

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 65
3080938

BETWEEN	GRAEME MURRAY WATTS Applicant
AND	NGĀTI PĀHAUWERA COMMERCIAL DEVELOPMENT LIMITED Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Bill Calver, advocate for the Applicant
Michael McAleer, advocate for the Respondent

Submissions Received: 23 November 2020 from the Applicant
4 December 2020 from the Respondent

Date of Determination: 22 February 2021

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 3 November 2020 the Authority issued a determination concluding Graeme Watts had been unjustifiably dismissed.¹ Costs were reserved and the parties have been unable to resolve the issue of costs between themselves. Mr Watts as the successful party now seeks a contribution towards costs incurred.

[2] The investigation took one day. The Authority generally determines costs on its usual notional daily tariff-based approach. The starting point is \$4,500 for the first day. From there, adjustments may be made depending on the circumstances.

¹ [2020] NZERA 454.

Costs submissions

[3] Mr Watts seeks a contribution which exceeds the daily tariff and asks for an uplift as follows:

- (a) \$12,000 (in addition to the daily tariff);
- (b) Disbursements for:
 - (i) photocopying and printing in relation to bundles of documents of \$300; and
 - (ii) the filing fee of \$71.56.

[4] As Mr Watts' full costs total \$16,871.56, in essence he is asking for indemnity costs. Mr Watts' claim for an uplift is primarily based on a "Calderbank" offer made on 11 December 2019. The Calderbank offer proposed to settle the claim on the basis of one month's salary, a \$5,000 payment for hurt and humiliation, and a contribution towards costs of \$3,000 plus GST. The offer rounded those sums to a payment of \$10,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 plus a sum of \$3,000 plus GST as a contribution to costs.

[5] The Calderbank offer was made in a timely manner, on 11 December 2019, well before the investigation meeting which was conducted on 4 August 2020.

[6] At the date of the Calderbank offer, the parties had already attended mediation unsuccessfully. Mr Calver submits that at the time of the Calderbank, Mr Watts had incurred costs of \$4,000. As the offer was made within one day of mediation occurring, I can assume that those costs relate to mediation and other prior attendances and in considering an uplift, I have taken into account costs incurred after that date only.

[7] I consider the "Calderbank" offer as something I need to take into account. Mr Watts was entirely successful in his claim and was awarded:

- (a) Lost salary of \$8,150 (less PAYE).
- (b) \$25,000 compensation in terms of s 123(1)(c)(i) of the Act.
- (c) Costs were reserved, but tariff costs would equate to \$4,500.

[8] The amount awarded greatly exceeds the amount Mr Watts was prepared to settle for in his Calderbank offer. Accordingly, the respondent would have been significantly better off if it had accepted the offer.

[9] Mr Calver on behalf of Mr Watts also submits that further costs were expended because Ngāti Pāhauwera Commercial Development Limited (NPC) shied away from producing information, which it ultimately did produce, which it knew existed and which it would have known seriously compromised its defence.

[10] For NPC, Mr McAleer states that he considers the applicant's costs excessive and far from reasonable. The only submission he makes in support of this, is a comparison of his costs of a further \$4,900 (inclusive of GST) from the expiry of the Calderbank until the end of the investigation meeting.

Discussion

[11] The principles in respect of the approach adopted by the Authority under which an award of costs is made, are well settled.² Mr Watts' settlement offer therefore, needs to be considered in light of whether or not its acceptance would have put the recipient in a better place. If the answer is yes, as it is here, then costs incurred by the other party as a result of the rejection is an issue warranting consideration and will often see an increase in the resulting award.³ The purpose of a Calderbank offer is to attempt to settle matters between the parties at an early stage in the dispute. It was made after the parties have attended mediation and therefore after the parties were well aware of their respective positions. NPC, although at this stage had not provided copies of the Board minutes or a copy of the report it was relying on to justify the redundancy, was aware of their existence and should have known that its justification of Mr Watts dismissal would be difficult once these documents came to light. It was therefore unreasonable for NPC to reject Mr Watt's settlement offer.

Conclusion and orders

[12] For the above reasons, I order:

- (a) NPC to pay a contribution towards costs incurred by Mr Watts of \$12,500.

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

³ *Blue Star Print Group (NZ) Limited v Mitchell* [2010] ERNZ 446 (CA).

- (b) Photocopying and binding expenses of \$300.
- (c) Reimbursement of the filing fee of \$71.56.

Geoff O'Sullivan
Member of the Employment Relations Authority