

submissions.” It is submitted for THL that because Mr Charlesworth rejected the *Calderbank* offer, it incurred “*considerable and unnecessary costs.*”

[3] Therefore, THL seeks an award of costs of \$15,000 plus a contribution towards preparing its costs submissions of \$500.

[4] Conversely, the submissions for Mr Charlesworth are that it would be fair and reasonable for costs to lie where they fall [“... *in all the circumstances considering the nature of the matter, the short hearing and the Respondent’s refusal of a [counter] Calderbank offer that was significantly less than the costs now claimed.*” The Authority is also asked to consider the inability of Mr Charlesworth to pay a contribution to the costs incurred by THL. Evidence has been provided of Mr Charlesworth’s very substantial student loan liability incurred (apparently) in the course of obtaining a helicopter pilot’s licence. Also there is an IRD record of the limited earnings of Mr Charlesworth for the 2009-2010 tax year, although the Authority understands that Mr Charlesworth expended some time obtaining the pilot’s licence. Nonetheless, the bank records show that as of 20th October 2010, Mr Charlesworth had a substantial overdraft liability also.

[5] The accepted practice of the Authority is to apply the principles set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808. In particular, a tariff based approach is applied with the current rate of \$3,000 for each day of an investigation meeting being commonly awarded. But the tariff can be raised or reduced depending on the particular circumstances of a case. The matter of an appropriate tariff has recently been addressed by the Employment Court in *Cathy Johnson v Gilligan Business School Limited* (unreported) AC 14/09, 3 April 2009.¹ Judge Travis cited the following passage from *Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73:

In a judgment in November 2006 the Court noted that the Authority’s tariff ranged up to about \$3,000 per day. Given the passage of time since then, that figure is most likely to be an appropriate starting point for the Authority’s tariff rather than an upper figure.

Judge Travis agreed with observations of Judge Shaw in the *Department of Corrections* decision in that the higher end of the scale is not to be regarded as a fixed

¹ A challenge to a costs award of \$3,750 made by the Authority.

rate but as an appropriate starting point. But, Judge Travis then held that:

Applying the principles set out in *PBO*, I find that the award [\$3,750] was at the higher end of the range, but that is explainable by the hearing being longer than a normal one day hearing.

[6] On the basis of the *Johnson* decision, it would appear that it remains appropriate for the Authority to continue to use a sum of \$3,000 per hearing day as a reasonable starting point and then applying the principles set out in *PBO*, exercise its discretion to increase or decrease the amount awarded, taking into account the particular circumstances of a case.

[7] In this case, taking into account that a credible *Calderbank* offer was made, had it not been for the financial circumstances of Mr Charlesworth, I would have awarded costs considerably in excess of the daily tariff amount. But I am bound to take into account the financial circumstances of Mr Charlesworth and it is not the role of the Authority to impose undue hardship upon an unsuccessful party.

[8] Therefore, taking all the circumstances of this particular case into account, I conclude that an award of a sum of \$3,000 is appropriate.

Determination

[9] Mr Charlesworth is ordered to pay to Tourism Holdings Limited the total sum of \$3,000.00 as a contribution to costs.

K J Anderson
Member of the Employment Relations Authority