IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2019] NZERA 30
3005393

	BETWEEN	MANU TAEFU Applicant
	AND	ALLIED SECURITY LIMITED Respondent
	AND	ALLIED INVESTMENTS LIMITED
Member of Authority:	Trish MacKinnon	
Representatives:	Geoff O'Sullivan, counsel for the Applicant Damian Black, for the Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	6 June 2018 from the Applicant 15 December 2018 from the Respondent	
Date of Determination:	23 January 2019	

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 14 May 2018 I found Mr Taefu had been unjustifiably dismissed and I awarded him remedies comprising lost wages of $6,725.25 and compensation of $15,000 for humiliation, loss of dignity and injury to feelings.[1] I reserved the issue of costs. Mr Taefu now seeks a contribution to the costs he incurred in successfully bringing his application to the Authority.

[2] After my determination was issued, Mr Taefu applied to the Authority to reopen the investigation for the purpose of correctly identifying Mr Taefu's employer in order that he could receive the sums awarded to him. The identity of the employer was a matter I had

[1] *Manu Taefu v Allied Security Limited* [2018] NZERA Wellington 40.

referred to in my determination concluding, on the basis of the evidence available, that Allied Security Limited had employed Mr Taefu.

[3] The reopening application was determined on the papers and I granted the application to reopen the matter solely for the purpose of adding Allied Investments Limited (Allied Investments) as second respondent.[2] I accepted, on the evidence presented by both Mr Taefu and Allied Investments, that Allied Security was the trading name of Allied Investments and that Allied Security Limited was not involved in Mr Taefu's employment. I found there would be a serious miscarriage of justice if the matter were not reopened for the purpose of amending the employer identity.

[4] I found no grounds for reopening the matter for the purpose of rehearing it, as sought by Allied Investments. That company had been fully aware of Mr Taefu's claims and had defended them through its Operations Manager, Mr Chris McDowell, who represented the employer in the Authority's investigation meeting. Mr McDowell is a shareholder and one of two directors of Allied Investments Limited. He had signed the statement in reply lodged by Allied Investments and had asserted in the Authority's investigation that he was authorised to act for Mr Taefu's employer. I note here that Mr McDowall has, on a number of previous occasions, represented Allied Investments Limited in Authority proceedings.[3]

[5] Mr Taefu, through his counsel, Mr O'Sullivan, submits he was wholly successful in all of his claims before the Authority and seeks a high level of contribution to his costs. In his submission this is justified because of the behaviour of the respondent, which attended mediation only after being directed by the Authority to do so, and would not engage over the issue of costs. He also provided evidence of two Calderbank offers he had made to the respondent, one on 22 May 2017, before mediation occurred and the second on 27 September 2017 after mediation.

[6] Both Calderbank offers, which were made on the basis of full and final settlement of matters, were rejected by the respondent within an hour of being emailed them. The 22 May 2017 Calderbank offer was on the basis of a reference; legal costs, which were described as being approximately $3,000 at that time; and compensation of $5,000 under s 123(1)(c)(i) of

---

[2] *Manu Taefu v Allied Security Limited & Allied Investments Limited* [2018] NZERA 82.
[3] For example, *Wale v Allied Investments Ltd* [2013] Christchurch 232; *Cook v Allied Investments Ltd* [2012] Auckland 426; and *Schoenhardt v Allied Investments Ltd trading as Allied Security* [2011] Auckland 185.

the Employment Relations Act 2000 (the Act). Mr O'Sullivan described that offer as being reasonable in light of the outcome of the case and submits it should have been accepted.

[7] The 27 September 2017 Calderbank offer was for the same amount of compensation, and for a higher contribution to Mr Taefu's legal costs, being $4,500 plus GST. In Mr O'Sullivan's submission, this was a generous and reasonable offer to resolve issues between the parties.

[8] Each of the Calderbank offers was for a lower amount overall than that awarded to Mr Taefu in my determination of 14 May 2018. Counsel for Mr Taefu submits the Authority should adopt the "steely" approach to Calderbank offers recommended by the Court of Appeal in *Bluestar Print Group (NZ) v Mitchell*.[4] He submits the respondent would have been in a significantly better position if it had accepted one of the offers made by Mr Taefu.

[9] In Mr O'Sullivan's submission the steely approach would result in increasing the costs award starting point from the notional daily tariff the Authority normally applies to full indemnity of Mr Taefu's actual and reasonable costs.

[10] Damian Black, who is a director and shareholder of Allied Investments Limited, provided submissions on behalf of the employer. His submissions related more to the reopening application and outcome than to the matter of costs for the substantive matter. They did not address the Calderbank offers or provide any pertinent reasons for not following the normal process of costs following the event.

[11] In Mr Black's submission Allied Investments Limited was not responsible for the errors of identification of the employer and should not be penalised by a costs award being made against it for the correction of the applicant's error. I will consider that further when determining the issue of costs for the reopening application.

Discussion

[12] Awards of costs in the Authority are discretionary. It is up to the Authority to decide whether they should be awarded and, if so, in what amount. Underpinning the award of costs

[4] [2010] NZCA 385 at [20].

are principles that were referred to with approval by the Full Court of the Employment Court in *Da Cruz*[5]. Those principles were confirmed ten years later by the Full Court in *Fagotti*[6].

[13] Among them are that the discretion to award costs is to be exercised in accordance with principle rather than arbitrarily. Costs will usually follow the event, which normally results in the successful party being entitled to a reasonable contribution to its actual costs from the unsuccessful party. Costs should be modest and are to be considered in the light of the particular circumstances.

[14] Costs are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. If a party's conduct has unnecessarily increased costs, that factor may be taken into account in the award that is made. However, costs are not to be used as a punishment or as an expression of disapproval of a party's conduct.

[15] In this instance I consider it appropriate that an award of costs be made to Mr Taefu. He succeeded in his claim to have been unjustifiably dismissed and it is fitting that he receives a contribution from his employer to the costs he incurred in achieving that success. I accept in part Mr O'Sullivan's submission that the Calderbank offers should be taken into account.

[16] I accept that the latter of the two offers is relevant to a consideration of costs. I consider the employer had more reason to reject the first Calderbank offer which, in addition to financial elements, included the provision of a reference in its terms. Having dismissed Mr Taefu on what it may have perceived at the time to be justifiable grounds, it was not unreasonable of the employer to reject an offer to resolve the matter that included the provision of a reference.

[17] The second Calderbank, however, which was made on 27 September 2017, more than four months before the Authority hearing of Mr Taefu's application, contained financial components only. It was a reasonable offer which, if accepted by the respondent, would have saved both parties time and money. It incorporated an element for costs and it remained open for acceptance for seven days which, in the circumstances, was an adequate time frame.

---

[5] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC).
[6] *Fagotti v Acme & Co Ltd* [2015] EmpC 135.

[18] Mr Taefu seeks costs of $16,746.62 in total inclusive of goods and services tax (GST). This includes full indemnity for costs that relate to preparation for, and attendance at, mediation to reflect "the successful Calderbank". The same reason is advanced for seeking full indemnity relating to the proceedings before the Authority. Mr Taefu also seeks a contribution of 90 percent to the costs of preparing and filing costs submissions costs, "to reflect the conduct of the respondent" which, he says, refused to enter into discussions to resolve the matter of costs.

[19] The Authority's investigation was completed in one day and I take as the starting point for an award of costs the Authority's notional daily tariff of $4,500. I do not accept the submission that this is a case for indemnity costs. Such awards are rare in the Authority and are considered only where behaviour has been particularly egregious. I do not consider the respondent's behaviour fits that description.

[20] I find no good reason to depart from the usual expectation that parties will pay their own costs for attendance at mediation, having found it was reasonable for the employer not to accept the 22 May 2017 Calderbank offer.

[21] The employer's rejection of the second Calderbank offer, made more than four months before the Authority's hearing, is a factor that merits uplifting the daily tariff by $2000. However, it is not usual practice for the Authority to award costs for the preparation of costs submissions, nor to increase the daily tariff to encompass GST, and I reject the submissions for Mr Taefu on both those matters.

Orders

[22] I order the second respondent, Allied Investments Limited, to pay $6,500 to Mr Taefu as a contribution to the costs he incurred in bringing his personal grievance claim against his employer.

Trish MacKinnon
Member of the Employment Relations Authority