

- (b) unjustifiably disadvantaged;
- (c) entitled to lost wages, compensation, outstanding holiday pay and payment for time worked on public holidays and alternative holidays.

[4] In both cases, costs were reserved with the parties being encouraged to resolve that issue between themselves. Unfortunately, they have been unable to do so and both parties have filed submissions in respect of costs.

[5] In the applicant's application for costs, Mr Clarkson seeks:

- (a) Indemnity costs in the sum of \$79,597.56 plus GST; and
- (b) Costs on costs in the sum of \$2,500.00 plus GST.

[6] In seeking indemnity costs, Peter Clarkson is asking for indemnity costs and/or an uplift because of:

- (a) The Glenlyon Trust's conduct in defending Mr Clarkson's claims;
- (b) The Glenlyon Trust taking over 12 months to provide discoverable documents;
- (c) The late provision of documentation;
- (d) The Glenlyon Trust's vexatious, frivolous, improper, and unnecessary conduct in defending claims.

[7] Further, Mr Clarkson relies on a rejected Calderbank offer. He says Glenlyon Trust unreasonably declined the settlement offer he made on 27 February 2020.

[8] The Glenlyon Trust strongly opposes the application for indemnity costs and rejects the notion there should be an uplift because of the Calderbank letter which the Glenlyon Trust notes essentially included reinstatement, a remedy not sought before the Employment Relations Authority.

[9] The Glenlyon Trust rejects the notion that it dragged its heels and that whilst it may have been unsuccessful in the defence of its claims, there was nothing to support the imposition of indemnity costs.

[10] The Glenlyon Trust also rejects the notion that there should be "costs on costs" in respect of costs Mr Clarkson incurred in filing cost submissions.

The Authority's approach to costs

[11] The power of the Authority toward costs is contained in s 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[12] The principles and the approach adopted by the Authority in which an award of costs is made is settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹ as confirmed in *Fagotti v Acme & Co. Limited*.² The principles set out in the above cases is that costs are modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as punishment or expression of disapproval of the unsuccessful party's conduct.

Glenlyon Trust's conduct

[13] Peter Clarkson submits that Glenlyon Trust's decision to defend his claims, amounts to flagrant misconduct causing unnecessary increased costs.

[14] I find nothing in Glenlyon Trust's conduct that was improper, and certainly nothing that added to the length of the investigation meeting. On the contrary, both parties acted professionally at all times during the two-day investigation meeting and contributed to the investigation meeting running smoothly and ending slightly earlier than scheduled.

[15] In any event, as the Glenlyon Trust submits, it was perfectly entitled to vigorously defend Mr Clarkson's claims. The claims were significant and it was not surprising they were strongly defended. There is nothing before the Authority to suggest there are grounds to support a claim for indemnity costs.

¹ [2005] 1 ERNZ 808.

² [2015] NZEmpC 135 at [114].

Calderbank offer

[16] Mr Peter Clarkson claims for an uplift in costs because the Glenlyon Trust declined a reasonable Calderbank settlement offer. He says this resulted in the parties incurring substantial fees, presumably which would not have been incurred if the offer had been settled.

[17] I accept that where an offer of settlement has been made and is unreasonably rejected, this is likely to have caused extra costs and could well be grounds for supporting an uplift.

[18] The “Calderbank” offer was made on 27 February 2020, well before the investigation meeting on 2 May 2022. However, it is difficult to give any weight to the Calderbank offer for two reasons:

- (i) As noted by Mr Mitchell KC, the offer was in effect an offer for reinstatement. This is because it required the immediate rescinding of the written warning of 6 November 2019 and the dismissal of 7 December 2019. Rescinding the written warning, is in essence a reinstatement under the circumstances.
- (ii) The offer made on 27 February 2020 (4.53 pm) remained open to the Glenlyon Trust to accept until 4 pm, 28 February 2020, at which point the offer expired. There was simply no time for Glenlyon Trust to consider the offer in any event. It would not have been unreasonable to reject such an offer.

It follows, therefore, that there are no proper grounds supporting an uplift of costs on the basis of the Calderbank offer.

Costs on costs

[19] Mr Peter Clarkson says he has incurred additional costs in having to prepare costs submissions. However, the parties’ submissions indicate that Glenlyon Trust acknowledges that costs follow the event but says that the appropriate level of costs would be tariff costs. I agree with that submission. In light of that acknowledgment, there can be no basis for Mr Peter Clarkson’s claim for costs on costs.

Conclusion and orders

[20] The investigation meeting took two days for which tariff costs would equal \$8,000.00. Costs in respect of matters determined by the Authority on 2 May 2022 were reserved. I have no breakdown as to the time spent on submissions for Mr Clarkson, however, consider 25 percent of the daily tariff, namely a sum of \$1,125.00 to be appropriate.

[21] Accordingly, I order Hugh Oswald Clarkson, Ian Neil Clarkson, and Peter Richard Clarkson as trustees of the Glenlyon Trust to pay Peter Richard Clarkson the sum of \$9,125.00 together with the filing fee of \$71.56 as a contribution towards his costs.

Geoff O'Sullivan
Member of the Employment Relations Authority