

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 624
3159641

BETWEEN KEVIN RICHARD BORLAND
Applicant

AND HIGGINS CONTRACTORS LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Philip Bellamy, counsel for Applicant
Chloe Luscombe, counsel for Respondent

Submissions received: 9 October 2023 from Respondent only

Determination: 25 October 2023

COSTS DETERMINATION

[1] The respondent (HC) has applied for a contribution to its costs from the Applicant, Mr Borland. I dismissed Mr Borland's claim of constructive dismissal in my determination dated 27 September 2023 (my determination)¹.

[2] The issue of costs was reserved, I encouraged the parties to resolve any issue of costs and if not successful, HC was to file first in time if an award of costs was sought. Mr Borland

¹ *Kevin Richard Borland v Higgins Contractors Limited* [2023] NZERA 557.

had 14 days from any application to file submissions in response. HC has filed an application. No submissions in response have been received from Mr Borland by the directed timeframe. There has been no explanation for this nor any request to extend the time to provide submissions for costs. Mr Borland's representative acknowledged by email to the Authority that he received my determination. A further response email from the Authority reminded him about the timetabling for costs as contained in that determination. In these circumstances I will decide the matter of HC's application.

Costs principles

[3] The Authority may order costs to any party as it thinks reasonable.² A party should receive a reasonable contribution to costs incurred in achieving a successful result which may include the successful defence of a claim. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.³

[4] The Authority uses a notional daily tariff⁴ as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter and considers the things that are required to prepare for that meeting. This tariff may then be adjusted upwards or downwards according to the circumstances of each case considering things like a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs. The effect of a 'Calderbank' letter may be taken into consideration.⁵

HC's submission

[5] HC submits that the Authority should consider an uplift to \$16,000.00 from the starting point of a two-day investigation meeting tariff which is \$8,000.00. It submits the

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 at 819; *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106.

⁴ The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 for the first day and \$3,500.00 for each additional day.

⁵ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

reason for this uplift is that there was a reasonable Calderbank letter not accepted and that Mr Borland's way of conducting his claim unnecessarily increased HC's costs.

Assessment

[6] I agree that the respondent should have an order for a contribution to its costs. It was wholly successful in defending Mr Borland's claim. The matter was heard across two days which I accept included time for written submissions to follow.

[7] I have no current information before me in relation to Mr Borland's ability to pay costs and consider this a neutral consideration.

[8] Accordingly, I find the starting point for a costs order should reasonably be two days at the tariff which is \$8,000.00. I will now consider whether an increase of \$8,000.00, or any part of this amount, should be awarded.

Calderbank letter dated 23 February 2023

[9] HC made Mr Borland a 'without prejudice except as to costs' offer to settle this matter on Thursday 23 February 2023 by way of email to Mr Borland's counsel. The offer was to pay Mr Borland \$7,000.00 compensation together with \$2,500.00 (plus GST) as a contribution to Mr Borland's costs.

[10] The offer remained open until 5.00pm the following Thursday 2 March 2023. The offer was not responded to and in the absence of anything further from Mr Borland, I accept HC's submission that the offer can be regarded as not accepted.

[11] The offer was based on HC saying it had a strong defence to the claim of constructive dismissal and that the historic issues Mr Borland had put forward in relation to workplace injury could not succeed.

[12] The Employment Court⁶ has observed that while ‘Calderbank’ offers are “front and centre” for the Court when considering costs, the Authority’s discretion is broader and sits within the context of a jurisdiction “intended to be low level, costs effective, readily accessible and non-technical”. That case involved the Court considering as disproportionate an application for costs asking for an uplift of \$20,000.00 to the then one day Authority tariff of \$3,500.00.⁷

[13] Considering all the above I am not satisfied that an uplift is appropriate for the reason of the Calderbank letter. While I accept that had Mr Borland accepted the offer, he would now be in a better position, the issue of constructive dismissal was identified as the issue to be investigated. The issue of constructive dismissal was not overly complex, and my findings reflect this. Mr Borland is to pay at the tariff for his lack of success in bringing his claim.

[14] I do not accept that there should be an uplift for the reason of the Calderbank letter.

Unnecessary costs

[15] HC further submits that there have been unnecessary costs incurred by HC that justify an uplift to the tariff.

Second case management conference 15 July 2022

[16] It is submitted for HC that it incurred unnecessary costs because its representative had to attend a second case management conference (CMC). This was directed by me after the first CMC⁸ due to an apparent lack of clarity about the historic narrative in the Statement of

⁶ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

⁷ Compare also Employment Court Regulations 2000, Regulation 68 with Employment Relations Act 2000, Schedule 2, clause 15, the latter not specifying that ‘Calderbank’ letters have to be considered in the Authority’s consideration of costs.

Problem and the connection this had to the claim for constructive dismissal. This is the type of thing that is already covered in the tariff set by the Authority. I do not accept it justifies an uplift to the tariff.

Time taken to request an amendment to the evidence timetable, and to raise concerns about Mr Borland not filing his evidence in time or to challenge what was not provided as directed including attendance at a third CMC.

[17] It is submitted for HC that extra time was spent having to raise the above issues. I accept this as likely. However, it is also not uncommon for there to be backwards and forwards before Investigation Meetings when parties do not file their evidence in time. I consider the tariff is set to encompass this type of situation. I note further that these things occurred before HC prepared and eventually filed its evidence on 20 March 2023. I do not accept this justifies an uplift to the tariff.

Having to prepare additional evidence and a witness not required.

[18] I accept that HC likely incurred extra costs to prepare an additional witness to address considerable material that Mr Borland had continued to include in his witness statement. However, that witness was able to confirm some aspects of whether I should consider deliberate motivation was behind the immediate actions relating to Mr Borland's resignation. I do not find this justifies an increase to the tariff.

Time taken to prepare and file evidence to address the historic matters in Mr Borland's evidence without the benefit of being clear how these related to the claims for investigation.

[19] I accept that before the investigation meeting Mr Borland did not take opportunities given to better clarify his evidence in relation to his claim for 'compensation' or how this

⁸ Directions of the Authority dated 28 June 2022.

connected to his grievance based on constructive dismissal. An amended statement of problem was directed after a second CMC. This was not filed. Mr Borland's brief of evidence was unexpectedly provided in amended form with a few changes on the afternoon before the Investigation Meeting. I accept that HC likely incurred the unnecessary cost of having to identify these changes at a late stage before the investigation meeting, that they required some analysis to identify, and that they did not in the end greatly change the matters for investigation.

[20] Standing back from the above I find it justifies a modest uplift to the tariff.

Preparing for Mr Borland's two witnesses who did not appear at the investigation meeting.

[21] I accept that HC likely incurred the costs of preparation for questioning Mr Borland's witnesses after he filed briefs of evidence from these two people and then, at the investigation meeting, confirmed they were not coming. There was little explanation about this. I find this justifies a modest uplift to the tariff.

Failure to file submissions

[22] Mr Borland did not file submissions to summarise what he concluded the evidence told me about his claim, HC filed extensive submissions which it says took more time because it did not have submissions to reply to. The issue of constructive dismissal was identified as the issue I would be investigating. While there was a lack of clarity about Mr Borland's apparent claims about compensation this compensation could only have been considered falling from that single grievance issue. I find in these circumstances that while Mr Borland may have assisted my investigation by summarising his case it was not compulsory. I do not find this justifies an uplift to the tariff which includes investigation time and the time for written submissions coming later.

Summary

[23] While I accept there should be a modest uplift to the tariff, I have no clear information before me to show what the 'extra' costs incurred were. Considering the overall invoice charges, I therefore arrive at the figure of \$2,000.00 for likely unnecessary additional costs incurred.

Order

[24] Within 28 days from the date of this order, Kevin Richard Borland is ordered to pay Higgins Contractors Limited the single sum of \$10,000.00 as a contribution to its costs.

Antoinette Baker
Member of the Employment Relations Authority