

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 157
5568965

BETWEEN CRAIG TULLOCH
 Applicant

AND HAYS SPECIALIST
 RECRUITMENT (AUSTRALIA)
 PTY LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Barbara Buckett, Counsel for Applicant
 Miles Edwards, Counsel for Respondent

Investigation Meeting: On the papers

Submissions 31 October 2016, from Applicant
 17 October from Respondent

Determination: 16 December 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 3 October 2016¹ I found Craig Tulloch had a casual employment relationship with Hays Specialist Recruitment (Australia) Pty Limited (Hays) under the terms of which Hays would offer him temporary assignments with its clients which Mr Tulloch could accept or decline. I found Hays had not bargained unfairly with him in offering him its Individual Agreement –Temporary Staff- New Zealand; and it did not breach its obligations of good faith to him during his employment. I also found Hays did not dismiss Mr Tulloch when it brought his temporary assignment with an external organization to an end on 22 April 2015.

[2] I reserved the issue of costs. Hays now seeks a contribution to the legal costs it incurred in defending Mr Tulloch's claims. It has itemised those costs which

¹ [2016] NZERA Wellington 120

amounted to \$23,573.18, including disbursements, but excluding GST. Copies of invoices have been provided to the Authority to support the claim.

[3] Mr Edwards, counsel for Hays, referred in his submissions to the well-known legal principles applying to the determination of costs, as set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² and affirmed more recently by that court in *Fagotti v Acme Ltd.*³ In his submission the notional daily tariff, which was \$3,500 per day at the date of hearing the substantive matter, should be the starting point for a determination of costs.

[4] There should be an uplift to the daily tariff in his submission, on the basis that a written *Calderbank* offer was made to Mr Tulloch in December 2015 which he rejected. Citing the Court of Appeal's exhortation in *Health Waikato v Elmsly*⁴ for a "steely approach" to be taken in such situations on public interest grounds, Mr Edwards proposes it would be reasonable for the Authority to order Mr Tulloch to pay \$10,000 as a contribution to Hays' legal costs.

[5] Mr Tulloch opposes Hays' application and, through his counsel, Ms Buckett, has claimed this "is a clear case where costs should lie where they fall to reflect the justice of the matter between the parties". In the alternative, should the Authority be minded to award costs to Hays, Ms Buckett submits the Authority's notional daily tariff should apply without an uplift.

[6] She asserts the "without prejudice save as to costs" offer made by the respondent was not a legitimate *Calderbank* offer. It lacked the necessary elements of such an offer and, accordingly, in counsel's submission should not be treated as one. The offer was not a "reasonable and realistic compromise, and its tone strongly discourages any subsequent resolution by settlement".

[7] If an uplift were to be deemed appropriate, counsel submits the Authority should follow precedent. Ms Buckett has noted the Employment Court in *Fagotti*⁵ approved of the Authority's approach "in incorporating small uplifts of around \$1,000 only".

² [2005] ERNZ 808 (EmpC)

³ [2015] NZEmpC 135

⁴ [2004] 1 ERNZ 172 (CA) at [53]

⁵ n3

[8] Ms Buckett further submits that the Authority is unable to exercise its discretion to award costs in this instance due to "a lack of information from the respondent to enable it to responsibly exercise the discretion". In elaborating on this submission counsel has referred to mediation costs being included in the invoices produced.

[9] She has also referred to the insufficient reasons advanced by Hays for requesting a departure from the normal tariff based approach and submits it has not justified its assertion that the costs it incurred of over \$23,000 were reasonable. In her submission the \$10,000 sought by Hays is an excessive amount "cherry picked" from the air with no reason being given for that specific sum.

Discussion

[10] Having considered the views of the parties, of which I have given only a brief overview, and taken the *Da Cruz* principles referred to earlier into account I find it is appropriate that the usual principle of costs following the successful party be applied in this instance. I am not persuaded by counsel for Mr Tulloch that the particular circumstances of this case warrant the leaving of costs to lie where they fall or that such a course of action would reflect the justice of the matter between the parties.

[11] Nor do I accept the submission that insufficient information was provided by the respondent for the Authority to exercise its discretion to award costs. Counsel for Hays provided itemised invoices it had rendered to its client from which it was very clear what costs related to particular actions taken by counsel, and in which timeframe those actions occurred.

[12] I take as the starting point the Authority's nominal daily tariff. The investigation hearing occupied one day and the starting point for a matter lodged before 1 August 2016 is \$3,500. I consider an uplift should be applied to take account of the "without prejudice except as to costs" offer Hays made approximately five months before the Authority's investigation took place.

[13] That offer was for a settlement payment of \$5,000 to be made under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Its terms included costs to lie where they fell, and a record of settlement to be prepared and executed pursuant to s.149 of the Act. The offer was made on 3 December 2015 and was open for acceptance for a week which I consider to be a reasonable timeframe. I do not

accept counsel for Mr Tulloch's submission that the offer was unreasonable and unrealistic. The outcome of the Authority's investigation, which saw his claims fail entirely, suggests otherwise.

[14] However, in considering and balancing the relevant principles and factors I have also taken into account the evidence given by both Mr Tulloch and his wife of the financial pressures they and their family have endured since the ending of Mr Tulloch's assignment. Balancing all these considerations I find a modest uplift of \$1,500 to the daily tariff to be appropriate.

Determination

[15] Mr Tulloch is ordered to contribute to Hays' costs in the sum of \$5,000.

Trish MacKinnon
Member of the Employment Relations Authority