

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2021] NZERA 375
3110432**

BETWEEN

MICHAEL XU
Applicant

AND

MATERIALS AND TESTING
LABORATORIES LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Danny Gelb, advocate for the Applicant
Bruce Murray, counsel for the Respondent

Costs Submissions 23 August 2021 from the Applicant
9 August 2021 from the Respondent

Determination: 25 August 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 28 July 2021 ([2021] NZERA 329), I determined that the trial period provision in the Employment Agreement was valid and Mr Xu was not unjustifiably dismissed by the Respondent, Materials and Testing Laboratories Limited (MTL).

[2] In that determination I encouraged the parties to resolve the issue of costs between themselves. They have been unable to do so and both parties have filed submissions in respect of costs.

[3] The matter involved slightly in excess of half a day of an investigation meeting on 28 July 2021.

[4] Mr Murray, on behalf of MTL, citing actual costs in excess of \$15,800.00 (including GST) is seeking a costs award of \$10,000.00 plus witness reimbursement.

The Respondent's submissions

[5] The Respondent submits that it made a number of offers to settle the matter, notably in an email dated 29 October 2019, and in a number of *Calderbank*¹ Offers in an email dated 22 February 2021 and letters dated 5 October 2020 and 15 July 2021 headed 'Without prejudice save as to costs' (the Calderbank Offers).

[6] Mr Xu was not successful in his claim before the Authority. MTL submits that the number, nature and content of the offers were such that the claim could have ended at a much earlier stage and would have provided a payment to Mr Xu, rather than the current position in which he is facing a claim for costs.

[7] It is submitted that significant cost could have been saved by MTL if any of the offers had been accepted. Acceptance of the initial offer would have avoided the need for mediation, and acceptance of the post mediation offers could have avoided the costs of the further steps – teleconference, preparation of evidence, and hearing. In summary it is submitted that there were substantial savings from settlement at various stages.

[8] On this basis the Respondent submits that a costs award in excess of the notional daily tariff rate of \$4,500.00 is appropriate and is seeking a costs contribution award of \$10,000.00.

[9] In addition MTL is seeking an additional award recognising the expenses incurred as a result of the input and attendance at the Investigation Meeting of its witness, Mr Lastennet, noting that he lives outside of Auckland CBD.

The Applicant's submissions

[10] Mr Gelb for the Applicant submits that the claim was neither vexatious nor frivolous, and that there were no decisions of the Employment Court that mirror the circumstances in which Mr Xu found himself.

[11] It is submitted that the hearing time was, once the breaks were deducted, in essence the equivalent of a half day hearing. On that basis the starting point for costs should be \$2,250.00.

[12] The Applicant accepts that in light of the Calderbank Offers there should be some uplift in costs and submits this should be of an additional \$1,000.00, resulting in a costs award of \$3,250.00.

[13] It is also submitted that the travel expenses of a witness should not be included in a costs assessment.

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

Principles

[14] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[15] Costs are at the discretion of the Authority².

[16] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

[17] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

Costs Award

[18] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing. This amount can then be adjusted upwards or downwards by the Authority at its discretion having regard to the factors as set out in *Da Cruz*.

[19] I consider that the Calderbank Offers are a factor that should be taken into consideration in determining the appropriate level of costs.

[20] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the 'steely' approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*⁴ which referred to 'significant costs awards', I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted⁵.

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

⁴ [2015] NZEmpC 137 at para [95]

⁵ *Aoraki Corporation Ltd v McGavin*⁵ [2004] 1 ERNZ 172 (CA) at [53]

[21] In this matter the Calderbank Offers covered a period from 29 October 2019 to 15 July 2021, just prior to the Investigation Meeting held on 28 July 2021.

[22] Balanced against this I recognise that Mr Xu's claim was not brought vexatiously or frivolously.

[23] Costs of witness attendance, including travel costs of witnesses, are a matter for the party seeking to call that witness and not separately recognised in the daily tariff amount.

[24] Taking the normal daily rate in the Authority of \$4,500.00 as a starting point, I consider it appropriate in this case to base a costs award starting point on a half day investigation meeting i.e. as a starting point of \$2,250.00.

[25] Taking all the submissions into consideration and the number of attempts by the Respondent to settle the matter prior to the investigation which I find are proper to be taken into account, I consider that \$5,500.00 is the appropriate costs award in this case.

[26] I order Mr Xu to pay MTL a contribution to costs in the sum of \$5,500.00 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority
