

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 671
3144304

BETWEEN EMMA KENT
 Applicant

AND CENTRAL OTAGO LIVING
 OPTIONS LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Kevin Murray, advocate for the Applicant
 Dale Lloyd, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: No submissions received from the Applicant
 23 November 2022 from the Respondent

Date of Determination: 19 December 2022

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 10 November 2022 I found that Emma Kent's personal grievances had not been established and therefore her claims against Central Otago Living

Options Limited (COLO) had not been successful.¹ In my determination I reserved costs; COLO now seeks costs.

Application for costs

[2] Counsel for COLO seeks an award of costs of \$18,500.00 plus disbursements, which is essentially the full amount COLO has been invoiced for legal fees relating to the investigation of Ms Kent's claims, i.e., indemnity costs. Counsel seeks this amount, based on an uplift being applied to the normal cost principles and tariff in the Authority.

[3] No submissions were received from Ms Kent.

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 the Authority's practice note on costs.²

Costs for COLO

[5] The first principle relating to costs in the Authority is that an award of costs should follow the event, that is, a successful party should normally be awarded costs.

[6] COLO was successful in defending Ms Kent's claims and is entitled to an award of costs.

¹ *Kent v Central Otago Living Options Limited* [2022] NZERA 586.

² For further information about the factors considered in assessing costs, see:

www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

Applying the daily tariff

[7] The basic premise for quantifying the amount of a costs award in the Authority is to apply the daily tariff. The daily tariff is an amount awarded for each day of an investigation meeting at the rate of \$4,500.00 for the first day of an investigation meeting.

[8] I can depart from applying the daily tariff in certain circumstances, such as where the conduct of a case justifies actual or indemnity costs to be awarded.

[9] Whilst counsel for COLO seeks an award of costs that is essentially the full amount of COLO's actual costs and disbursements, counsel does so on the basis that the daily tariff should be adjusted so the full amount is awarded. The grounds for seeking the adjustment are that Ms Kent's claim required additional work because of the way it was framed and the evidence she submitted.

[10] I will deal with adjusting the daily tariff below but first will explain why I will not award the full amount of COLO costs, or indemnity costs. In terms of awarding indemnity costs I must be satisfied that Ms Kent's conduct of her claim meets the standard for awarding indemnity costs set out in *Bradbury v Westpac Banking Corp*³. I have reviewed Ms Kent's conduct of her claim and overall, I conclude that there is no basis to award indemnity costs. The behaviour complained of does not meet the standard set out by the Court of Appeal in *Bradbury*.

[11] I am satisfied that the daily tariff is the correct approach to setting costs in this matter.

[12] My investigation into this matter took one day and therefore the initial quantum based on the daily tariff is \$4,500.00.

³ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234

Adjusting the daily tariff

[13] I must now consider if the initial quantum of \$4,500.00 should be adjusted. The daily tariff amount can be adjusted for various reasons - the factors relevant to my consideration of the increase or decrease of the daily tariff in this case include:

- (a) Costs awards in the Authority will be modest;
- (b) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- (c) Without prejudice offers can be considered;
- (d) A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[14] So, against the requirement that costs in the Authority should be modest and determined in line with principles bearing in mind the equity and good conscience jurisdiction of the Authority, I must consider whether the conduct of Ms Kent's claim by her increased COLO's costs unnecessarily.

[15] In this regard, counsel for COLO refers to additional requests having to be made for directions about the evidence and the investigation meeting being protracted because of the way Ms Kent's claims were framed.

[16] When I consider these points and balance the other relevant factors, I am not persuaded that an increase in the daily tariff is required.

[17] Whilst there may have been some additional work around directions this was minor in the general scheme of how claims operate and really part of what the daily tariff covers. Likewise, there may have been some additional work in terms of questions and discussion

around Ms Kent's claims in the investigation meeting, this additional time is covered by the daily tariff also.

[18] The other aspect counsel refers to in support of an uplift in the daily tariff is a without prejudice offer. Whilst the case law refers to without prejudice offers being relevant this is accepted as being a reference to Calderbank offers.⁴ There is no evidence in the submissions to show that the offers referred to were Calderbank offers and that the offers were unreasonably refused. For these reasons I do not consider the offer referred to to be relevant to the question of uplifting the daily tariff.

[19] Therefore, I conclude there is no basis to increase the daily tariff in terms of the costs COLO is entitled to.

Conclusion

[20] As set out above, the daily tariff is currently \$4,500.00 for the first day of the investigation meeting and COLO is entitled to costs for a one day investigation meeting.

Disbursements

[21] The disbursements claimed in this case are not the type I consider to be relevant to an investigation meeting and therefore I do not consider that Ms Kent should contribute the cost of those.

⁴ A Calderbank offer is an offer made by one party 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.

Order

[22] Emma Kent is to pay Central Otago Living Options Limited \$4,500.00 within fourteen days, as a contribution to its costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority