

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 38
3050532

BETWEEN

PETER BEST
Applicant

AND

WELLINGTON COMBINED
TAXIS LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Charles McGuinness, counsel for the Applicant
Paul McBride, counsel for the Respondent

Submissions Received: 26 November 2021 from the Respondent
13 December 2021 from the Applicant

Date of Determination: 14 February 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] On 15 October 2021 I issued a determination in which I concluded Mr Best had failed to establish he had been unjustifiably dismissed by Wellington Combined Taxis Limited (WCT).¹ It follows he also failed to establish WCT had not acted in good faith by virtue of the way it handled the dismissal and for which he sought penalties. Indeed I went so far as to suggest that if anyone had failed to act in good faith it was Mr Best.²

[2] Costs were reserved and as the successful party WCT now seeks a contribution toward those it incurred defending the claims.

¹ [2021] NZERA 457

² Above n1 at [59]

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim, with the current starting point being \$4,500 for the first day and \$3,500 for each day thereafter.³ From there adjustment may occur depending on the circumstances.

[4] The investigation saw the parties attend on six days which, applying the tariff and according to WCT, would see a contribution in the order of \$22,000. While Mr Best accepts that calculation⁴ I don't as the investigation was adjourned before lunch on the third day and the sixth was shortened. I would say \$20,000 for the tariff but irrespective of which is correct WCT seeks an increase – indeed it is suggested the starting point should be indemnity cost which amounted to some \$60,000 plus GST.

[5] In support of its claim WCT relies upon submissions that:

- (a) The length of the investigation was prolonged by Mr Best's *scattergun conspiracy theory approach*;
- (b) Mr Best advanced a range of claims which included unfounded allegations of impropriety, fraud and other reprehensible conduct against various people including some of his own witnesses with many of those being irrelevant and/or unsubstantiated;
- (c) Mr Best rejected a substantial offer made after the investigation concluded on its third day and which is clearly in the form of a Calderbank; and
- (d) By *grasping the nettle and pursuing a penalty claim* Mr Best added further unnecessary time to the investigation.

[6] It is submitted the pursuit of unsubstantiated and baseless claims of serious wrongdoing warrants a consideration of indemnity costs and this assertion is supported with reference to *Scarborough v Micron Security Products*.⁵ When the other issues are added, especially the Calderbank, it is submitted a consideration of indemnity costs is now more than justified but in the event that does not occur it is suggested there be a significant uplift with an award in the order of \$40,000-\$50,000.

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

⁴ Mr Best's submission at [3]

⁵ *Scarborough v Micron Security Products* [2015] NZEmpC 105, [2015] ERNZ 812 at [15] and [16]

[7] Mr Best opposes any suggestion there be a significant increase in the tariff but *accepts a modest uplift over the final three days is appropriate*.⁶ It is suggested there be an uplift of \$500 per day for each of those three days. In making this concession it is accepted the Calderbank should be considered though its timing is also a factor.

[8] With respect to the other issues I have to note the absence of a response to WCT's submission about the pursuit of hopeless and improper accusations. It is denied Mr Best *checked out* when responding to WCT's restructuring proposal as is stated in WCT's submission and argued he participated wholeheartedly in the subsequent litigation process, both at mediation and before the Authority. It is submitted he *was entitled to bring his claims before the Authority and have the Authority determine them*.

[9] It is also submitted consideration be given to then Judge Inglis' comment that *in my view it will be generally inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority*.⁷

[10] I shall deal with the last submission first and suggest the reference to *Stevens* fails to sway me either way. First it appears to have been taken out of context with the quote coming from a paragraph in which the Judge is discussing the chilling effect of giving full effect to a Calderbank in her substantive consideration of Ms Stevens claims. Second I note the Court later rejected a similar access to justice argument from Ms Stevens when considering Hapag-Lloyd's subsequent costs application.⁸

[11] Turning now to Calderbank itself and my conclusion the argument again fails to sway me. The simple fact is that to be relevant, at least as a factor justifying an increased costs award, a Calderbank must be timely. It must also address the issues and claims.

[12] This Calderbank does neither. It was proffered after the third day and by which time the bulk of both party's costs had been incurred and were no longer avoidable. Furthermore, and while the Calderbank may have been prompted by weaknesses in the case presented by Mr Best, it failed to recognise there was no dispute dismissal had occurred and as a result the onus of justification fell upon WCT. While WCT had, by that time, inflicted considerable damage on Mr Best's case and brought the veracity of his claims into question it was still

⁶ Applicant's submission at [4]

⁷ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, [2015] ERNZ 224 at [95]

⁸ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137, [2015] ERNZ 1080 at [31] and [32]

required to justify its actions and satisfy the requirements of s103A of the Act. With respect to that it had a considerable way to go so an offer asking Mr Best simply walk away in return for a guarantee costs would not be sought might be considered premature.

[13] Turning to the other submissions. The discussion regarding whether or not Mr Best checked out is, I conclude, irrelevant. I read WCT's comment, with which Mr Best takes issue, to be nothing more than part of its chronology setting the scene and not an argument for increasing the tariff. If I am wrong I note it refers to his behaviour with respect to the substantive issues and a consideration of costs should neither reward nor punish behaviours relevant to the substantive consideration. The issue is conduct during the investigation and whether or not it unreasonably increased costs which this is not.

[14] That leaves what I consider the key issue which is the allegation Mr Best prolonged the investigation by pursuing a number of conspiracy theories supported by repeated and unfounded accusations of wrongdoing by others.

[15] That such behaviour might be a consideration which increases a costs award is well established⁹ but, as already said, Mr Best ignored this accusation in his submission and failed to deny it. That creates a problem for him in that this is probably the key submission and one with which I must agree.

[16] In the substantive determination I found, as alleged, that Mr Best levelled numerous accusations of wrongdoing against various people including allegations of reprehensible behaviour. He then failed to substantiate them.¹⁰ Upon these accusations he based what Mr McBride, correctly in my view, characterises as his *scattergun conspiracy theory*. By pursuing this approach Mr Best definitely added to the time taken. As Mr McBride submits, this warrants an increase in the tariff. The question is how much?

[17] I cannot accept the indemnity cost submission if, for no other reason, I do not know the exact amount expended. I also have to note considerable time was also spent on what I would characterise as the legitimate consideration of a potentially viable claim. As already said it was accepted WCT dismissed Mr Best and it follows it must, if challenged, justify that decision.

⁹ See *Bradbury v Westpac Banking Corporation* [2009] 3 NZCA 234 where reference is made to the making of accusations which should not have been made. Accusations of wrongdoing absent credible supporting evidence should not be made.

¹⁰ Above n1 at [41] to [45]

[18] The fact however remains that Mr Best introduced unnecessary and irrelevant material which increased the time taken in two ways. First the claims still had to be addressed and the fact they were unsubstantiated confirmed by cross examination and rebuttal. Second those against whom the accusations were levelled still felt compelled to answer them and that is a natural response which is difficult to criticise.

[19] The question then remains as to what extent this should be recognised and the tariff increased. I would estimate a day was wasted and that should be reimbursed in full. While I have stated I am unaware of WCT's exact bill sufficient information was provided to allow me to conclude an additional day cost around \$10,000. This, I consider, should be added to the tariff which I have calculated at \$20,000. Alternately a perusal of other cost determinations would suggest a 50% increase to the tariff is not inordinate where time has been increased by the pursuit of unmeritorious and irrelevant claims. Either way the outcome is the same - \$30,000.

Conclusion and Orders

[20] For the above reasons I order Peter Best pay Wellington Combined Taxis Limited the sum of \$30,000.00 (thirty thousand dollars) as a contribution toward the costs WCT incurred defending Mr Best's claims.

[21] Payment is to be made within 28 days of this determination.

Michael Loftus
Member of the Employment Relations Authority