

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 127
3073012

BETWEEN	SCOTT WELLS Applicant
A N D	MILSON PLUMBING & DRAINLAYING LIMITED Respondent

Member of Authority: Peter van Keulen

Representatives: Matthew McGoldrick and Michelle Bowen, counsel for
the Applicant
Kay Chapman, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 15 February 2021 from the Applicant
1 March 2021 from the Respondent

Date of Determination: 1 April 2021

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 18 January 2021,¹ I found that Millson Plumbing & Drainlaying Limited had unjustifiably dismissed Scott Wells and I ordered Millson Plumbing to pay various amounts by way of remedies for this grievance. I also reserved costs so that the parties could try to agree costs. The parties were unable to agree and now Mr Wells seeks costs.

¹ *Wells v Millson Plumbing & Drainlaying Limited* [2021] NZERA 17.

Application for costs

[2] Counsel for Mr Wells seeks an award of costs of \$21,967.40 (including GST and disbursements). Counsel seeks this amount based on an increase in the normal daily tariff that would otherwise be applied for two reasons: Millson Plumbing's conduct of its defence unnecessarily increasing costs; and Millson Plumbing failing to accept a Calderbank offer that Mr Wells made, which was for an amount less than the remedies awarded in my determination.²

[3] The advocate for Millson Plumbing accepts that costs should follow the event i.e. the Mr Wells is entitled to costs but she says that I should award costs in the normal way, based on the application of the daily tariff and not increase this amount.

Analysis

Costs in the Authority

[4] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³ and other relevant Employment Court and Court of Appeal decisions.⁴ I have applied these principles when determining this costs application.

Costs for Mr Wells

[5] The starting point is that costs should follow the event; as Mr Wells was successful in his claim he is entitled to an award of cost.

Applying the daily tariff

² A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

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

⁴ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; and *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

[6] The next question is whether I should follow the normal practice of the Authority when setting costs, which is applying a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff. The current daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for every subsequent day of an investigation meeting.

[7] There is no dispute between the parties that I should apply the daily tariff; the dispute is whether I should adjust the daily tariff so that I award more for each day than the current prescribed amounts.

Increasing the daily tariff

[8] I will consider the two factors advanced by counsel for Mr Wells for increasing the daily tariff.

Conduct of Millson Plumbing's defence

[9] Counsel for Mr Wells submits that Millson Plumbing was dilatory in the way it responded Mr Wells' claim and the various directions I made regarding the progression of the claim to an investigation meeting. And counsel submits that Mr Wells' costs were increased by this.

[10] I have reviewed the progress of this claim and the compliance with my various directions as set out by counsel and accept that there were delays by Millson Plumbing, which required further attendances by counsel for Mr Wells and as a consequence there must have been an increase in his costs. I am satisfied that I should increase the daily tariff for this but only by a modest amount of \$500.00 per day.

Calderbank offer

[11] On 17 August 2020 Mr Wells made a Calderbank offer to Millson Plumbing, offering to accept a payment of \$30,000.00 for remedies claimed and costs. Millson Plumbing did not accept this offer.

[12] I am satisfied that the offer met the requirements for Calderbank offers and the failure to accept the offer was not reasonably explained i.e. there was no reasonable basis to refuse the offer which Mr Wells exceeded in terms of the outcome in my determination.

[13] On this basis the Calderbank offer is relevant to the question of uplifting the daily tariff, but this will not be a significant uplift. Whilst the Court of Appeal⁵ and the Employment Court⁶ advocate adopting a “steely approach” to Calderbank offers, this does not necessarily apply to quantum rather to the concept of reversing costs against a successful party that did not better a Calderbank – this is not the situation here.

[14] A number of factors must be considered in terms of adjusting the daily tariff and Judge Inglis observed in *Stevens v. Hapag-Lloyd (NZ) Ltd* that it would be inconsistent with the statutory imperatives for significant costs awards to be imposed on unsuccessful litigants in the Authority.⁷

[15] In *Davide Fagotti v. Acme & Co Ltd* the Full Bench of the Employment Court’s analysis was that a \$1,000.00 uplift in respect of the daily tariff against a party who unreasonably rejected a Calderbank offer was appropriate.⁸ I find this to be instructive and therefore, in this case, I think the Calderbank offer justifies uplifting the daily tariff by \$1,000.00 per day.

Conclusion

[16] As set out above, the daily tariff is currently \$4,500.00 for the first day of the investigation meeting and \$3,500.00 for the second and any subsequent days. I will uplift these amounts by \$1,500.00 per day for the reasons set out, so they become \$6,000.00 for the first day and \$5,000.00 for every other day.

[17] The investigation meeting in this matter took one and a half days so the award of costs is \$8,500.00.

⁵ *Blue Star Print Group (NZ) Ltd v. Mitchell*, above n4.

⁶ *Davide Fagotti v. Acme & Co Ltd*, above n 4.

⁷ *Stevens v. Hapag-Lloyd (NZ) Ltd*, above n4.

⁸ *Davide Fagotti v. Acme & Co Ltd*, above n 4.

Disbursements

[18] Mr Wells is entitled to following disbursements:

- (a) The filing fee of \$71.56.
- (b) Hearing fees of \$153.33.
- (c) His medical fees of \$180.00.

GST

[19] Counsel for Mr Wells has also requested that GST be added to the award of costs, relying on case law from the Court of Appeal and the Employment Court.⁹ However, the exercise of the Authority's discretion to award costs under cl 15(1) of the Act as that relates to the addition of GST is different; the Authority's current approach is that the daily tariff is an all-inclusive, GST neutral figure. Consequently, counsel's claim for GST on Mr Wells' costs is declined.

Order

[20] Millson Plumbing is to pay Mr Wells \$8,500.00 as a contribution to his costs in this matter. Millson Plumbing must also pay Mr Wells disbursements of \$404.89.

Peter van Keulen
Member of the Employment Relations Authority

⁹ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282; *BR & SL Porter Ltd v James Higgs* [2020] NZEmpC 212.