

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 424
3054653

BETWEEN THOMAS EDWARDS
Applicant

AND RECREATIONAL SERVICES
LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Peter Moore, advocate for the Applicant
Garry Pollak, counsel for the Respondents

Submissions Received: 28 September 2020 from Respondent
12 October 2020 from Applicant

Date of Determination: 14 October 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] On 13 August 2020 I issued a determination addressing a number of claims brought by Mr Edwards.¹ He failed to succeed with any.

[2] Costs were reserved and as the successful party Recreational Services Limited (Recreational Services) now seeks a contribution toward those it incurred defending Mr Edwards' claims.

[3] Normally the Authority will use a daily tariff when addressing a costs claim, with the current starting point being \$4,500 for the first day and \$3,500 for each day thereafter.² From there adjustment may be made depending on the circumstances.

¹ [2020] NZERA 301

[4] The investigation took the better part of, but not, a full day. I would estimate application of the tariff would see a contribution of \$3,500 but Recreational Services seeks a significant increase. It uses a full days' tariff and then asks it be doubled (\$9,000).

[5] Mr Edwards, while accepting costs follow the event and something is payable, argues a significant reduction is warranted. He suggests I order he pay \$500.

[6] In support of its claim the tariff be increased Recreational Services comments on the fact that while the dismissal was challenged with alacrity some 26 months passed before proceedings were initiated. It claims the delay caused *additional time, effort and prejudice*.

[7] It also alleges Mr Edwards put considerable reliance on hearsay evidence and made no attempt to call a witness who, according to him, made assertions upon which he could rely and which would substantiate his views about the nature of his arrangement with Recreational Services and upon which his other claims were founded. Notwithstanding that, and the fact the witness's possible relevance was not mentioned until proceedings were well advanced, it was Recreational Services who tried to get his attendance. It is now said that while this proved unsuccessful due to various issues, including the witness's health, the attempt generated additional and unnecessary cost.

[8] Finally reference is made to attempts to settle and, in particular, what is characterised as a Calderbank exchange about a month prior to the investigation meeting. The first e-mail, from Mr Moore, advises it is *without prejudice except as to costs* and that his client would settle for a total of \$15,025. The response offers \$10,000.

[9] Having considered the submission I conclude Recreational Services' arguments do not convince me there are grounds to increase the tariff, especially by the margin sought.

[10] The argument regarding delay fails due to the fact the legislature considered, and then specified, what it considers an appropriate period within which an applicant might advance a grievance.³ That period is three years and I find it difficult to penalise Mr Edwards for acting within those bounds especially as, as already said, the grievance was initially raised with alacrity. That meant Recreational Services was immediately on notice it should prepare and

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

³ Section 114(6) of the Employment Relations Act 2000

had plenty of opportunity to act accordingly. In any even the extent of any additional cost is not quantified.

[11] That raises the second point: the relevance of the witness Mr Edwards considered conclusive but failed to mention for over two years. He was the manager responsible at the time of the events Mr Edwards challenged. I am of the view his position meant he was someone whose views should have then been canvassed in order to form an opinion about the claims veracity. Whether or not that occurred is, however, irrelevant. The key point is the early raising of the grievance meant Recreational Services had a chance to speak to the witness and while the specifics of Mr Edwards delayed allegations could not be put, Recreational Services was not deprived of an opportunity to at least get an understanding of his views. I accept some additional costs were incurred as a result of Mr Edwards approach but again they are unquantified and, in my view, likely minor.

[12] Turning now to the Calderbank. The underlying principle of a Calderbank is the offer would have led to a more beneficial outcome for the party against whom costs are sought, thus putting the other party to costs that, albeit with the benefit of hindsight, could have been avoided. While it is clear that is the case, given Mr Edwards rejection of the offer and the fact he was subsequently unsuccessful, this submission faces an insurmountable problem.

[13] To be valid a Calderbank offer must expressly state it is *without prejudice except as to costs*.⁴ Recreational Services e-mail, which initiated the exchange, is not couched as such. While these attempts to settle might be a factor taken into account, they do not deliver the potential benefits of a valid Calderbank and are considered the norm in this jurisdiction. Here the documents suggest a fairly standard approach with the parties being unable to conclude a deal which does not warrant an increase in the tariff.

[14] Turning now to Mr Edwards' submission. It concentrates on addressing Recreational Services arguments for an increase to the tariff and those submissions were considered when reaching the conclusion an increase was not warranted. That said the submission raises two additional points. The first is an argument the costs application is improperly motivated and designed to punish Mr Edwards for lodging a challenge to the substantive determination.

⁴ See, for example, High Court Rules 2016, Rule 14.10(1)(a)

[15] It is well established costs may follow the event. The event was Recreational Services success in defending Mr Edwards' claims and irrespective of the motivation it is difficult to criticise the company for exercising a right it has. Further, and even if the allegation costs are sought solely in response to Mr Edwards' challenge is correct, that is a tactic often used in such circumstances and could influence some form of agreed resolution.

[16] The second issue is a claim Mr Edwards is impecunious and, as a result, I should reduce the tariff to the suggested amount of \$500. Even then it is asserted difficulties would arise and after reference to Chief Judge Inglis' comments in *Elistra v Allianz NZ Ltd*⁵ it is suggested I order payment by instalments of \$5 to \$10 per week.

[17] This claim faces a major impediment which is that it is unsupported. No credible evidence has been tendered to support the claim of impecuniosity. All I have is a reference to evidence of Mr Edwards' situation over a year ago followed by Mr Moore's comment that to the best of his knowledge that remains the situation.⁶ In other words Mr Moore does not even appear to know whether or not the claim has factual foundation. It must, in these circumstances, be disregarded.

Conclusion and orders

[18] Having weighed the points considered above I conclude neither party has convinced me there are grounds which would justify a departure from the tariff.

[19] As a result I order the applicant, Thomas Edwards, pay Recreational Services Limited the sum of \$3,500.00 (three thousand, five hundred dollars) being a contribution toward the costs incurred in defending Mr Edwards claims. Payment is to be made no later than 4.00pm on Wednesday 11 November 2020.

Michael Loftus
Member of the Employment Relations Authority

⁵ *Elistra v Allianz NZ Ltd* [2020] NZEmpC 13

⁶ Mr Edwards' submission at [10]