

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 192
3097472

BETWEEN TYLER WARD
Applicant

A N D SAMSON HILL FOREST
HARVESTING LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Naoimh McAllister and Jenny Hamilton, counsel for the Applicant
Damien Pine and Jessica Hayes, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 14 April 2021 from the Applicant
27 April 2021 from the Respondent

Date of Determination: 7 May 2021

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 10 March 2021,¹ I found that Samson Hill Forest Harvesting Limited had unjustifiably dismissed Tyler Ward and that it had breached the duty of good faith owed to Mr Ward. I ordered Samson Hill to pay various amounts by way of remedies for this grievance and a penalty for the breach of good faith. I also reserved costs so that the parties could try to agree costs. The parties have been unable to agree and now Mr Ward seeks costs.

¹ *Ward v Samson Hill Forest Harvesting Limited* [2021] NZERA 97.

Application for costs

[2] Counsel for Mr Ward seeks an award of costs which she says should be in excess of \$6,250.00; the submission being that the daily tariff should be applied to one and a half days, being \$6,250.00, and then I should increase that to reflect the respondent's conduct in dealing with the Authority claim.

[3] Counsel for Samson Hill advances two responses:

- (a) The application for costs was lodged and served after the time directed by me and should therefore not be allowed.
- (b) Alternatively, if I allow the late application then the daily tariff should be applied for one day and I should not apply an uplift to it. Counsel submits that the length of the investigation meeting was one day so the daily tariff applies on the basis of one day and there is no basis to increase the daily tariff amount.

Application for costs out of time

[4] In my determination I set a timetable for the parties' to make submissions seeking costs. That timetable required any party seeking costs to lodge and serve a memorandum seeking costs by 24 March 2021. Mr Ward's memorandum seeking costs was lodged on 14 April 2021, 22 days after the timetable date for lodging.

[5] I have considered the relevant case law relating to allowing an application for costs to be considered out of time.²

[6] In my view there are two factors relevant to the exercise of my discretion to consider the application for costs out of time, in this case:

- (a) The delay in lodging the memorandum seeking costs is not significant.
- (b) There is no evidence of any prejudice to Samson Hill in the short delay in lodging.

² *Metallic Sweeping (1998) Limited v Stephen Whitehead* [2010] NZEmpC 23.

[7] On balance I am prepared to exercise my discretion and allow the late lodging of the memorandum – I will consider Mr Ward’s application for costs.

Analysis

Costs in the Authority

[8] 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 Ward

[9] The starting point is that costs should follow the event, therefore as Mr Ward was successful in his claim he is entitled to an award of costs.

Applying the daily tariff

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

[11] There is no dispute between the parties that I should apply the daily tariff. The questions are whether I should apply the tariff to one day of investigation meeting or one and a half days and whether I should increase the daily tariff because of Samson Hill’s conduct.

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.

Length of time for my investigation meeting

[12] The actual time spent in the investigation meeting was one day. However counsel for Mr Ward says additional work was required after the investigation meeting because of documents produced during the meeting and because originals of some documents were not provided until after the investigation meeting.

[13] Whilst I accept there was some additional work involved for counsel as a result of the late production of documents I am not satisfied that the right response is to increase the time of the investigation meeting for the purposes of the daily tariff.

[14] The reality is, if the documents, including the original documents, had been produced before the investigation meeting then counsel for Mr Ward would have undertaken the same work in relation to them, except that work would have been before the investigation meeting. And the documents and the additional work would not have increased the actual time of the investigation meeting beyond one day. So, the additional work would have just been accounted for, in terms of costs, by the application of one day of the daily tariff.

[15] I do however accept there was some additional attendances in relation to the documents that would not have been required had the documents been produced before the investigation meeting – this includes attending a case management conference to discuss the consequences of the documents in terms of additional evidence and submissions. However this additional work is a factor relating to the respondent's conduct of the case and whether that justifies an increase in the amount of the daily tariff. I will turn to this aspect next.

Increasing the daily tariff because of Samson Hill's conduct

[16] Counsel for Mr Ward submits that the way that Samson Hill conducted its response to Mr Ward's claim was not constructive and caused additional work, which increased costs for Mr Ward.

[17] I have reviewed the progress of this claim, including compliance with my various directions and accept that there were delays by Samson Hill, which required further attendances by counsel for Mr Ward. As a consequence there must have been an increase in Mr Ward's costs.

[18] I am satisfied that I should increase the daily tariff for this and set that increase at \$1,000.00.

Conclusion

[19] The investigation meeting in this matter took one day and the daily tariff is currently \$4,500.00 for the first day of the investigation meeting. However, I will increase this amount by \$1,000.00 for the reasons set out, so the award of costs is \$5,500.00.

Disbursements

[20] Mr Ward is also entitled to be paid the filing fee of \$71.56.

Order

[21] Samson Hill is to pay Mr Ward \$5,500.00 as a contribution to his costs in this matter. Samson Hill must also pay Mr Ward disbursements of \$71.56.

Peter van Keulen
Member of the Employment Relations Authority