IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 43
5578470

	BETWEEN	CHRISTOPHER TALBOT Applicant
	AND	CORIGLADE LIMITED trading as GEEKS ON WHEELS Respondent

Member of Authority:	M B Loftus
Representatives:	Barbara Bucket, Counsel for Applicant Susan Jane Davies, Counsel for Respondent
Submissions Received:	10 February and 13 March 2017 from Respondent 9 March 2017 from Applicant
Determination:	31 May 2017

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

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[1] On 25 November 2016 I issued a determination in which I dismissed Mr Talbot's claim he had been unjustifiably dismissed by the respondent, Coriglade Limited. I also dismissed claims Mr Talbot had been unjustifiably disadvantaged and Coriglade's counterclaim Mr Talbot breached the duty of good faith.[1]

[2] Costs were reserved and both parties now seek a contribution toward their costs though Mr Talbot's claim is limited to recognition of the filing a costs submission given Coriglade's alleged lack of good faith during negotiations on the issue.

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[1] [2016] NZERA Wellington 142

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.[2] At the time of this investigation the normal starting point was $3,500 per day and from there adjustment might be made depending on the circumstances.

[4] The investigation took approximately three days with comprehensive submission being prepared and forwarded at a later date. Coriglade is of the view the effort required amounts to a further day meaning a total of four hearing days. Applying the tariff that would see an award in the order of $14,000 but Coriglade seeks more.

[5] Coriglade asks the daily tariff be increased to $5,000 for the 4 days. It also seeks a further $3,617.66 (GST exclusive) being two thirds of allegedly unnecessary costs incurred between 18 May 2015 (incorrectly stated as 2016 in the submissions) and *the date of commencement of this litigation*. To that is added a further $1948.16 for disbursements and $2,500 (an initial $2,000 plus $500 *costs on costs*) as a contribution toward the cost seeking a resolution on costs.

[6] In arguing the daily tariff should be increased Coriglade refers to various aspects of the applicant's conduct which it says warrants such a response. These were detailed in a letter to Ms Buckett dated 20 January 2017 and include:

a. Requiring Coriglade spend money unnecessarily addressing Mr Talbot's attempts to admit inadmissible material referring to events at mediation;

b. Notwithstanding the Authority's order material referred to in [6(a)] be redacted Mr Talbot again submitted it via another medium;

c. Mr Talbot forced Coriglade to spend money addressing *a patently meritless claim for reinstatement* which was (a) ultimately withdrawn and (b) drew an expression of incredulity from myself;[3]

d. Mr Talbot forced Coriglade to spend time and money considering irrelevant evidence with reference being made to a number of

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[2] refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[3] refer n 1 at [49]

examples in the letter of 20 January and my comments about this in the determination;[4]

e. The inclusion of numerous offensive slurs against one of Coriglade's principles (Mr Carr-Gomm) in the briefs of Mr Talbot and his supporting witnesses which were not ultimately supported with evidence but which Mr Carr-Gomm felt compelled to address.

f. The putting of offensive propositions in cross-examination which were not only irrelevant but patently false which exacerbated their offensiveness;

g. The introduction of several new pieces of evidence during cross examination in order to surprise witnesses. This is both contrary to the Authorities process which envisages evidence is tabled *up front* but increased the hearing time while adjournments were taken to consider it;

h. The time wasted by the way Dr Hornabrook's evidence was presented; and

i. Continued slurs on Mr Carr-Gomms' character in closing submissions despite a lack of supporting evidence.

[7] The claim relating to costs after 18 May 2015 refers to a letter Coriglade sent to Ms Buckett that day. It outlined significant concessions Coriglade was willing to make in order to resolve the employment relationship problem.[5] It is submitted the offer contained a more than reasonable basis for resolution and its rejection, along with Mr Talbot's conduct from that time, *warrants an award of special damages for unnecessary costs incurred by the Respondent* given the *…sound platform for resolution of the [problem] without the need for further legal intervention*.

[8] With respect to attempts to settle the issue of costs Coriglade refers to various offers and correspondence (as does Mr Talbot).

[9] A significant portion of the large disbursement claim relates to travel but this was occasioned by Coriglade's initial advisor, Wellington based Business Central,

[4] refer n 1 at [50]
[5] refer n 1 at [28]

operating its legal service from a related Auckland based organisation. It is said the service was initially free but when it became a chargeable one it was cheaper to stay than brief new representatives who would have to familiarise themselves with the issues. After the failure of mediation Coriglade chose to brief the matter out and while they chose a Hamilton firm it is argued the costs were similar to those they would have incurred had they stayed with Business Central. There was also the cost of bringing a witness who had subsequently shifted to Auckland.

[10] By way of response Mr Talbot's *primary position* is costs should lie where they fall. In the alternate and if this is rejected it is submitted the daily tariff should be reduced to account for:

a. Coriglade's conduct during the hearing;

b. Mr Talbot's financial circumstances;

c. the fact Coriglade was only partially successful; and

d. to recognise Mr Talbot felt particularly aggrieved and alienated by the conduct of the Respondent .

[11] Comment is then made about the efforts to settle costs. On 1 December 2016 Coriglade proposed Mr Talbot pay $10,000 though the offer required quick acceptance and payment. Mr Talbot tabled a counter of $4,000 on the 19th. Coriglade replied on 20 January 2017 with a detailed argument as to why a contribution of just short of $32,500 was appropriate. Mr Talbot labels this *unjustifiable and wildly unrealistic*. Further correspondence followed which included Coriglade's final offer of just over $12,000 on 28 February 2017. That, according to Mr Talbot, failed to take account of the daily tariff (though he relies on dated information)[6] and the factors which warrant a reduction. Mr Talbot's financial circumstances were outlined in an attached affidavit.

[12] As is recognised by Mr Talbot costs follow the event. Costs should also not be used to punish but an alteration to the tariff is appropriate when it recognises conduct which directly affected the costs incurred by the parties as opposed to the conduct which was the subject of the claims.

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[6] Applicant's memorandum at [18] and reference to a 2011 Court decision

[13] I conclude the key event was a consideration of Mr Talbot's claim he was both unjustifiably dismissed and unjustifiably disadvantaged. With these claims he was wholly unsuccessful. For reasons outlined in [17] below I do not consider Coriglade's counterclaim and its outcome affects the issue.

[14] As submitted by Coriglade there were, I conclude, various instances of conduct both by and on behalf of Mr Talbot that materially increased Coriglade's costs. Examples include attempts to produce inadmissible evidence which counsel should have known was inappropriate; the tabling of unnecessary (and at times offensive) evidence the nature of which was guaranteed to trigger a response and a level of disorganisation on the part of Mr Talbot and his representative which unnecessarily increased the time required to hear this matter. Examples include the late inclusion of evidence and the organisation of witnesses, especially Dr Hornabrook. Finally there is merit to the argument that had Mr Talbot seriously addressed Coriglade's offer of 18 May 2015 costs may have been avoided. Instead he embarked on a programme of delaying the provision of relevant and meaningful information.[7]

[15] Having considered the evidence and submission I conclude there is merit in the argument the daily tariff be increased.

[16] Turing to Mr Talbot's four arguments as to why there should be a decrease in the daily tariff or perhaps an order costs lie where they fall. The argument regarding Coriglade's conduct fails to convince. The only specific example cited is its proffering of a counterclaim with which it was unsuccessful (with that argument being repeated under the third heading).

[17] Coriglade's counter claim became a nullity that had no bearing on the costs incurred by either party. As I observed in the substantive determination it was not specifically evidenced or referred to in Coriglade's submissions.[8] Also, and as said by Coriglade in its costs submissions, it was neither specifically evidenced nor referred to in Mr Talbot's submissions. It did nothing to increase costs for either party, unreasonably or otherwise. In other words the event from which a consideration of costs flows is limited to Mr Talbot's unsuccessful claims.

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[7] refer n 1 at [64] – [66]
[8] refer n 1 at [67]

[18] There is then the issue of Mr Talbot's ability to pay. *There is an established approach in this jurisdiction of taking into account a party's ability to pay if payment would place an undue hardship on that party.*[9] That undue hardship would result must be supported by acceptable evidence.[10]

[19] Here there is no such evidence – only an assertion a costs award would *cause a lot of financial pressure on my family and I.* The affidavit is, I conclude totally inadequate especially as it is not supported by evidence as to exactly what Mr Talbot's financial state is.

[20] Finally it is asserted Mr Talbot felt particularly aggrieved and alienated by the conduct of the Respondent. That, and the reasons why he says he felt that way, formed the essence of his claim. All I can do is repeat he was wholly unsuccessful.

[21] For the above reasons I conclude this is a situation in which it is appropriate the daily rate be lifted. Having considered the submissions and given my recollection of what occurred during the investigation meeting I conclude $4,500 is an appropriate daily tariff.

[22] Turning to how long. Coriglade suggests 4 days. The investigation took three though submissions had to be completed later. Had they been presented at the completion of evidence I doubt more than half a day would have been required. Three and a half days is appropriate.

[23] There is then Coriglades claim additional sums be added. Putting disbursements aside the answer is no. The daily tariff is considered all-encompassing and the behaviour post 18 May 2015 is a factor I have already considered when concluding an increase in the tariff is warranted ([14] above).

[24] With respect to the disbursements I note the argument about using remote counsel and attributing that to the way Business Central offers its service and the fact its legal team is in Auckland. That may be the case but the way in which Business Central serves its members is a matter between it and those members. It does not alter the fact, recognised by Coriglade, the Authority does not normally reimburse the costs of using out of town counsel.[11] Similarly I consider it inappropriate Mr Talbot be

[9] *O'Hagen v Waitomo Adventures Ltd* [2013] NZEmpC 58 at [33]
[10] *Walker v Procare health Ltd* [2012] NZEmpC 186 at [32]
[11] For example: *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35]

held to account for a decision over which he has no control – namely that of one of Coriglade's witnesses to move.

[25] Finally there is the claim for costs resulting from the way the costs negotiations were conducted and the resulting requirement for lengthy submission on the matter. For three reasons the answer is again no. First, and as already said, the tariff approach is seen as all encompassing. Second, the idea of *costs on costs* is an anathema to the Authority. Third the outcome of applying the increased tariff for three and a half days will see an amount that exceeds that which Coriglade was willing to accept when negotiations between the parties concluded and an application became necessary. A significant portion of the costs for which recompense is sought had already been incurred.

[26] That leaves Mr Talbot's claim regarding costs. One paragraph is dedicated to explaining the claim. Mr Talbot is saying the costs submission could have been avoided had Coriglade taken a more realistic and rational approach when negotiating the issue. A reading of the various offers and counter offers strongly suggests it was Corigalde which took the more rational approach and was closer to the mark. It was Mr Talbot who relied on dated assumptions ([11] above) and failed to evidence his assertions regarding financial hardship, while Coriglade supported its position with an unusual level of detail (the letter of 20 January 2017). For these reasons the counterclaim fails.

Conclusion

[27] For the above reasons I order the applicant, Christopher Talbot, pay the respondent, Coriglade Limited, the sum of $15,750.00 (fifteen thousand, seven hundred and fifty dollars) as a contribution toward the costs Coriglade incurred in successfully defending Mr Talbot's personal grievance claims.

M B Loftus
Member of the Employment Relations Authority