has now asked for an award of costs. M was given a time frame to reply² to the applicant's costs application and failed to do so. I will now consider the application.

¹ *Treleaven v MRZW Limited* [2024] NZERA 440.

² Above at [58].

[3] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party.

[4] The Authority uses a notional daily tariff adjusting the tariff up or down as appropriate depending on the case. Such an adjustment may take into consideration a liable party's means to pay costs, settlement offers made by either party, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.

[5] The current tariff applied for a one-day Authority investigation meeting is \$4,500.00. This amount is considered a starting point for assessing a reasonable contribution to the legal costs incurred by a party preparing for and taking part in an investigation meeting but generally not including preparation and attendance at mediation. The investigation meeting for the substantive matter took until 4.00pm so almost a full day. The starting point is therefore \$4,500.00.

Should there be an uplift to the starting point?

Written submissions beyond the investigation meeting

[6] It is submitted for Ms Treleaven that I consider an uplift because written submissions were timetabled beyond the end of the investigation meeting. As noted above the investigation meeting ended at 4.00pm and the representatives had earlier been asked to prepare for oral submissions³ unless time did not allow for these. In these circumstances and without any apparent overly complicating factors arising out of the investigation meeting evidence I do not accept the written submissions cannot be considered as part of the starting point of a one day tariff.

M's conduct

[7] It is submitted for Ms Treleaven that I consider an uplift because of the way that the respondent and its advocate behaved in the 'lead up' to and during the investigation meeting in relation to evidence and argument that was irrelevant and not helpful to the investigation. What specifically this relates to has not been identified in Ms Treleaven's

³ Directions of the Authority dated 5 December 2023 at [5].

submissions. I note here that the unusual factor in the substantive matter related to loans that the respondent director had benevolently made to Ms Treleaven which at the time of the investigation meeting she had yet to repay. While I accept that the respondent sought to raise issues about this, most of my investigation was centred on what happened in the process towards Ms Treleaven's employment ending. I made comments in my determination about the inappropriateness of the respondent's evidence continuing to raise a social media post to disparage Ms Treleaven, but I do not accept this ought to have incurred any significant increase in cost to Ms Treleaven. Without more I am not satisfied that (as submitted) there was 'conduct [that] absolutely aggravated the process' to the extent of ordering an uplift as to costs.

Calderbank letter dated 7 September 2023

[8] It is submitted for Ms Treleaven that I should consider an uplift to the day tariff for the reason of a 'Calderbank' letter sent to the director of the respondent on 7 September 2024. The letter was headed 'without prejudice save as to costs' and offered a settlement of \$10,000.00 in compensation and \$4,000.00 plus GST as a contribution to costs. The respondent was given seven days to consider the offer and did not take up the offer. The offer (and the time to respond) was before the respondent then lodged her claims in the Authority on 29 September 2023. The letter referred to instructions to 'escalate' matters to the Authority and that the offer was a 'final effort to reach an agreement'. The letter also noted that it should be considered a 'Calderbank offer' and explained that Ms Treleaven reserved her right to bring the letter to the attention of the Authority to support an uplift of costs. I accept the letter is one that can be categorised as a 'Calderbank⁴' letter.

[9] It is submitted for Ms Treleaven that the Authority should increase the tariff by a half day.

[10] The Employment Court⁵ has observed that while 'Calderbank' offers are 'front and centre' for the Court when considering costs, the Authority's discretion is broader

⁴ Also called 'Calderbank' offers being an offer made by one party, normally the successful party, to settle the claim on terms. The offer is marked 'without prejudice save as to costs'. The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled.

⁵ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

and sits within the context of a jurisdiction 'intended to be low level, costs effective, readily accessible and non-technical'. That case involved the Court considering as disproportionate an application for costs asking for an uplift of \$20,000.00 to the then one day Authority tariff of \$3,500.00.

[11] I have nothing before me to show the financial situation of the respondent that may go against any uplift as to costs. I accept that an uplift is to be awarded at half the daily tariff. This is because the difference between what the respondent could have settled on before Ms Treleven had to lodge her claim in the Authority to gain resolution is not an insignificant difference taking this determination into account. I accept Ms Treleven has incurred costs of \$14,507.89 based on the Invoice provided from her representative. I make therefore what remains a modest \$6,750.00 award for a contribution to her costs.

Order

[12] MRZW Limited is ordered to pay Bridget Treleven the single sum of \$6,750.00 as a contribution to her costs.

Antoinette Baker
Member of the Employment Relations Authority