

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 25
3057312

BETWEEN

JAMES HIGGS
Applicant

AND

BR & SL PORTER LIMITED
First Respondent

Member of Authority: Vicki Campbell

Representatives: Paul Matthews, advocate for Applicant
Mark Beech, counsel for Respondent

Submissions received: 9 December 2019 from Applicant
16 January 2020 from Respondent

Determination: 23 January 2020

COSTS DETERMINATION OF THE AUTHORITY

- A. BR & SL Porter Limited is ordered to pay to Mr Higgs the sum of \$5,000 as a contribution toward costs within 28 days of the date of this determination.**

[1] In a determination dated 14 November 2019 I declined Mr Higgs' application that one or more conditions of his employment had been affected to his disadvantage, but held that he had been unjustifiably dismissed and ordered remedies to be paid.¹

¹ *Higgs v BR & SL Porter Limited* [2019] NZERA 655.

[2] I reserved costs and invited the parties to resolve the issue between them. The parties have been unable to resolve the matter and the parties have lodged submissions seeking a determination of the matter.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.² The principles applying to costs are well settled and do not require repeating.³

[4] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁴ The investigation meeting took one day so the starting point is \$4,500.

[5] The Authority will take into account any offers made by the parties to settle matters.⁵ If the Applicant does not beat the offer, there should be a steely response by the Authority, as that would be in the broader public interest.⁶

[6] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:⁷

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[7] These comments also apply with respect to Calderbank offers made before an Authority investigation.⁸

[8] Mr Higgs made two Calderbank offers in an effort to resolve matters before the Authority's investigation meeting. The first offer was made on 6 May 2019. The

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁴ Practice Note 2, Costs in the Employment Relations Authority.

⁵ *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

⁶ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA) at [53]

⁷ Above n 5 at [18]-[20].

⁸ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [109]; *Spillman v Tandam Skydiving* [2018] NZEmpC 32 at [37].

offer comprised payment of \$6,000 under s 123(1)(c)(i), payment of \$4,000 under s 123(1)(b) for lost wages and a payment of \$3,000 plus GST as a contribution toward costs.

[9] Mr Higgs achieved an award of \$10,000 under s 123(1)(c)(i) but was unable to prove any loss of wages beyond one week because he started working for a new employer within a week of his dismissal. He was therefore successful to the extent of \$11,480.77. Leaving costs aside, this is more than Mr Higgs was offering to settle overall. The offer was open for acceptance for one week until 10 May. At the time the offer was made the Authority had not set any timetables for the lodgement of witness statements or for the investigation meeting.

[10] I have not been provided with the reasons why the 6 May Calderbank offer was rejected. I have concluded the apparent rejection was unreasonable given the extent to which Mr Higgs was ultimately successful in the Authority. Accepting that offer would have reduced the respondent's exposure to costs significantly. An uplift to the daily tariff is appropriate in these circumstances.

[11] The second Calderbank offer was made on 29 August and was open for acceptance until 6 September 2019. The offer comprised payment of \$12,000 under s 123(1)(c)(i), payment of \$5,600 under s 123(1)(b) for lost wages and a payment of \$4,000 plus GST as a contribution toward costs.

[12] There is no explanation in the offer why the offer to settle Mr Higgs' claim had increased to the extent that it did. In relation to the offer to resolve the lost wages, Mr Matthews must have been aware at that point that Mr Higgs actual loss of wages amounted only to one week. All evidence for the investigation meeting had been lodged and served when the offer was made. The investigation meeting was scheduled to be held 11 days after the offer lapsed, on 10 September.

[13] There has been no reason given for the apparent rejection of this Calderbank offer and so I have not been able to make any assessment as to whether its rejection was reasonable or not. However, given that Mr Higgs was not as successful as the offer, I have declined to uplift costs on the basis of its rejection.

[14] BR & SL Porter Limited made a counter-claim against Mr Higgs in its statement in reply. This counter-claim was only withdrawn at the beginning of the investigation meeting. Mr Higgs was required to prepare for his defence of this claim

as part of his preparation for the investigation meeting. A slight uplift is appropriate to take this into account.

[15] I am satisfied an appropriate order for costs is \$5,000. BR & SL Porter Limited is ordered to pay to Mr Higgs the sum of \$5,000 as a contribution toward costs within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority