

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 445
3041592

BETWEEN SAILI FISO
 Applicant

AND JOHN IBRAHIM
 t/a KINGS CUTS BARBER SHOP
 Respondent

Member of Authority: Michael Loftus

Representatives: Alex Kersjes, advocate for Applicant
 Respondent in person

Submissions Received: 11 July 2019 from Applicant
 26 July 2019 from Respondent

Determination: 30 July 2019

DETERMINATION OF THE AUTHORITY

[1] On 1 July 2019 I issued a determination concluding Mr Fiso had a personal grievance in that he had been unjustifiably dismissed.¹ Costs were reserved and the parties were advised to consider applying the Authority's normal tariff of \$4,500 a day to an investigation that took half a day.² They have been unable to resolve the issue and Mr Fiso, as the successful party, now seeks a contribution toward costs incurred.

[2] As already said the Authority normally uses a daily tariff when addressing a costs claim. The current starting point is \$4,500 for an investigation's first day. From there adjustment may be made depending on the circumstances.

¹ [2019] NZERA 387

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

[3] Mr Fiso seeks a contribution which exceeds that I indicated and asks for \$3,500 which is around two thirds of his actual costs. In support of his claim he states that while not complicated the case was time consuming given difficulty dealing with a respondent whose conduct was unreasonable. That is followed with an assertion there was ... *an inordinate amount of work completed in attempting to resolve the matter in what the Applicant would deem to be a sensible manner.*³

[4] Perhaps more importantly there is a calderbank offer sent on 8 May 2019. In it Mr Fiso offers to settle for \$5,000 pursuant to s 123(1)(c)(i), along with a contribution of \$2,500 plus GST toward his costs. There is no evidence of a response.

[5] Essentially Mr Ibrahim's position is the substantive determination is wrong and unfair. A number of examples are proffered in support. Issue is also taken with what Mr Ibrahim asserts is a disadvantage emanating from his lack of representation and he claims he would have won had he been able to afford a lawyer.

[6] Suffice to say Mr Ibrahim's approach is not persuasive and he provides no argument that directly addresses the issue of costs other than to mention possible impecuniosity. If he is correct and I got it wrong then that is a matter for challenge and not relevant to costs. That said I note he states he will not challenge. I also note the Authority is well versed in dealing with unrepresented parties and is often criticised for appearing to favour them. Suffice to say Mr Ibrahim's problem was a weak position undermined by a lack of preparation. He did not even bring relevant papers, with which he had been provided, to the investigation.

[7] The question therefore becomes whether or not Mr Fiso's arguments support an increase in the tariff. Those pertaining to mediation and the circumstances leading to it do not. As Mr Kersjes recognises that is not normally a matter the Authority will take into account.

[8] Similarly I am not persuaded by the submission Mr Ibrahim behaved unreasonably. There is no supporting evidence other than a possible reference to his rejection of the calderbank which I shall consider next.

³ Applicant's submission at [4]

[9] Without prejudice offers can be taken into account.⁴ The calderbank therefore raises the question is whether or not its acceptance would have put the recipient in a better place. If the answer is yes, as it clearly is here, then costs incurred by the other party as a result of rejection is an issue warranting consideration and will often see an increase in the resulting award.⁵ That calderbanks operate with respect to both parties is now accepted in the employment jurisdiction.

[10] Opposing an increase are three factors. The first is it is not clear from the invoice attached to Mr Fiso's submission whether or not costs relating to mediation are included. That is because the time billed was for action taken in assisting with the employment dispute. These are stated to include, but by implication are not therefore limited to, those required by the ERA investigation. When I combine this with the submissions about mediation I have unaddressed concerns there is an attempt to recover for mediation and that is not normally accepted.

[11] The second issue is what component of the costs are attributable to actions occurring after rejection of the calderbank which tend to be those taken into account when ascertaining its value to the party relying on it. The answer is relatively little as by 8 May the bulk of the work had already been performed – definitely the paperwork as there was no requirement for briefs with the parties being asked to simply attend and give oral evidence.

[12] There are then the respondent's continuing claim of impecuniosity. Mr Ibrhaim is a sole trader and there is a question as to whether his financial position means the imposition of a figure which would, in light of the calderbank, justly compensate Mr Fiso could also cause an excessive or disproportionate degree of hardship.⁶ Once again there is no supporting evidence but the claims did appear, at least during the substantive investigation, to have veracity.⁷ There is then the principle costs awards will generally be modest.⁸

[13] Having considered the issues above I conclude the calderbank's possible effect is balanced by factors that mitigate against an increase. I therefore conclude it

⁴ *Da Cruz*, above n 2, at [44]

⁵ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 (CA)

⁶ *Leota v Chief Executive of the Ministry of Social Development* [2017] NZEmpC 18 at [11]

⁷ n 1 at [29]

⁸ *Da Cruz*, above n 2, at [44]

appropriate to confirm the initial indication and apply the tariff on the basis of an investigation which took half a day.

Conclusion and orders

[14] For the above reasons I order John Ibrahim pay Sali Fiso \$2,250 (two thousand, two hundred and fifty dollars) as a contribution toward the costs Mr Fiso incurred in pursuing his claim.

Michael Loftus
Member of the Employment Relations Authority