

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 577
3170844

BETWEEN STEFAN BENDALL
Applicant

AND PRECUT CONSTRUCTION LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Anita Brockhouse, advocate for the Applicant
Robert Thompson, advocate for the Respondent

Submissions received: 28 August 2023 from Applicant
No submission received from Respondent

Determination: 4 October 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Bendall has applied for a contribution to his costs from the respondent (PC) in relation to the application he brought claiming amongst other things constructive unjustified dismissal. I heard this matter on 19 April 2023 across one day. In my determination dated 16 August 2023 (my determination) I found that Mr Bendall had been constructively and unjustifiably dismissed. I awarded \$23,000.00 in compensation together with a total of \$9,706.52 gross in lost earnings and some holiday pay and reimbursement of a training fee of \$49.49.

[2] In my determination, the issue of costs was reserved, and I directed Mr Bendall to file first in time if an award of costs was sought with PC having 14 days after this to respond. PC asked for and was granted an extension to file submissions by 22 September 2023¹, a date nominated for PC as achievable to complete the task. As of today's date, no submissions have been received from or for the respondent and I have proceeded to make this determination.

Costs principles

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

[4] The Authority uses a notional daily tariff³ as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter and takes into account preparation. 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.

¹ Conveyed in an email dated 8 September 2023 from the Authority to Juliet Harrison at IR Thompson, copied to Anita Brockhouse.

² Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

³ 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.

Mr Bendall's submission

[5] For Mr Bendall it is submitted that the Authority should consider an uplift of \$1,000.00 from the usual tariff because:

- a. A 'Calderbank' letter to settle the matter for costs of \$3,350 plus GST was sent before the process in the Authority would incur a 'significant escalation' of costs and was not responded to by PC despite a further prompt to respond about six weeks later;
- b. PC unnecessarily escalated Mr Bendall's costs by 'reneging' on an earlier 'agreement' to attend mediation.

[6] As noted above I do not have the benefit of submissions on costs from PC.

Assessment

[7] I agree that Mr Bendall should have an order for a contribution to his costs. The matter was heard across one day and attracts at the notional tariff a contribution of \$4,500.00 which I find is the starting point.

[8] I will now consider whether an increase of \$1,000.00 or any part of this amount should be awarded.

The 'Calderbank' letter

[9] The Employment Court 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".⁴

⁴ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

[10] As noted above the remedies were the result of my finding of constructive unjustified dismissal. My determination included an analysis of the claims in the alternative brought for Mr Bendall including that he had been directly unjustifiably dismissed including a claim that he had resigned in the 'heat of the moment' and his retraction had been accepted by PC after which PC then terminated his employment. The 'Calderbank' letter that is relied on in Mr Bendall's application for costs refers to offering to settle based on Mr Bendall's 'strong case for unjustified dismissal on the basis that Mr Bendall rescinded his resignation in a meeting with Chris [the director of PC, Mr Miller] and that Chris accepted the retraction of the resignation. This is evidenced with the recording therefore the letter sent on the following Monday can only be seen as a dismissal.'

[11] In my determination I did not find in Mr Bendall's favour the alternative claim that he had been directly unjustifiably dismissed. This was based primarily on my analysis of the 'recording' mentioned in the Calderbank letter. On this basis, I do not find that I should take this letter into account in awarding an uplift to the tariff starting point.

[12] In any event, while Mr Bendall also submits that a 'significant escalation of costs' resulted from PC not accepting or even negotiating in relation to the above mentioned 'Calderbank' letter, I have no evidence before me what this significant escalation of costs was. To some extent I find it likely that time was spent on the claim for direct unjustified dismissal to which Mr Bendall was unsuccessful. I have already commented on this above.

Mediation

[13] The nonattendance at mediation occurred before the parties likely began preparation for attending the Authority. I have nothing to show me how this delay incurred extra costs and find it likely that this can reasonably be captured in awarding the tariff starting point.

[14] Accordingly, after considering the above, I find that an uplift is not justified and award Mr Bendall \$4,500.00 as a contribution to his costs.

Order

[15] Precut Construction Limited is ordered to pay Stefan Bendall the single sum of \$4,500.00 as a contribution to his costs.

Antoinette Baker
Member of the Employment Relations Authority