

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 14
3049172

BETWEEN	HARPREET SINGH First Applicant
AND	JASWINDER SINGH Second Applicant
AND	SRI GURU SINGH SABHA AUCKLAND INC Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: May Moncur, advocate for the Applicant
Arunjeev Singh, counsel for the Respondent

Submissions and further Information received: 31 October and 14 November 2019 from the Applicant
14 November 2019 from the Respondent

Date of Determination: 15 January 2020

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 29 October 2019 I issued a determination in which I found the Applicants had each suffered unjustified disadvantages to their employment. The Respondent was ordered to pay each Applicant wage and holiday pay arrears as well as sums under s 123(1)(b) of the Employment Relations Act (the Act) and compensation under s 123(1)(c)(i). In addition, the Respondent was ordered to pay a sum of \$40,000 by way of penalty for its various breaches of the Act, the Minimum Wage Act 1983 and the Holidays Act 2003. The Respondent's counterclaim was dismissed.

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions that both parties have complied with.

Application for costs

[3] The Applicants apply for a contribution towards their costs in the amount of \$13,500 representing the daily tariff for a 3.25 day investigation meeting in the Authority plus a small uplift. This is opposed by the Respondent. It takes the position that costs should lie where they fall or otherwise there should be a downward adjustment to any cost award made to reflect the Applicants' unreasonable rejection of its Calderbank offer.

Legal Principles

[4] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and were outlined by a full Court in *PBO Ltd v Da Cruz*.¹

[5] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.² The principles include:

- a) There is discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

¹ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

² *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

Analysis

[6] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff for a one day investigation meeting is \$4,500 and \$3,500 for each day thereafter.³ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[7] The investigation meeting took place over 3.25 days. Using the notional daily tariff the starting point for an award of costs is \$12,375.

Should the daily tariff be adjusted upwards?

Unsuccessful counterclaim

[8] The Applicants' submit the daily tariff ought to be uplifted due to the Respondent being unsuccessful in its counterclaim.

The respondent's counter claims occupied a large chunk of the hearing time and unnecessarily increased both parties' costs. The Authority is required to be fair and reasonable to both parties in deciding whether or not to exercise its discretion in increasing or decreasing costs. It would not be unreasonable for the Authority to adjust the daily tariff upward to take into account the respondent's unhelpful counter claim demands and the position the respondent put the applicants in.

[9] I agree with the Applicants that the hearing time was lengthened due to the need to investigate the Respondent's counterclaim. However, this time has already been taken into account by the daily tariff.

³ *Hines v Eastlight Port Limited* [2018] NZEmpC 111 at [25]; *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].

[10] The Applicants provided no explanation as to what additional costs were incurred by them in relation to the counterclaim. However, a review of the invoice provided to the Authority shows that time was spent reviewing the counterclaim, meeting with the Applicants to prepare their statement in reply to the counterclaim, and preparing for the investigation. It is more likely than not that some of this preparation would have involved attendances in relation to the counterclaim.

[11] In the circumstances, and taking into account awards of costs in similar cases, I am satisfied the daily tariff ought to be increased by \$600.

Should the daily tariff be adjusted downwards?

Calderbank offer

[12] The Respondent submitted that costs should lie where they fall, or be adjusted downwards, on the grounds of a Calderbank offer that it made prior to the filing of evidence by either party. It submitted:

The respondent reasonably tried to resolve the matter by agreement through the Calderbank offer, but was unsuccessful, because of non-responsive attitude of the Applicants to the Calderbank offer, the respondent submits that there should be a downward adjustment in favour of the respondent, if the Authority determines that costs should be awarded.

[13] In *Xtreme Dining Ltd t/a Think Steel v Dewar* the full Court noted that the correct question in circumstances where a Calderbank offer has been made was whether the party to whom the offer was made had acted unreasonably in rejecting the offer, at the time that it did so.⁴

[14] On 6 April 2019 the Respondent offered to make payment of a sum of \$13,000 to each Applicant within a week of the signing of a record of settlement. This sum was said to include the Applicants' outstanding holiday pay and other entitlements due under their individual employment agreements. I understand no response was received from the Applicants or their Representative.

[15] In the Authority's substantive determination the Respondent was ordered to pay Harpreet Singh a sum of \$32,133.35, representing \$11,361.30 for wage arrears and holiday pay, \$10,772.05 under s 123(1)(b) of the Act and \$10,000 for compensation under s 123(1)(c)(i). The Respondent was ordered to pay Jaswinder

⁴ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].

Singh a sum of \$34,383.49, representing \$13,611.44 for wage arrears and holiday pay, \$10,772.05 under s 123(1)(b) of the Act and \$10,000 for compensation under s 123(1)(c)(i).

[16] I find the rejection of the offer of settlement by the Applicants was reasonable. The offer was significantly less than what the Authority found was due to the Applicants. In addition, it did not include a withdrawal of the counterclaim that had been made by the Respondent for sums totalling \$37,000 from each Applicant. I make no reduction to the daily tariff under this head.

The quantum of the tariff

[17] The Respondent also made submissions to the effect that the daily tariff should be adjusted downwards as it represented more than a reasonable contribution towards the Applicants' costs reasonably incurred. It pointed to the failure by the Applicants to "provide any evidence of the actual costs incurred and the grounds for reasonableness of the amount claimed" and incurred.

[18] In response to a request from the Authority, the Applicants' representative provided an invoice addressed to the Applicants. The invoice summarised the work that had been completed, recorded that the combined time spent by the Representative attending to this work was 60 hours, and advised that the Applicants had been charged an hourly rate of \$280. A reduction of 10% was applied leaving an amount payable of \$15,120 plus GST.

[19] Having considered this invoice, I am satisfied that the invoice included time for matters other than the Authority's investigation such as preparation of the personal grievance letter and attendances relating to the mediation. Doing the best that I can I find it is more likely than not that at least one third of the total invoice related to those attendances bringing the invoice total to around \$10,000 plus GST (\$11,500).

[20] Considering the Applicants' costs related to the Authority's investigation against the uplifted daily tariff (\$12,975) I am satisfied that a reasonable contribution towards the Applicants' costs reasonably incurred is \$8,000. This is the sum that the

Applicants initially submitted to the Authority as “reasonable in all the circumstances”.⁵ The daily tariff is adjusted downwards to this figure.

Outcome

[21] The overall outcome is:

- a) The Respondent is ordered to pay to the Applicants the combined sum of \$8,000 towards its legal costs.
- b) This sum must be paid within 14 days of the date of this determination by way of payment of the sum of \$4,000 to Harpreet Singh and the sum of \$4,000 to Jaswinder Singh.

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁵ Applicants’ submissions dated 7 November 2019 at paragraph 9.