IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 351
3028353

	BETWEEN	SAM WARD Applicant
	AND	CONCRETE STRUCTURES (NZ) LIMITED First Respondent
	AND	PERPETUAL GUARDIAN TRUST Second Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Greg Bennett, Advocate for the Applicant Kevin Badcock, Counsel for the First Respondent Fraser Wood, Counsel for the Second Respondent
Submissions received:	05 October 2018, from the Applicant 06 September 2018, from the Second Respondent
Determination:	14 November 2018

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 23 August 2018 I issued a determination in which I found the Authority had no jurisdiction to hear Mr Ward's claim against the Trustee of the CS Employees Trust Fund, Perpetual Guardian Trust. This was because the relief sought by Mr Ward against Perpetual Guardian arose out of an alleged statutory breach of the provisions of the Contract and Commercial Law Act 2017. The underlying problem that Mr Ward asked the Authority to resolve was not one relating to, or arising out of, an employment relationship. It was not therefore a matter within the jurisdiction of the Authority.

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions.

Submissions were filed by Perpetual Guardian Trust on 6 September 2018 and by Mr Ward on 5 October 2018.

Application for costs

[3] Perpetual Guardian claims indemnity costs in the sum of $13,921.90. This sum is made up of:

a) A sum of $12,748.90 inclusive of GST representing the legal costs Perpetual Guardian had incurred for the investigation ($8,429.50) and for preparation of cost submissions ($4,319.40); and

b) A sum of $1,173 inclusive of GST representing the costs the CS Employees Trust was charged by Perpetual Guardian Trust for its services.

Authority's Approach to Costs

[4] The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority thinks reasonable. [1]

[5] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs. [2] These costs were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.[3] The principles include:

a) There is a discretion as to whether costs would be awarded and in what amount.

b) The discretion is to be exercised in accordance with principle and not arbitrarily.

c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d) Equity and good conscience is to be considered on a case by case basis.

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[1] Employment Relations Act 2000, Schedule 2 clause 14.
[2] *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz*[2005] ERNZ 808 (EmpC) at [44].
[3] *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g) Costs generally follow the event.

h) Without prejudice offers can be taken into account.

i) Awards will be modest.

j) Frequently costs are judged against notional daily rates.

k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is $4,500.00 for the first day of an investigation meeting.[4] The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[7] This matter was dealt with on the papers. However, the preparation for the matter in my view was the equivalent to the preparation required for a half day investigation meeting. One affidavit was filed by the Trust and one affidavit was filed by Mr Ward. Submissions from Counsel for the Trust and for Mr Ward were also filed. Using the normal daily tariff this equates to a starting point of $2,250.

Should the daily tariff be adjusted?

Indemnity Costs?

[8] I am satisfied that an uplift to the daily tariff is warranted in the circumstances of this case but I do not agree with Perpetual Guardian that indemnity costs are appropriate.

[9] Recently in *Booth v Big Kahuna Holdings Limited* Judge Inglis said:[5]

[4] Practice Note 2, Costs in the Employment Relations Authority.
[5] [2015] NZEmpC.

> Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues …

[10] The costs that Perpetual Guardian incurred were well above that which I would have expected to have been incurred in the circumstances of this case. The case between Mr Ward and Perpetual Guardian was not complex. Substantial pleadings, affidavits and submissions were not required.

Uplift due to Applicant's conduct in unnecessarily increasing costs?

[11] Having reviewed Perpetual Guardian's Solicitor's time records, I find that Perpetual Guardian's costs were unnecessarily increased by Mr Ward breaching the timetabling directions that the Authority made on a number of occasions relevant to Guardian Trust's application. These include his failure to file the common bundle and his witness statements by the due date and non-compliance with directions made in my minute of 3 July 2018. This led to timetable directions having to be adjusted and additional attendances being required by Perpetual Guardian in reviewing and responding to the Authority's minutes, email correspondence and memoranda. I consider a reasonable contribution towards these costs is $500.00.

Uplift due to Calderbank offer?

[12] As stated in *PBO Ltd*, Calderbank offers can be taken into account when considering costs. Where such an offer is made, and an applicant does not beat the offer, the Courts have stated that there should be a steely response as that would be in the broader public interest.

> It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs. [6]

[6] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18]-[20].

[13] These comments also apply with respect to Calderbank offers made before an Authority investigation.[7]

[14] In *Xtreme Dining Ltd t/a Think Steel v Dewar* the full Court noted that the correct question in circumstances where a Calderbank offer has been made by a respondent was whether the applicant had acted unreasonably in rejecting the offer, at the time that it did so.[8]

[15] By way of letter dated 12 July 2018, Counsel for Perpetual Guardian Trust advanced a settlement offer to Mr Ward in the sum of $2,500. This offer was made on a Calderbank basis and was marked "without prejudice save as to costs". It recorded that "payment shall be without admission of liability and in full and final settlement of *all issues* between Sam Ward and Perpetual Guardian Trust" (emphasis added).

[16] Mr Ward failed in his claim against Perpetual Guardian because the Authority did not have jurisdiction to address his claim. The merits of any claim against Perpetual Guardian were not considered. In these circumstances I do not consider a rejection of Perpetual Guardian's offer, which would have prevented Mr Ward from pursuing a claim in the civil jurisdiction, to have been unreasonable. No adjustment to the daily tariff is made under this head.

Finding

[17] In the circumstances I am satisfied an uplift in the daily tariff to $2,750 is appropriate.

[18] For completeness I did consider, but I do not accept, that the time spent by Perpetual Guardian preparing for this case, as opposed to its Solicitors' attendances, warrants any uplift to the daily tariff. From the invoice I have viewed it appears that all attendances undertaken by it were within the normal range of attendances that are taken into account when the daily tariff was set by the Authority.

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[7] *Fagotti v Acme &Co Ltd*, above n 3, at [109]; *Spillman v Tandam Skydiving* [2018] NZEmpC 32 at [37].
[8] *Xtreme Dining Ltd t/a Think Steel v Dewar*[2017] NZEmpC 10 at [28].

Determination

[19] Mr Ward is ordered to pay to Perpetual Guardian the sum of $2,750 towards its legal costs. This sum must be paid within 28 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority