

costs in the Authority cannot be dealt with now. Having received brief costs submissions from both parties, they are now determined on the papers.

Mr Thing's submissions

[4] Ms Thing points out that as the successful party she should be entitled to an award of costs. She further says the investigation meeting itself took a full day, with written submissions lodged later. She identifies the starting point of the daily tariff at \$4,500.

[5] Ms Thing notes the Authority found South Pole's actions constituted an unjustified dismissal and that it breached the Holidays Act 2003. Ms Thing further suggests South Pole's failure to comply with employment standards justifies an award of increased costs.

[6] Ms Thing also relies on an offer made on a Calderbank basis dated 15 March 2024. I have seen the Calderbank offer, which was stated to be open until 5 April 2024. It proposed settlement on the basis South Pole paid:

- (a) \$12,000 as distress compensation;
- (b) \$10,000 as lost income; and
- (c) \$3,000 plus GST towards costs.

[7] Ms Thing observes that the personal grievance remedies awarded (totalling \$23,000) exceeded the compensation and lost income proposed in the offer. She says this offer was made to avoid further costs and was a reasonable attempt to settle the matter. Ms Thing submits that South Pole's refusal to accept the offer has resulted in unnecessary additional legal expenses.

[8] Ms Thing requests that the Authority take into account South Pole's conduct and its failure to accept reasonable settlement offers. Ms Thing says South Pole repeatedly failed to engage in constructive settlement discussions, citing its conduct during mediation and subsequently demonstrates a lack of willingness to resolve the matter amicably, resulting in unnecessary costs for Ms Thing.

[9] Ms Thing seeks an award of \$6,750 to reflect the additional costs incurred due to South Pole's "unreasonable conduct".

South Pole's submissions

[10] South Pole's brief submissions stated that increased costs should not be awarded because there were real issues to be tried between the parties, and Ms Thing's claims of a breach of good faith and unjustified disadvantage were not successful. It further says the remedies awarded were not exceptional and the Calderbank offer "was not entirely successful".

Costs principles

[11] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

Discussion

[12] A full day investigation meeting was held with written submissions received at a later date.

[13] Ms Thing was the successful party, as she succeeded in a claim of unjustified dismissal and for a penalty. Remedies were awarded as a result. Costs therefore follow this event.

[14] I understand South Pole to be submitting that there was mixed success that is relevant to any costs award here. As the Court has found, mixed success is still success. Ms Thing was the successful party and is entitled to receive a contribution to the costs

incurred. Therefore, my view is that the correct starting point for an assessment of costs is at the tariff rate of \$4,500.

[15] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff.

[16] The fact the Authority found a breach of employment standards in South Pole's failure to pay public holiday pay is not a reason to uplift costs. That breach was addressed by way of the imposition of a penalty. There will be no uplift on this basis.

[17] There is no evidence before the Authority that South Pole failed to engage in constructive settlement discussions. The only evidence before me regarding settlement is the Calderbank offer, which I now consider.

[18] The settlement offer was stated to be "without prejudice save as to costs" and on a Calderbank basis and that it would be produced to the Authority if necessary. I am satisfied this was a reasonable Calderbank offer made well in advance of the investigation meeting and before the parties would have needed to incur any preparation costs for the investigation meeting. The personal grievance remedies identified in the Calderbank were less than the amounts the Authority ultimately awarded by a modest margin. Acceptance of the offer would have put South Pole in a better position in terms of those awards, and the legal costs it now faces. The offer should be taken into account. An uplift to the tariff is appropriate to recognise the non-acceptance of offer. An uplift of \$1,000 is appropriate.

[19] Ms Thing is also entitled to recover the cost of the Authority application fee.

Outcome

[20] South Pole IP Holding (NZ) Limited must pay Janice Thing (also known as Rai Fong Thing) within 14 days of the date of this determination:

- (a) \$5,500 in costs; and
- (b) \$71.55 (Authority application fee).

Sarah Blick
Member of the Employment Relations Authority