

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2019] NZERA 333
3034411

BETWEEN KRYSTAL DELAMERE
 Applicant

AND HOWARD McGUIRE t/a HMG
 CATERING AND EVENTS
 Respondent

Member of Authority: Michael Loftus

Representatives: Adrian Plunkett, advocate for the Applicant
 Respondent in person

Submissions Received: 16 May 2019 from Applicant
 27 May 2019 From Respondent

Date of determination: 5 June 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] On 8 April 2019 I issued a determination in respect to various claims of underpayment made by Ms Delamere. She also sought the imposition of penalties.¹

[2] The claims of underpayment were largely successful. The penalty applications were not.

[3] Costs were reserved and Ms Delamere now seeks \$6,000 plus disbursements as a contribution toward those she incurred in pursuing her claims.

[4] Normally the Authority will use a daily tariff when addressing a costs claim.² 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 206

[5] Notwithstanding Mr Plunkett's assertion the investigation took the *majority of a full day*³ my notes indicate it was only a couple of hours and I was on an aircraft back to Wellington just after midday. Two hours would, applying the above tariff, see a contribution short of \$1,500 but, as already said, Ms Delamere seeks considerably more.

[6] She does so on the basis she was billed \$8,121.94, that there is a valid Calderbank and the conduct of the respondent was unreasonable in that he failed to provide a statement in reply, participate in a telephone conference called to discuss administrative matters pertaining to the investigation and failed to respond to correspondence. Further complaint is made that the failure to reply included a non-response to attempts to negotiate costs.

[7] Mr McGuire's response is sparse. He simply says he told Mr Plunkett his financial situation meant he was unable to make a full payment but was open to a discussion about instalment payments. It is unclear whether he was talking about the original order, costs or both. Mr Plunkett denies he has ever received a response about costs.

[8] Returning to the claim and the submission I should increase the daily tariff by a significant amount I make the following observations. I have already commented on the base from which the claim is calculated and suggest it is severely overstated by suggesting the hearing took the bulk of a day – it did not. I also note the invoice claims over 27 hours were spent on this matter yet there is no breakdown to explain either that or the disbursements. I can only say I consider 27 hours excessive given what was at stake and that the issues were, as Mr Plunkett conceded, *uncomplicated*.⁴ As already said the claim was almost wholly successful yet costs exceed the amount ordered.

[9] I must also comment on the claim costs were increased by Mr McGuire's conduct. I disagree. This was a wage claim and given s 132 (the application of which effectively determined this matter) a non-response should actually assist the applicant and reduce the effort required. Essentially the claim can be accepted with the onus falling on the respondent to prove it is false. I also note the call Mr McGuire did not participate in was short and he did participate later.

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

³ Applicant's submission at [10]

⁴ Applicant's submission at [3]

[10] Turning to the Calderbank. I cannot agree it is valid. While it offers to settle for an amount which was less than that ultimately ordered it seeks a global payment under s 123. It does not say which subsection but the content strongly suggests a compensatory sum. That raises two issues. First a compensatory sum is totally inappropriate for a wage arrears claim where tax remains a consideration. Second, and as emphasised by the last comment, the offer lacks sufficient clarity which is an issue which undermines its validity as a Calderbank.

[11] For the above reasons I conclude the arguments offered in support of an uplift in the tariff fail to convince and none shall be awarded save the rounding increase that comes from calculating what portion of a day two hours comprises.

Conclusion and orders

[12] For the above reasons the respondent, Howard McGuire, is ordered to pay the applicant, Krystal Delamere, the sum of \$1,500.00 (one thousand, five hundred dollars) as a contribution toward the costs she incurred in pursuing her claims.

Michael Loftus
Member of the Employment Relations Authority