

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 477
3139801

BETWEEN

PEX
Applicant

AND

LYTTELTON PORT COMPANY
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Ashleigh Fechny, advocate for the Applicant
Andrew Shaw and Alex Beal, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 September 2022 from the Applicant
26 August 2022 from the Respondent

Date of Determination: 20 September 2022

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 1 August 2022,¹ I dismissed PEX's claims against Lyttelton Port Company Ltd (LPC). I also reserved costs so that the parties could try to agree costs. The parties were unable to agree and now LPC seeks costs.

Application for costs

[2] Counsel for LPC seeks an award of costs of \$8,000.00. Counsel seeks this amount, based on applying the daily tariff to a two-day investigation meeting. Counsel also refers to a Calderbank offer, which given that PEX was not successful with his claims could be relevant

¹ *PEX v Lyttelton Port Company Limited* [2022] NZERA 353.

to increasing the daily tariff, however counsel has not sought an uplift based on the Calderbank offer.

[3] The advocate for PEX says the daily tariff should be applied at a reduced rate because the investigation meeting did not last two full days and because of PEX's financial situation. The advocate also disputes that the Calderbank offer is a valid offer and says it should not be considered for the application for costs. Overall, the advocate submits that PEX should only be ordered to pay \$500.00 towards LPC's costs and asks that I order that he pay this at the rate of \$10.00 per week.

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 Employment Relations Act 2000. 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*² and other relevant Employment Court and Court of Appeal decisions.³ I have applied these principles when determining this application for costs.

Costs for LPC

[5] The starting point is that costs should follow the event. As LPC was successful in defending PEX's claims it is entitled to an award of cost.

Applying the daily tariff

[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.

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

³ *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.

[7] There is no reason in this case to depart from applying the daily tariff.

[8] The question however in relation to applying the daily tariff is whether the daily tariff should be applied simply as two days, as the investigation meeting spanned two days, or two part days as both days of the investigation meeting were not full days.

[9] Despite the daily tariff being expressed as an amount for each day of the investigation meeting it is normal practice in the Authority to apply the amounts in parts to reflect the actual time spent in the investigation meeting.

[10] In this case I am satisfied that the two-day investigation meeting should have the tariff applied as \$4,500.00 for the first day of the investigation meeting, which lasted over three quarters of the normal time used, and then one half of \$3,500.00 for the second day as this lasted close to half of a day.

[11] So, applying the daily tariff on the basis of part days needed for the investigation meeting, my starting point for a costs award is \$6,250.00.

Adjusting the daily tariff

[12] I must now consider if the initial quantum of \$6,250.00 should be adjusted. The daily tariff amount can be adjusted for various reasons and in this case the relevant consideration is the financial circumstances of PEX.

[13] Before I turn to the financial circumstances, I acknowledge the submissions made by both parties about the Calderbank offer; however, given that LPC does not seek an uplift I need not consider this aspect.

[14] In terms of PEX's financial circumstances the advocate for PEX referred to *Gates v Air New Zealand Ltd.*⁴ I have considered this as well as other similar Employment Court cases particularly *Tomo v Checkmate Precision Cutting Tools Ltd.*⁵

[15] My conclusion is that the approach taken by the Employment Court to an unsuccessful party's impecuniosity as that impacts the level of costs that might be awarded, is that a

⁴ *Gates v Air New Zealand Ltd* [2010] NZEmpC 26.

⁵ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

reduction in costs because of a party's impecuniosity cannot be applied without some balance, as the principles of equity and good conscience must also account for the countervailing interests of the successful party and broader public policy considerations.⁶

[16] The balance here is that PEX's claim was not without some merit based on his account of what happened and his view that LPC's drug and alcohol policy was inadequate and as a result he was unfairly punished; PEX should not suffer an undue hardship, which a significant costs award would do, in these circumstances.

[17] However, from LPC's perspective this matter was straight forward. It has an appropriate drug and alcohol policy particularly given the current expert advice on testing for drug use and impairment in the workplace and given that it operates in a safety sensitive environment. It had every right to defend its position where PEX had breached that policy twice and, on this basis every right to expect PEX to pay part of its costs. And it is noted that it provided PEX with an opportunity to avoid any cost liability at an early stage when it asserted that his case would not succeed and offered to let him withdraw it with no costs being sought at that time.

[18] Overall, I am satisfied that I should reduce the daily tariff because \$6,250.00 (the starting point in applying the daily tariff) would cause significant hardship to PEX, given what I know about his current circumstances. I note here that I have been advised of PEX's current situation that includes health matters, which I need not set out here, and that he is without employment and does not receive any government assistance by way of a benefit. I am also told he has no savings.

[19] However, I am not prepared to reduce the daily tariff by the amount sought. Also, I am not prepared to make an order that payment be made at the rate of \$10.00 per week as sought given that I have no information on PEX's household income and outgoings, any household savings and/or debt, and possible access to additional sources of money such as family assistance or the ability to realise any assets.

⁶ *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)* [2004] 2 ERNZ 274; *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 (EmpC); *Gates v Air New Zealand Ltd* [2010] NZEmpC 26; and *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

[20] An appropriate reduction in all of the circumstances is 50%. I conclude that PEX must pay \$3,125.00 as a contribution to LPC's costs.

Order

[21] PEX is to pay LPC \$3,125.00 as a contribution to its costs in this matter. I make no additional orders about a timeframe for total payment or instalments over time at this stage. I leave it to the parties in the first instance to negotiate a payment plan and if that fails then they can come back to the Authority for assistance with setting payments, by way of a variation to my order.

Peter van Keulen
Member of the Employment Relations Authority