

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 351
3031211

BETWEEN HELEN BLANCHARD
Applicant

A N D MURRAY BOYD
Respondent

Member of Authority: Peter van Keulen

Representatives: David Beck, counsel for the Applicant
Nick McKessar, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 2 April 2019, 15 April 2019 and 17 May 2019 from the
Applicant
15 April 2019 from the Respondent

Date of Determination: 13 June 2019

COST DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 5 March 2019¹, I determined that Murray Boyd had unjustifiably dismissed Helen Blanchard and failed to provide her with an employment agreement and failed to produce wage and time records and holiday and leave records when requested. I awarded remedies to Ms Blanchard and imposed a penalty against Mr Boyd.

[2] In my determination, I reserved costs in order to give the parties an opportunity to try to resolve the question of costs. The parties have been unable to agree costs and now Ms Blanchard seeks costs.

¹ [2019] NZERA 122

Application for costs

[3] Mr Beck on behalf of Ms Blanchard, seeks an award of costs in Ms Blanchard's favour being indemnity costs or, alternatively, an award of costs based on the daily tariff with that tariff uplifted to reflect additional cost incurred because of Mr Boyd's conduct of this matter and because Mr Boyd unreasonably rejected a Calderbank offer.

[4] Mr McKessar on behalf of Mr Boyd accepts that costs should follow the event so an award of costs can be made in Ms Blanchard's favour. However, he says there is no basis for increasing the award of costs beyond the standard daily tariff rate and as Ms Blanchard was not successful in all of her claims the daily tariff should be reduced.

Analysis

Costs in the Authority

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² and other relevant Employment Court and Court of Appeal decisions.³

[6] I have considered counsel's submissions and applied the principles referred to above, when determining this costs application.

Costs for Ms Blanchard

[7] The starting point is that costs should follow the event. As Ms Blanchard was successful with her claim, she is entitled to an award of costs.

Daily tariff

[8] The next question is whether I should follow the normal practice of the Authority when setting costs, which is applying the daily tariff being a set amount for each day of the investigation meeting. Or, whether I should depart from applying the daily tariff because

² *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

³ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *GSTech Limited v A labour Inspector of MBIE* [2018] NZEmpC 127

there is some aspect of this case that warrants awarding costs on some other basis, which Mr Beck says in this case should be on an indemnity basis.

[9] Mr Beck says Mr Boyd's conduct in refusing to attend mediation was unreasonable and this is relevant to my assessment of costs. He also says Mr Boyd refused an offer made on a Calderbank basis and as Ms Blanchard was awarded more than that offer in my determination, this is relevant to quantum. In simple terms, this means the costs incurred in the investigation of this claim after Mr Boyd rejected the offer would have been avoided if Mr Boyd had been reasonable in accepting the offer and settled Ms Blanchard's claim by making the payment suggested.

[10] Turning to mediation first, I am not satisfied that Mr Boyd's conduct in relation to the setting down of a mediation date is such that it should impact on the quantum of costs. It appears that he cancelled a scheduled mediation date because of work commitments and then I decided, after discussion with the parties, that this matter would be better progressed through an investigation. Mr Boyd's conduct was insufficient, in my view, to warrant any impact on the assessment of costs.

[11] However, the Calderbank offer is relevant to the question of quantum.

[12] A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

[13] A Calderbank offer will not be relevant to assessing costs if the receiving party reasonably rejects it.

[14] So, looking at the Calderbank offer made by Mr Beck on Ms Blanchard's behalf:

- (a) I am satisfied that the offer of 8 October 2015 met the requirements to be a valid Calderbank offer.⁴

⁴ *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

(b) This offer was rejected by Mr Boyd without any explanation so I cannot say it was reasonably rejected.

[15] So, the Calderbank offer is relevant to the question of quantum, starting with the issue of indemnity costs. There is no presumption that indemnity costs will be imposed following the rejection of a Calderbank offer.⁵ In fact, in most cases where there is an applicable Calderbank offer, the Authority will use it as a basis to uplift the daily tariff.

[16] Indemnity costs normally only follow a Calderbank offer where there is some additional factor making that appropriate, such as the conduct of the case by the applicant.⁶ This means that in order to award indemnity costs I must be satisfied that there was exceptionally bad behaviour by Mr Boyd in his conduct of the case.⁷

[17] I am not satisfied that there was exceptionally bad behaviour by Mr Boyd in his conduct of this claim and I will not award indemnity costs. I am satisfied that it is appropriate to award costs to Ms Blanchard on basis of daily tariff.

Length of the investigation meeting

[18] The investigation meeting in this matter took half a day. Therefore, my starting point, applying the daily tariff is that the award of costs for Ms Blanchard should be \$2,250.00 being half of the daily tariff.

Increasing the daily tariff

[19] The daily tariff can be adjusted for various reasons - the factors relevant to the consideration of the increase or decrease of the daily tariff include:

- (a) Costs awards in the Authority will be modest;
- (b) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;

⁵ *Diver v Geo Boyes and Co Ltd* HC Hamilton CP58/93.

⁶ See for example, *Prins v Tirohanga Group Limited (formally Tirohanga Rural Estates Ltd)* EmpC Auckland AC 27/07

⁷ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234

- (c) Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- (d) Without prejudice offers can be considered;
- (e) Impecuniosity of the other party may be relevant;
- (f) A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[20] The Calderbank offer is relevant to the question of uplifting the daily tariff, but this will not be a significant uplift. Whilst the Court of Appeal⁸ and the Employment Court⁹ advocate adopting a "steely approach" to Calderbank offers, this does not necessarily apply to quantum. A number of factors must be considered in terms of quantum (as set out above) and Judge Inglis observed in *Stevens v. Hapag-Lloyd (NZ) Ltd*¹⁰ that it would be inconsistent with the statutory imperatives for significant costs awards to be imposed on unsuccessful litigants in the Authority.

[21] In *Davide Fagotti v. Acme & Co Ltd*¹¹ the Full Bench of the Employment Court's analysis was that a \$1,000.00 uplift in respect of the daily tariff against a party who unreasonably rejected a Calderbank offer was appropriate. I think this is particularly persuasive and instructive and therefore, in this case, I believe the unreasonable rejection of the Calderbank offer justifies uplifting the daily tariff by \$1,000.00.

Reducing the daily tariff

[22] Mr McKessar on behalf of Mr Boyd says that Ms Blanchard was not successful in her claim of sexual harassment and therefore the daily tariff should be reduced. I do not accept this is appropriate. Ms Blanchard's allegations of sexual harassment did not form a separate personal grievance or claim but rather formed part of the allegations regarding Mr Boyd's conduct which informed her decision to resign i.e. the allegations were part of her unjustified dismissal claim. Ms Blanchard was successful with this claim and it matters not, for cost

⁸ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385

⁹ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135

¹⁰ [2015] NZEmpC 28

¹¹ [2015] NZEmpC 135

purposes, that I made an evidential finding as part of that claim that Mr Boyd's behaviour did not amount to sexual harassment.

GST

[23] In *Stormont v Peddle Thorp Aitken Limited*¹² Chief Judge Inglis summarised the Employment Court's approach to GST on costs. The Chief Judge referred to the Court of Appeal decision in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*¹³ and judgments of the Employment Court¹⁴ before summarising the position as follows (at paragraph [37]):

The position in respect of GST can be summarised as follows. The GST registration status of a successful party is a material factor in determining whether or not an uplift is appropriate, whether from scale or otherwise. The plaintiff is not able to recover GST. It is appropriate to take this into account and uplift costs to reflect that.

[24] The Chief Judge then made the following statement on the issue of GST in connection with awards of costs in the Authority (at paragraph [44]):

It appears that the Authority does not tend to take into account a party's ability, or otherwise, to recover 15 per cent of its costs in applying the daily rate. I accept, essentially for the reasons set out above, that there should be an uplift in costs to reflect the plaintiff's GST status in determining a just contribution to costs in the Authority. I see no reason in principle to adopt a different approach in each forum, including having regard to the underlying objectives of the legislation. It is appropriate to take the plaintiff's GST status into account and to uplift costs in the Authority to reflect that.

[25] Applying this, I consider the circumstances of this case make it appropriate to apply an uplift to the daily tariff to reflect the fact that Ms Blanchard is not registered for GST and she cannot recover the GST amount of her costs. I will uplift the award of costs by 15%.

Conclusion

[26] I award costs to Ms Blanchard based on the daily tariff for a half of a one-day investigation meeting being \$2,250. This rate is then adjusted upward for the unreasonable rejection of the Calderbank offer to \$3,250.00 and this amount is then further adjusted by an uplift of 15%. The amount of costs awarded to Ms Blanchard is \$3,737.50.

¹² [2017] NZEmpC 159

¹³ [2016] NZCA 282 at [10], (2016) 23 PRNZ 260.

¹⁴ *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120 and *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10

Order

[27] Mr Boyd is to pay Ms Blanchard \$3,737.50 as a contribution to her costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority