

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 26
5424345

BETWEEN

JAMES ELLIOTT
Applicant

AND

CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: P R Stapp
Submissions: On the papers
Determination: 20 March 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority reserved costs in [2014] NZERA Wellington 87. Mr Elliott was not successful with his claims.

[2] The parties have not been able to resolve the matter of costs. The Department of Corrections has requested the Authority to uplift the daily rate for the costs that it has been put to by Mr Elliott. Mr Elliott opposes the claim. He has asked that costs lie where they fall, or that the Authority make a nominal award, if it is necessary.

[3] Costs are determined pursuant to clause 15 of Schedule 2 to the Employment Relations Act, 2000. In accordance with current practice costs are assessed as a matter of principle,¹ and based on a daily rate of \$3,500 as fixed by the Authority. This is an all-inclusive rate for any submissions and including submissions on costs. In practice costs are dealt with differently than in the Employment Court, because of the tariff approach applied in the Authority. This difference in approach is because the Authority operates as an investigative body to resolve employment relationship

¹ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

problems. The Employment Court has said that costs in the Authority should be modest and that based on the tariff costs can be uplifted or reduced.² This will accord with the factors involved in each case.

The current matter

[4] There was an attempt to settle made by the Department and I have considered that as a factor, although I note Her Honour Judge Inglis said that there is some doubt that the approach that applies in the Court in regard to *Calderbank* letters should have equal application in the Authority. In particular she noted that the steely approach referred to by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell*³ was directed at the Employment Court, and that it was not apparent that the comment was intended to have broader application, meaning in the Authority. I agree with Mr Elliott that features of the *Calderbank* offer did not enhance the prospects of settlement and that he reasonably rejected it given that he was genuinely hopeful for reinstatement and the timeframe he had to consider the offer. Because he was unsuccessful in the matter costs follow the event and as such the Department is entitled to a contribution towards its costs.

[5] Recently Judge Inglis has returned to the same theme in *Stevens v Hapag Lloyd* [2015] NZEmpC 28. Her Honour reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical.⁴ Indeed her Honour went further and said that where there is a choice exercised by a party to obtain representation and apply significant legal resources that is a choice that must have regard to the generally applied daily rate.

[6] The investigation meeting took two days. There was nothing unusual about the matter and the timeframe for the investigation was reasonable given the claims and that Mr Elliott was not represented. Mr Elliott's conduct of the matter however means that costs cannot lie where they fall. Also, I am not satisfied that the daily rate should be reduced to reflect a nominal award based on Mr Elliott's financial circumstances. The Department has been put to the costs in the matter given its success. Some time may have been avoided to save costs if Mr Elliott had been

² *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 paragraph [6]

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

⁴ *Stevens v Hapag Lloyd* [2014] NZEmpC 28; and Employment Relations Act s 157 (1)

represented and a proper risk assessment had been undertaken on the issues. I have had regard to Mr Elliott's attempt to save costs by not being represented and not reducing access to justice given that he was acting on his own. Bearing in mind Mr Elliott's right to access justice I have to balance the merits of the matter and Mr Elliott's decision to pursue it in the Authority when it might have been better to settle or indeed to have narrowed the issues and the claims. I reject the claim that costs should lie where they fall and to reduce the daily rate to a nominal amount. In this regard I am satisfied that the daily rate must apply without deduction. I am not satisfied that Mr Elliott will not be able to pay the Department at some time in the future when there is clear notice of what the daily tariff applying is. There has been a suggestion that payment be made by instalments. Any instalments will have to be arranged between the parties in light of any financial difficulties Mr Elliott has, because I have some doubt that the Authority has any power to make an order for instalments at this stage.

[7] Costs therefore are awarded to the Department of Corrections in the sum of \$7,000.

Order of the Authority

[8] I order James Elliott to pay to the Chief Executive of the Department of Corrections the sum of \$7,000 to its costs.

P R Stapp
Member of the Authority