

[0] On 13 September 2022, by way of email, the DHB lodged and served its cost submissions with the Authority and Dr De Zoysa. On 16 September 2022, the Authority invited Dr De Zoysa to lodge his submissions in response by 4 pm Friday 30 September 2022.

[1] Dr De Zoysa did not respond to the DHB's costs submissions. Instead, he provided the Authority with his objections to the substantive determination. However, it was explained to Dr De Zoysa that the Authority was now *functus officio* and that it would not be revisiting its decision. It was also explained to Dr De Zoysa that he had a right to challenge the Authority's determination to the Employment Court and he was referred to the relevant page on Authority's website for further information regarding the appeal process.

Costs principles

[2] The Authority has the power under clause 15 of Schedule 2 of the Act to award costs. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.¹ Those principles are as follows:

- a. The Authority has a discretion whether to award costs, and how much, but the discretion must be exercised in accordance with principle and not arbitrarily.
- b. The statutory jurisdiction towards costs is consistent with the Authority's equity and good conscience jurisdiction.
- c. Equity and good conscience are to be considered on a case-by-case basis.
- d. Costs are not to be used to punish or express disapproval for the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- e. The Authority can consider whether all or any of the parties' costs were unnecessary or unreasonable.
- f. Costs generally follow the event (i.e. the unsuccessful party will normally be required to contribute to the costs of the successful party).
- g. *Calderbank offers* may be taken into account when setting costs.

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

- h. Awards will be modest.
- i. Frequently costs are judged against the notional daily tariff.
- j. The nature of the case can influence costs, which means the Authority may order those costs should lie where they fall.

[6] On 2 May 2022, Practice Note 2, Costs in the Employment Relations Authority, came into effect. Among other things, the practice note reaffirmed the Authority's use of the notional daily tariff as the starting point in assessing costs.

Costs submissions

[7] In his submissions Mr Russell stated that the DHB was wholly successful in defending Dr De Zoysa's interim reinstatement and substantive reinstatement claims. The DHB sought the daily tariff of \$4,500 for a one-day investigation meeting for the interim reinstatement application. It also sought a further \$10,200 for the substantive determination and therefore the total costs sought against Dr De Zoysa was \$14,700. It was submitted that the DHB's legal expenses were well in excess of \$50,000 plus GST and three invoices were provided as verification.

[8] It should be noted that \$4,500 is the notional daily tariff for the first day of hearing. For the second and subsequent day \$3,500 is the going rate. Here the investigation meeting of the substantive matter took one full day and two-thirds of a second day which ended at 1.45 pm. The amount sought by the DHB on a *pro rata* basis for the second day of hearing was \$2,300.

[9] In addition to the \$6,800 sought for the substantive hearing, a 50 percent uplift on that amount or \$3,400 was sought on the basis that Dr De Zoysa had failed to accept a Calderbank offer from the DHB.

Costs analysis

Starting point

[10] In assessing an appropriate award of costs, the notional daily tariff is the usual starting point. For the interim application, I agree with Mr Russell that the daily tariff for the first day of an investigation meeting of \$4,500 ought to apply. This fairly reflects the considerable front loading of work the DHB had to undertake at short notice which included the preparation of three substantial witness statements.

[3] As for the substantive investigation meeting, the hearing did not require the full two days and consequently a *pro rata* approach to the second day is appropriate and consistent with the maxim that costs be modest. For the first day of the investigation meeting \$4,500 is the correct starting point. For the second day \$2,300 is appropriate being two-thirds of the applicable tariff of \$3,500 for a second or subsequent day.

[4] Accordingly, I reach a starting point for the substantive investigation of \$6,800. However, to avoid an overly rigid and formulaic approach to the costs setting exercise, it is necessary to adjust this amount upwards or downwards on account of any applicable relevant factors as noted above at [5]. Here, a 50 percent uplift is sought by the DHB on account of Dr De Zoysa's failure to accept its Calderbank offer.

Valid Calderbank offer

[5] A Calderbank offer is a without prejudice save as to costs offer that is made to settle a dispute. Such an offer puts the other side on notice that if the dispute goes to hearing and the outcome is less favourable than the Calderbank offer that was made, the side making the offer may disclose it to the court when determining costs.

[6] The DHB's Calderbank offer meets the characteristics of such a letter. It is clearly marked "Without Prejudice Except as to Costs", explained to Dr De Zoysa that the DHB reserved the right to produce it after the hearing in relation to any issue about and gave Dr De Zoysa 11 days to accept the offer, which is a reasonable period of time in my view.

Uplift warranted

[7] However, accepting the DHB's settlement offer was never an option for Dr De Zoysa whose employment relationship problem was never about money but about him being reinstated to his previous employment. However, for the reasons set out in the substantive determination, reinstatement or redeployment as it turns out was never an option for the DHB either.

[8] I consider a 50 percent uplift too high given the limited options there were to settle the dispute. The Authority's discretion in setting costs must be exercised within its equity and good conscience jurisdiction and in my view, an uplift of 25 percent only or \$1,700 is closer to the mark.

Other factors

[11] There is nothing before the Authority relevant to Dr De Zoysa's ability to pay costs. Past correspondence suggests that this is unlikely to be an issue for him.

Conclusion

[12] The DHB was wholly successful in defending Dr De Zoysa's claims. I see no reason why costs should not follow the event. With the exception of a downwards adjustment from the initially claimed amount of \$14,700, the Authority finds that Dr De Zoysa is to pay \$13,000 as a contribution towards the DHB's legal costs.

Orders

[13] The Authority orders Nilkanth Kumar De Zoysa to pay Waitemata District Health Board \$13,000 as a contribution towards its legal costs no later than 5 pm Thursday 3 November 2022.

Peter Fuiava
Member of the Employment Relations Authority