

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 291  
3003611

BETWEEN                      A  
   Applicant

A N D                              R LIMITED  
   Respondent

Member of Authority:      Rachel Larmer

Representatives:            Michael Smyth and Charlotte Foster, Counsel for the  
   Applicant  
   Ken Anderson, Counsel for the Respondent

Investigation Meeting:      On the papers

Submissions Received:      07 August 2018 from Applicant  
   No submissions from Respondent

Date of Determination:      14 September 2018

---

**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

---

**Employment relationship problem**

[1]      Mr A was successful in his unjustified dismissal personal grievance claim.<sup>1</sup>

[2]      The Authority encouraged the parties to resolve costs by agreement but failing that set a timetable for costs submissions to be filed.<sup>2</sup>

[3]      Costs have not been agreed so Mr A now applies for a costs award in his favour. R Limited has not filed any costs submissions.

[4]      Mr A's actual costs were \$19,807.20 (including GST). He also seeks reimbursement of the Authority's filing fee of \$71.56. Although Mr A was

---

<sup>1</sup> [2018] NZERA Auckland 232.

<sup>2</sup> Supra, paragraphs [211] – [214].

represented by two counsel (Mr Smyth took over Mr A's case later in the matter), the costs application submitted to the Authority relates solely to Mr Smyth's invoices.

[5] Mr Smyth seeks either indemnity costs or if that is not granted then an uplift to the Authority's usual notional daily tariff.

[6] This matter involved a two day investigation meeting. Therefore the notional daily tariff in respect of this matter is \$4,500 for the first day and \$3,500 for the second day, giving a notional starting tariff of \$8,000.

[7] The costs principles for an award of costs by the Authority are so well established I do not need to set them out again in full here. I acknowledge that I have had regard to the factors set out in *PBO Limited v Da Cruz*<sup>3</sup> when assessing costs in this matter.

[8] I consider it appropriate to adopt the Authority's usual notional daily tariff approach to assessing costs in this matter. This requires the notional starting tariff of \$8,000 to be adjusted to reflect the particular factors of this case.

[9] Neither party identified any factors which would warrant the notional daily tariff being decreased, and I am not aware of any. Accordingly, the notional starting tariff is not decreased.

[10] However there are a number of factors that warrant an increase being made to the notional starting tariff of \$8,000 to reflect the fact that the manner in which R Limited elected to conduct itself regarding this matter unnecessarily increased Mr A's actual legal costs.

[11] The first factor is that R Limited failed to disclose all relevant documents and unsuccessfully challenged the admissibility of relevant evidence disclosed by Mr A.

[12] The second factor is that Mr A made a successful application to the Authority for disclosure of relevant documents from R Limited.

[13] The third factor is that the first investigation meeting date was adjourned at R Limited's request due to the unavailability of one of its witnesses. This resulted in

---

<sup>3</sup> [2005] ERNZ 808

Mr A incurring additional costs due to the need to duplicate preparation as a result of the late notification of the request for an adjournment.

[14] The fourth factor is that while the investigation lasted two days, these were longer than normal days and further written submissions were required subsequent to the investigation meeting.

[15] The fifth factor is that there was some legal complexity involved in terms of the inter-relationship between ACC and remedies potentially available under the Employment Relations Act 2000 which required extra time to address.

[16] The sixth factor is that Mr A made a *Calderbank* offer by letter dated 26 January 2018 that was unreasonably rejected by R Limited. Mr A's *Calderbank* offer responded to R Limited's previous *Calderbank* offer to him.

[17] Mr A offered to settle on terms that were less favourable to him than what he ultimately achieved from the Authority's substantive determination. Had R Limited accepted that offer, which was made approximately 10-11 weeks prior to the substantive investigation meeting, then both parties would have avoided to additional incurring legal costs from 26 January 2018 onwards.

[18] Mr A's *Calderbank* offer indicated he would be prepared to accept \$20,000 distress compensation plus \$10,000 towards his actual legal costs. Mr A did not insist on an acknowledgement of liability from R Limited.

[19] The compensatory award sought by Mr A in his *Calderbank* offer was \$5,000 less than that awarded to him by the Authority in its substantive determination. The legal costs that Mr A offered to settle for were also significantly less than the legal costs that have been awarded to him in this costs determination.

[20] Mr A's *Calderbank* offer specifically put R Limited on notice that if it was not accepted and if Mr A obtained remedies from the Authority that were greater than his settlement offer, then he would be seeking an uplift to the notional daily tariff when costs were being assessed and/or would be seeking an award of indemnity costs.

[21] I note that Mr A's request for costs reimbursement of \$19,807.20 is not in fact equivalent to indemnity costs because the amount Mr A has claimed relates solely to

the actual costs invoiced to him by Mr Smyth. It does not include the legal costs Mr A incurred with his previous counsel.

[22] I am satisfied that this matter requires an uplift of 2.5 times the notional daily tariff, giving total overall costs of \$20,000. That amount must then be adjusted downwards to reflect the actual costs incurred by Mr Smyth, which were \$19,807.20.

[23] Mr A cannot be awarded more than his actual costs incurred, and the Authority was not provided with evidence about the extent of the costs incurred with Mr A's first solicitor.

[24] Mr A is also awarded \$500 costs towards his legal costs in connection with this costs application.

[25] Accordingly, within 28 days of the date of this determination, R Limited is ordered to pay Mr A:

- (a) \$19,807.20 towards his actual legal costs on the substantive matter;
- (b) \$71.56 to reimburse his filing fee;
- (c) \$500 towards his legal costs for this costs application.

**Rachel Larmer**  
**Member of the Employment Relations Authority**