

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 350  
3027871

BETWEEN	TRAVIS WHITE Applicant
A N D	DAVERON SCAFFOLDING LIMITED Respondent

Member of Authority: Peter van Keulen

Representatives: Chrissy Gordon, advocate for the Applicant  
James Pullar and Amy Kennerley, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 10 June 2019 from the Applicant  
22 May 2019 from the Respondent

Date of Determination: 13 June 2019

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**COST DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1] In a determination dated 16 April 2019, I dismissed Travis White's claims for unjustified dismissal, unjustified action causing disadvantage, discrimination and a breach of his employment agreement.

[2] In my determination, I reserved costs in order to give the parties an opportunity to try and resolve the question of costs. The parties have been unable to agree costs and Daveron Scaffolding Limited now seeks an order for costs.

## **Application for costs**

[3] Mr Pullar on behalf of Daveron seeks costs based on the daily tariff applied to a one day investigation being \$4,500.00. He also seeks an uplift to reflect various aspects of Mr White's conduct of his claims including his rejection of a Calderbank offer. Mr Pullar says the uplift should be \$4,500.00 and I should award Daveron costs of \$9,000.00.

[4] Ms Gordon for Mr White submits that costs should lie where they fall or alternatively if I must award costs to Daveron it should be at a reduced rate. Ms Gordon accepts that the daily tariff is the starting point for any costs award but says I should not increase the daily tariff because Mr White's rejection of the Calderbank offer was reasonable so it is not relevant and the other aspects of the alleged conduct of Mr White's claim do not justify an increase. Ms Gordon then submits that Mr White's personal circumstances, including his financial situation, are such that there should be no award of costs i.e. the daily tariff should be reduced completely or alternatively it should be reduced to a much more modest amount than \$4,500.00.

## **Discussion**

[5] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>1</sup> and have been affirmed by the Full Court in *Davide Fagotti v. Acme & Co Ltd*<sup>2</sup>.

[6] I am satisfied that costs should follow the event and Daveron is entitled to an award of costs. I am also satisfied that applying the daily tariff is the correct approach in this case.

[7] My investigation meeting took less than one full day so my starting point for quantum of any award is \$4,000.00.

### *Adjusting the daily tariff*

[8] The daily tariff amount can then be adjusted for various reasons - the factors relevant to the consideration of the increase or decrease of the daily tariff include:

- (a) Costs awards in the Authority will be modest;

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<sup>1</sup> [2005] 1 ERNZ 808

<sup>2</sup> [2015] NZEmpC 135

- (b) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- (c) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- (d) Without prejudice save as to costs offers can be considered;
- (e) Impecuniosity of the other party may be relevant;
- (f) A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[9] Whilst there are various aspects raised by Mr Pullar as a basis for increasing the daily tariff based on the points set out above, there is one principle relating to reducing the daily tariff that is applicable here, which overrides the points he makes.

[10] *In Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)*<sup>3</sup> the Employment Court said, at paragraph [11]:

Whatever the rights and wrongs of the way the case was managed in the Employment Relations Authority the fact is that costs awards must be realistic and to this end must reflect the ability of the party to pay. Mr Koia's financial situation at the time means that any award of costs at all would have created hardship to him but on the other hand as the losing party he should be required to make some contribution to the department's costs. For this reason I now reassess the costs to be paid by Mr Koia in relation to the Employment Relations Authority investigation meeting. At \$1,000 for each day this makes a cost award of \$2,000 which will I am satisfied Mr Koia will be able to pay even if it is by instalments over a period of time.

[11] In essence, the Court is saying that in some cases regardless of the conduct of the claim, that might otherwise justify an increase in the daily tariff, a costs award should reflect the ability of a party to pay. I believe this is one of those cases. So rather than analysing and applying the various factors raised by Mr Pullar I need to focus on Mr White's circumstances as set out by Ms Gordon and base my assessment of any adjustment to the daily tariff on that.

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<sup>3</sup> [2004] 2 ERNZ 274

[12] In this case I am satisfied that Mr White's circumstances are such that he can and should pay some costs but that he has limited financial means to pay such costs and therefore the daily tariff should be reduced significantly.

[13] On this basis, I reduce the daily tariff to \$1,000.00.

[14] It is also clear that any payment of this cost award will need to be made by instalments and I trust that the parties can come to a suitable arrangement.

### **Order**

[15] Mr White must pay Daveron \$1,000.00 as a contribution to the costs it has incurred in this matter. That amount can be paid by instalments, to be agreed between the parties but if they are unable to agree either party may apply to the Authority for further orders specifying a suitable amount.

Peter van Keulen  
Member of the Employment Relations Authority