

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 480
3177128

BETWEEN HAPATI MAGUIRE
 Applicant

AND CONCRETE LIMITED t/a
 CONCRETE UNLIMITED
 Respondent

Member of Authority: David G Beck

Representatives: Alex Kersjes, advocate for the Applicant
 Hilary Palmer, counsel for the Respondent

Investigation Meeting: 2 June 2023 by audio visual link

Submissions Received: 1 August 2023 from the Applicant
 25 August 2023 from the Respondent

Date of Determination: 25 August 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination of 18 July 2023, I found that Hapati Maguire had been unjustifiably dismissed by Concrete Limited and that they must pay Mr Maguire \$10,000.00 compensation, combined lost wages/holiday pay in the amount of \$3,024 with a further sum of holiday pay to be determined between the parties.¹ Costs were reserved to allow the parties to explore agreement but with none being reached, Mr Maguire has applied for an order of costs.

The application for costs

[2] Mr Maguire's advocate seeks costs of \$6,500.00 and disbursements (the filing fee) for a one-day investigation meeting that was conducted by an audio-visual link. In seeking and

¹ *Hapati Maguire v Concrete Limited t/a Concrete Unlimited* [2023] NZERA 377.

uplift in costs, Mr Maguire's advocate cited what he considered unnecessary delaying tactics that put his client to extra cost due to the failure to disclose documents in a timely manner and the impact of a Calderbank offer.

[3] Counsel for Concrete Limited in contrast, opposed any 'uplift' citing inadequate initial and then amended pleadings by the applicant, and noted this hampered the settlement negotiations discussed below as the full extent of Mr Maguire's claims were not disclosed at the time. Counsel noted Mr Maguire provided inadequate information on steps he took to mitigate his loss that prevented Concrete Limited being able to assess the full extent of lost wages. Further counsel alluded to unnecessary witness evidence that Mr Maguire filed and the credibility of such. Overall, counsel noted Concrete Limited's defence of the claims was not unreasonable and that a more concisely pleaded case would have reduced costs for both parties.

Assessment

The Authority's costs approach

[4] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000.

Costs for Mr Maguire

[5] A starting point is that costs normally follow the event and as Mr Maguire was successful in his personal grievance he is entitled to an award of costs.

Applying the daily rate

[6] As outlined in the substantive determination,² the Authority's approach is to apply a notional daily rate and only adjust that rate if persuaded that particular circumstances or other factors require an upward or downward adjustment.³ The discretion it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ including costs are not to be used as a punishment or as a reflection on how either party conducted proceedings

² Ibid at [103].

³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.⁵ The current daily rate is \$4,500 for the first day of an investigation meeting.

Adjusting the daily rate

[7] Other than the Calderbank offer (discussed below) I could not identify any additional factors that would have significantly increased Mr Maguire's costs.

Calderbank offer⁶

[8] After mediation but prior to the Authority investigation meeting of 2 June 2023, Mr Maguire attempted to settle matters with a Calderbank offer of 15 September 2022. The offer was rejected and the amount of the offer was less than what Mr Maguire achieved in my determination. I am satisfied that the pragmatic format of the offer met the requirements of a Calderbank offer and should be taken into consideration. In the overall circumstances it is my view, that the Calderbank offer should increase the daily rate by a modest amount of \$500.

Conclusion

[9] An uplifted daily rate to reflect Concrete Limited's rejection of the Calderbank offer is to be applied to also reflect Mr Maguire's success in establishing he was an employee throughout his employment and his unjustified dismissal claim.

Order

[10] Concrete Limited is to pay Hapati Maguire a contribution to his costs in the amount of \$5,000 and \$71.55 as reimbursement of Mr Maguire's Authority filing fee.

David G Beck
Member of the Employment Relations Authority

⁵ Section 160(2) Employment Relations Act 2000.

⁶ A Calderbank is an offer made in writing by either party on a 'without prejudice save as to costs' basis. The purpose of such an offer is, if rejected, to reserve the right to bring it before the Authority or court for costs proceedings after the substantive claim has been determined.