

- (b) Engineering RGV was ordered to pay Mr Sedlmeier the sum of \$20,000 as compensation for humiliation, loss of dignity and injury to feelings caused by the dismissal and the manner in which it was carried out.
- (c) Costs were reserved and the parties were invited to exchange memoranda as to costs.

Submissions as to costs on behalf of Mr Sedlmeier

[2] Mr Smyth on behalf of Mr Sedlmeier submits that Mr Sedlmeier's total costs amount to \$18,419.38 (including GST). This amount is made up of legal fees totalling \$18,170 (including GST) together with disbursements totalling \$286.79 (including GST).

[3] Mr Smyth seeks a 50% uplift in the Authority's daily tariff for the following reasons:

- (a) Engineering RGV did not accept an early offer of settlement which was significantly less than that determined by the Authority.
- (b) Engineering RGV's conduct unnecessarily increased Mr Sedlmeier's costs.

[4] Mr Smyth has copied to the Authority a letter that he sent on behalf of Mr Sedlmeier to the representatives for Engineering RGV on 27 February 2017. The letter was headed "without prejudice". The letter contained a proposal for settlement. The letter stated that if the proposal was acceptable that it would be put into a confidential settlement agreement to be signed by a mediator for the Ministry of Business Innovation and Employment. It was stipulated that the offer was open for acceptance for seven days after which time Mr Sedlmeier would reserve his right to review the remedies he was seeking. The proposal was not accepted by Engineering RGV.

[5] The conduct by Engineering RGV which Mr Smyth says unnecessarily increased costs for Mr Sedlmeier included the counterclaim filed and then abandoned, the altering of minutes of meetings and the withholding of financial information.

Submissions as to costs on behalf of Engineering RGV

[6] Ms Bainbridge for Engineering RGV argues that this is not a case which merits an uplift in the Authority's normal daily tariff for costs. Engineering RGV accepts that the starting point by the Authority for an assessment of costs in this matter is \$8,000.

[7] Ms Bainbridge submits that Mr Sedlmeier brought three claims to the Authority for determination, only one of which was successful. Ms Bainbridge for Engineering RGV says the bringing of the unnecessary claims resulted in an unnecessarily prolonged investigation meeting with the Authority investigating two unsuccessful claims.

[8] The first claim brought by Mr Sedlmeier was that he was unjustifiably dismissed. The second was that he had been unjustifiably disadvantaged by the removal of access to work tools and the sending of a letter to the German consulate. The third claim was the failure by Engineering RGV to comply with its good faith obligations towards him thereby warranting a penalty.

Costs determination

[9] The Authority's power to award costs against a party is set out in clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act) which provides as follows:

15. Power to Award Costs

(1) The Authority may order any party to a matter to pay to any other party such cost and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit and may at any time vary or alter any such order and such manner as it thinks reasonable.

[10] The Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² when settling costs awards. These include:

- There is discretion as to whether costs would be awarded and in what amount;
- Discretion is to be exercised in accordance with principle and not arbitrarily;

² [2005] 1 ERNZ 808.

- The statutory jurisdiction to award costs is consistent with the equity and good conscience of the Authority;
- Equity and good conscience are to be considered on a case-by-case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate; and
- 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.

[11] First, I accept that it is appropriate for Engineering RGV to make a contribution to Mr Sedlmeier's costs on the basis that costs follow the event. Mr Sedlmeier was largely successful in his claims against RGV Engineering.

[12] The starting point in awarding costs in the Authority, where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day for matters lodged after 1 August 2016 (which Mr Sedlmeier's statement of problem was). The investigation meeting lasted two full days so the starting point in this matter is \$8,000. This starting point has been accepted by RGV Engineering.

Should the daily rate be uplifted?

Without prejudice offer

[13] As mentioned, Mr Smyth has advanced two reasons for the Authority to uplift the daily rate. The first being the without prejudice offer and the second being Engineering RGV's conduct which it is submitted unnecessarily increased Mr Sedlmeier's costs.

[14] The without prejudice offer has not been expressed "without prejudice except as to costs" so as to bring it into the category of a *Calderbank* offer³. As the former Chief of the Employment Court, Judge Goddard stated in *Ogilvy v Mather (NZ Limited) v Darroch* [1993] 2 ERNZ 943 at 953:

... in this Court as in the ordinary Courts, an offer made without prejudice except as to costs is admissible on an application for costs unlike other letters written without prejudice and that should not be received by the Court. Once the Court has received evidence of the *Calderbank* offer, it can take into account the fact of its making and non-acceptance in the course of the exercise of its discretion on costs.

[15] In the letter produced to the Court by Mr Smyth in support of his application for an uplift, the letter is marked without prejudice and therefore should not have been produced to the Authority unless it was expressed as a *Calderbank* offer.

[16] Even so, Mr Smyth's submissions do not go so far as seeking full indemnity costs, rather the letter has been produced in support of his submission that there should be an uplift in costs because of attempts to settle the matter early.

Conduct unnecessarily increasing costs

[17] In exercising my discretion in respect of costs, I do take into account the conduct of Engineering RGV during the course of the Authority's investigation. I accept the submission made by Mr Smyth that in bringing a counterclaim against Mr Sedlmeier in the sum of more than \$3,000,000, Engineering RGV was attempting to deter him from continuing his personal grievance claim.

[18] Following a direction by the Authority that the further and better particulars of the counterclaim be provided, and which were then provided, Mr Sedlmeier sought an order that the counterclaim be severed from the personal grievance. This produced an extremely unhelpful and rude letter to the Authority from the director of Engineering

³ *Calderbank v Calderbank* [1974] 3 All ER 333.

RGV, Mr Robert Vaughan. The counterclaim was not pursued by Engineering RGV but Mr Sedlmeier was put to the expense of seeking further and better particulars in relation to it.

[19] The other matter which I take into account relates to the withholding of company financial information. This information was not produced in accordance with the Authority's direction and when it was produced, it was not in the form of audited accounts but rather was from RGV Engineering's Xero accounting system. This caused additional work for Mr Sedlmeier.

[20] The other matter which is worthy of comment relates to the witness statement by Mr Robert Vaughan. At a telephone conference for the purposes of scheduling the Authority's investigation, Mr Vaughan's representative agreed to the provision of a witness statement by Mr Vaughan. The witness statement was unhelpful and indeed the first part of it contained a tirade of abuse directed at Mr Sedlmeier. The failure to provide a focussed witness statement also caused delays in this matter and added to the length of the Authority's investigation in my view.

[21] For all of these reasons, I consider an uplift to be appropriate. I shall uplift the Authority's daily rate for the two day investigation meeting by \$4,000, from \$8,000 to \$12,000. This figure takes into account GST.

Order

[22] I order Engineering RGV to make a contribution to Mr Sedlmeier's costs in the sum of \$12,000 together with the \$71.56 filing fee. These costs are to be paid to Mr Sedlmeier no later than fourteen days from the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority