

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 175
3015951

BETWEEN JCE
 Applicant

A N D THE CHIEF EXECUTIVE OF THE
 DEPARTMENT OF CORRECTIONS
 Respondent

Member of Authority: Peter van Keulen

Representatives: Anne Toohey and Rachelle Boulton, counsel for the Applicant
 Andrew Shaw, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 12 October 2018 for the Applicant
 29 October 2018 for the Respondent

Date of Determination: 29 November 2018

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 7 September 2018¹, I determined that Corrections had failed to provide a safe workplace for JCE in respect of an assault that occurred on him whilst he was working and then subsequently in respect of his return to work. I also determined that Corrections had not unjustifiably dismissed JCE.

Costs application

[2] In my determination, I reserved costs. JCE now seeks costs. Counsel for JCE seeks the full costs incurred by JCE for two counsel and expert medical evidence, totalling

¹ [2018] NZERA Christchurch 130

\$90,204.76, based on an uplifted daily tariff applied to eight days. In support of this argument counsel says:

- a. JCE's costs were reasonably incurred given the complex nature of the case and the length of the hearing, being six investigation days.
- b. Whilst the investigation took six days, there was additional time spent on submissions, which were presented in writing after the investigation meeting. This included additional submissions provided at the request of the Authority. Had these submissions been presented orally two further investigation days would have been required.
- c. Corrections' conduct of this case, essentially its (allegedly deliberate) failure to provide full and timely disclosure of relevant documents and its delay in instructing a medical expert, increased the costs incurred.
- d. Any award based solely on the daily tariff would leave JCE with a net loss from his successful claim, rendering it a pyrrhic victory.

[3] In response Corrections says there is no reason to depart from applying the daily tariff to this matter. In support of this proposition counsel for Corrections says:

- a. The costs incurred by JCE are not reasonable.
- b. Both parties had a measure of success.
- c. JCE caused unnecessary costs to be incurred for Corrections.
- d. JCE did not respond to a reasonable Calderbank offer.

Discussion

[4] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² and other relevant Employment

² *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

Court and Court of Appeal decisions³. The approach to be adopted to determining an award of costs includes:

- (a) An award of costs is discretionary. The exercise of that discretion should not be made arbitrarily but in accordance with principle.
- (b) The decision to award costs is consistent with the equity and good conscience jurisdiction of the Authority. Equity and good conscience should be considered on a case-by-case basis in terms of the award of costs.
- (c) Costs will generally follow the event. However, in some instances this will not be the case - for example, where the nature of the case is such that costs should lie where they fall or where an applicant has not bettered the terms of a Calderbank offer which he or she unreasonably rejected prior to the investigation meeting and costs should be reversed.
- (d) Once a decision has been made by the Authority to award costs in favour of one party then the starting point for quantum is the daily tariff. The Authority can depart from applying the daily tariff in certain circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a Calderbank offer are more appropriate.
- (e) The normal approach is to apply the daily tariff considering whether the tariff should be increased or decreased. The factors relevant to the consideration of the increase or decrease of the daily tariff include:
 - (i) Costs awards in the Authority will be modest;
 - (ii) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
 - (iii) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases

³ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *GSTech Limited v A labour Inspector of MBIE* [2018] NZEmpC 127

costs unnecessarily can be taken into account in increasing the daily tariff;

- (iv) Without prejudice offers can be considered;
- (v) The ability of the liable party to pay costs may justify a reduction in the daily tariff;
- (vi) Mixed success in a claim may inform a reduction in the daily tariff⁴;
- (vii) The nature and intensity of the work required for a matter may justify an increase in the daily tariff.

Costs for JCE

[5] Both parties accept that costs should follow the event and JCE is entitled to an award of costs. I agree.

Daily tariff

[6] The next decision is whether I should depart from the normal practice of applying the daily tariff.

[7] Whilst counsel for JCE seeks an award of costs in the full amount of JCE's actual costs and disbursements, they do so on the basis that the daily tariff should be adjusted so the full amount is awarded.

[8] There is a reference in counsel's submissions to indemnity costs being awarded in *Binnie v Pacific Health*⁵. In *Binnie* the Court of Appeal rejected the principle that full indemnity costs should be reserved just to cases in which the losing party's case was wholly lacking in merit and its stance had been pursued in a way that was reprehensible.

[9] Counsel did not expand on this reference to support a direct submission on indemnity costs but rather stated that *Binnie* establishes the proposition that the discretion to award costs

⁴ Noting that mixed success for an applicant will not normally reverse the principle that costs should follow the event, see *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 156.

⁵ *Binnie v Pacific Health* [2002] 1 ERNZ 438 (CA)

should not be unduly restrained and that the losing party's conduct will be relevant overall. It seems to me that the relevance of *Binnie* is limited as it pre-dates *Da Cruz*. At best the two factors simply form part of the approach I have outlined above, noting that the proposition that the discretion to award costs should not be unduly restrained is tempered by the principle that costs in the Authority should be modest. As stand-alone observations the principles in *Binnie* cannot support indemnity costs being awarded in this case, if that is the submission being made.

[10] In terms of awarding indemnity costs I must be satisfied that Corrections conduct in this matter meets the standard for awarding indemnity costs set out in *Bradbury v Westpac Banking Corp*⁶. I have reviewed Correction's conduct of this claim and overall, I conclude that there is no basis to award indemnity costs. The behaviour complained of does not meet the standard set out by the Court of Appeal in *Bradbury*.

[11] I am satisfied that the daily tariff is the correct approach to setting costs in this matter.

Uplift to the daily tariff

[12] I will consider if an uplift is appropriate, including whether any uplift should be such that the full costs incurred by JCE should be awarded.

[13] The competing arguments for an uplift to the daily tariff are:

- a. An increase is justified as:
 - i. JCE's costs were reasonably incurred given the complexity of this matter and the need to instruct experienced counsel;
 - ii. The daily tariff would be insufficient given the costs incurred and this would render JCE's success moot given that there would be a shortfall between the Authority's awards of remedies and costs (if awarded on the daily tariff only) and actual costs;
 - iii. This matter was complex, involving a complicated and lengthy fact pattern, expert medical opinion and difficult legal issues;

⁶ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234

- iv. Corrections' conduct of this matter, including delays with disclosure of relevant material and introducing expert medical evidence at a late stage, increased the time required to prepare.
- b. The daily tariff should not be adjusted as:
- i. JCE's costs were not reasonably incurred and an uplift is not justified simply because JCE decided to instruct experienced counsel;
 - ii. JCE was unsuccessful in his claim for unjustified dismissal;
 - iii. The late lodging of JCE's grievances and the delay in lodging his statement of problem created a situation where some of the matters in issue occurred up to almost six years prior to the investigation meeting creating complications in obtaining evidence;
 - iv. JCE unnecessarily sought historic health and safety documents, which he did not rely on;
 - v. JCE initially refused to provide medical information and then agreed conditional disclosure, which required Corrections to instruct a medical expert and then that disclosure was not complete, requiring the expert medical evidence to be reassessed;
 - vi. Further evidence was required from Corrections based on JCE's allegations regarding back up at the time he was assaulted – allegations that the Authority ultimately found to be wrong;
 - vii. JCE changed his claim regarding lost remuneration and this required additional submissions, at the request of the Authority.

[14] I will consider these arguments in light of the factors I have summarised in paragraph 4(e) above.

[15] My first observation is that JCE's costs were reasonably incurred. Given the nature and complexity of the claim, it is perfectly reasonable for him to instruct experienced counsel,

as Corrections did. And given the complexity of this matter the amount of work completed and charged for appears appropriate.

[16] However, simply incurring high costs does not mean an increase in the daily tariff is justified. As the Employment Court stated in 2015, in two cases about cost in the Authority⁷, costs should be modest reflecting the low level, readily accessible and non-technical nature of Authority investigations. And, it follows that adopting a “belts-and-braces” approach to conducting a case in the Authority is a choice parties can make but it is not a choice that should be automatically levied on a losing party by way of a high costs award.

[17] Further, it also follows that if the consequence of incurring high costs is that those costs exceed any remedies and costs awarded to a successful party then that may be unfortunate but it is the case that this cannot influence any costs award.

[18] Actually, what this issue is really about is assessing whether, notwithstanding the presumption of Authority investigations being low level and non-technical, an Authority matter is sufficiently complex that the use of experienced counsel and a large amount of work being undertaken, leading to higher than normal costs being incurred, is justified. And if so whether that should sound in an increase in a cost award, i.e. because the complexity of the case justifies an increase.

[19] On my assessment, this case is one where the complexity of the legal issues and the factual enquiry justify an increase in the daily tariff. I will address the quantum of this increase below.

[20] Turning to the competing arguments about the parties’ conduct of this matter and whether this requires an adjustment to the daily tariff, the key consideration is whether the conduct complained of caused costs to be increased unnecessarily.

[21] My assessment is that the conduct complained of was a product of the complexity of the case and unavoidable difficulties in dealing with documentary and witness evidence for historical matters. For example, there was more work on disclosure in this case than other

⁷ *Stevens v Hapag-Lloyd* [2015] NZEmpC 28 and *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4

Authority matters but this reflects the complexity of the legal issues and factual enquiry, not any particular behaviour by either party. As counsel for Corrections submits, given the nature of the claims extensive disclosure occurred but this was not the fault of either party and as a result, neither party should pay more or receive less in costs. This is a position I have previously supported when dealing with costs and I see no reason to depart from that in this case.

[22] This also applies to the remedies pleaded, witnesses required and the expert medical evidence. Any increase in work for these aspects reflects the complexity of the case and is compensated for in an increased daily tariff for complexity (as I have indicated above) and the additional investigation meeting days required for the witness evidence.

[23] There is one other aspect of the parties' conduct of this matter that must be addressed - whether JCE's delay in lodging the statement of problem increased costs unnecessarily such that a reduction in the daily tariff is appropriate. I do not accept this submission. JCE lodged his claim within the requisite timeframes. The timing may have caused some difficulties to Corrections in dealing with historic matters but any consequent cost implication should not be visited upon JCE as his conduct, in lodging his claim, was within the mandated parameters. This conduct cannot be said to have increased costs unnecessarily.

[24] Another argument raised by counsel for Corrections is that JCE had mixed success with his claim, losing his unjustified dismissal grievance, and this justifies a reduction in the daily tariff. I am not satisfied that the unjustified dismissal claim was sufficiently significant in the context of JCE's claim and the outcome to justify a reduction. Only a small amount of the investigation time was spent on the evidence and legal arguments underpinning the unjustified dismissal claim. And, the failure to succeed with this claim made no difference to the remedies JCE was awarded as I found he was unable to work and had lost remuneration as a result of Corrections' failure to provide a safe workplace.

[25] The final argument advanced by Corrections is that JCE did not engage with it over a without prejudice offer. However, the offer referred to relates to resolving costs, not the substantive matter and therefore has no bearing on my assessment of costs for the substantive matter.

[26] In conclusion, on the question of adjusting the daily tariff, I am satisfied that the complexity of this matter does justify an increase in the daily tariff but none of the other matters raised by counsel have an impact. Given the complexity of this matter and my view of the increased work required I will increase the daily tariff by \$1,500.00.

Application of daily tariff

[27] The investigation meeting in this matter was conducted over six days. These days were not all complete days. Reviewing the time spent overall, particularly for the part days, I conclude that one of the part days was effectively a full day and the other two part days combined were one full day. So, I will calculate costs on the basis that the time spent on the investigation meeting was five days.

[28] I have already indicated I will increase the daily tariff by \$1,500.00 per day. This means a daily rate of \$6,000 for the first day and then \$5,000 for each of the four subsequent days. This equates to a total of \$26,000.00.

Further increase for written submissions

[29] There is one final aspect to the application for costs. Counsel for JCE seek a further increase to the costs awarded on the basis of the written submissions required. Two sets of written submissions were provided. The first submissions covered the normal submission made at the conclusion of the evidence but in this case rather than dealing with oral submissions by counsel these submissions were made in writing. Then additional submissions were made at my request to address issues with remedies.

[30] I accept that in this case there is a basis to award additional costs to cover the submissions provided in writing. This was additional work, which in a sense was not covered by the daily tariff. I assess the value of the additional work to be the equivalent of one further day and award an additional \$5,000.00 to JCE.

Disbursements

[31] JCE is also entitled to an award for the expert medical fees, being \$5,764.25

Costs

[32] Corrections must pay JCE \$31,000.00 as a contribution to the costs incurred in this matter plus disbursements of \$5,764.25.

Peter van Keulen
Member of the Employment Relations Authority