IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 154
5534644

	BETWEEN	STEVEN JAMES GIBBS Applicant
	A N D	THE VICE-CHANCELLOR OF LINCOLN UNIVERSITY Respondent

Member of Authority:	Helen Doyle
Representatives:	Tim Twomey, Counsel for the Applicant Raewyn Gibson, Advocate for the Respondent
Submissions Received:	10 September 2015 from the Applicant 24 September 2015 from the Respondent
Date of Determination:	14 October 2015

COSTS DETERMINATION OF THE AUTHORITY

A I order the Vice-Chancellor of Lincoln University to pay to Steven James Gibbs the sum of $18,000 costs and disbursements in the sum of $378.22.

[1] The applicant was successful in both his application for interim reinstatement and in his substantive application for unjustifiable dismissal. Remedies included an order that the interim order for reinstatement be made permanent. Costs were reserved in both determinations. The parties have been unable to reach agreement as to costs and the applicant now applies for costs. I have received submissions from both parties.

The applicant's submissions

[2] Mr Twomey on behalf of the applicant refers to general principles with respect to costs in the Authority. In doing so he has relied on principles in Employment

Court judgments in *Reid v New Zealand Fire Service Commission*[1] and *Okeby v Computer Associates (NZ) Limited.*[2]. The full Court of the Employment Court in *PBO Limited v Da Cruz*[3] referred to the principles to be applied in an exercise of the discretion as to costs in the Authority.

[3] Mr Twomey submits that the importance of the case to the parties was immense and that the applicant was clear from the outset that his objective was to seek permanent reinstatement to his former position with the respondent. The respondent opposed the application for reinstatement. Mr Twomey submits that both parties committed themselves to significant legal expenses to achieve their respective objectives and that the nature of the applicant's claim required a legalistic approach to be taken.

[4] Mr Twomey submits that if the tariff approach is to be taken, then it would be unfair and unjust to the applicant for the notional daily rate to apply without any uplift. Mr Twomey submits that the amount of time, expertise and skills applied in support of the applicant's case was no different to that for an application for interim injunction followed by a substantive hearing in the High Court or Employment Court.

[5] Mr Twomey submits that the actual hearing time was almost three days with one particularly late finish and that the applicant's actual legal costs including disbursements are $43,075.14. He submits that there should be a significant uplift from the notional daily rate for the applicant to receive a proper and realistic contribution towards his actual legal costs.

[6] Costs are also sought for filing the costs memorandum.

The respondent's submissions

[7] Ms Gibson rejects the submission that the circumstances of this matter warrant a significant uplift from the notional daily rate and maintains the rationale for that is flawed because it is primarily based upon considerations not relevant to the accepted principles to be applied by the Authority in a cost setting.

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[1] [1995] 2 ERNZ at [38]
[2] [1994] 1 ERNZ 613 at 619
[3] [2005] ERNZ 808

[8] Ms Gibson submits that Mr Twomey is seeking to have the Authority apply the principles surrounding an award of costs which are applicable in the Court when the Authority does not apply the same criteria. She refers to the judgment of the full Court of the Employment Court in *Fagotti v Acme & Co Limited*[4] and the statements at [105] and [106] that confirm the Authority is not bound in its approach to the question of costs by the same principles as apply to the Court.

[9] Ms Gibson sets out the principles in *Da Cruz* in her submission. She submits that the principles as set out in PBO have recently been reaffirmed in *Fagotti* at [114] where the Court stated *We have not been persuaded that the broad principles stated by the full Court in Da Cruz should now be departed from or even altered, either in general or in this case in particular….*

[10] Ms Gibson submits that the factors relied on by the applicant in support of the claim for an uplift are not relevant to the exercise of the Authority's discretion. She refers to an element of choice in respect of instruction of counsel and the level of legal resource to apply to the pursuit of the claim having regard to the generally applied daily rate - *Hapag-Lloyd (NZ) Ltd v. Angelique Stephens*[5]:

> *[94] Nor should the original legislative intent be lost sight of. Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of a more formal, procedurally constrained processes of a Court. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate, currently set at $3,500) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate. As the full Court observed in <u>De Cruz</u>:*
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> > *"… the unique nature of the Authority and its proceedings mean parties to investigation meetings should not have the same expectation about procedure and cost as they have at the Court."*

[11] Ms Gibson submits that the majority cases where there has been an uplift in the accepted daily notional rate have involved a situation where *Calderbank* offers

[4] [2005] NZEmpC 135
[5] [2015] NZEmpC 28 at para.[94]

have impacted upon the determination on costs and there are no such considerations in this matter.

[12] Ms Gibson refers to a *Calderbank* offer made by the respondent to the applicant on 16 April 2005. She acknowledges that given the order of reinstatement, this offer does not impact upon an award of costs and the notional daily rate but can be taken into account in terms of the choice the applicant made to incur significant costs in pursuing the matter.

Determination

[13] I have referred to my minute book for the hearing times as there was some dispute about the times for the substantive investigation in the submissions. The application for interim reinstatement occupied half a day. The first day of the substantive investigation was from 9.30am to 4.30pm and the second day was from 10.30am to 6.30pm.

[14] The Authority in determining costs exercises a discretion in accordance with principle whether costs are awarded and if so, in what amount. Awards in the Authority are modest and frequently assessed against a notional daily rate which is at the current time $3,500.00. The Employment Court has recently confirmed in *Fagotti* the broad principles in *Da Cruz* in general should not be departed from and that there should not be an expectation that costs in the Authority are the same as in the Court.

[15] Costs generally follow the event and the applicant is entitled to an award of costs as the successful party in this case.

[16] Costs are not to be used as a punishment or an expression of disapproval. There is no conduct in this case I find which increased costs unnecessarily.

[17] I find that the correct approach to costs in this matter is to start with the daily tariff rate of $3,500 and consider whether there should be uplift or otherwise to that daily rate. It was recognised in *Fagotti* at [114] as important that the Authority did not in that case bind itself inflexibly to the daily tariff but had exercised its broad statutory discretion appropriately to reflect the particular circumstances of Mr Fagotti's case.

[18] The respondent made a financially significant *Calderbank* offer on 16 April 2015 shortly before the first day of the substantive investigation meeting on 22 April 2015. Ms Gibson recognises correctly in her submission that in light of the subsequent reinstatement order the *Calderbank* offer does not impact on the issue of costs. The applicant's rejection of that *Calderbank* offer confirms the importance to him of reinstatement to his position and the value of such an order.

[19] I do not find that uplift to the daily tariff is confined to situations where *Calderbank* offers impact on the determination of costs. Issues such as complexity of a case which in turn impacts on preparation time may also result in uplift to the tariff.

[20] This was not a straightforward unjustified dismissal claim for which the daily tariff without adjustment should be applied to costs. There were areas of factual and legal complexity. The bundle of documents comprised 400 pages and 85 documents. The matter commenced with an application for interim reinstatement with detailed affidavit evidence and submissions. There were two full days of evidence that followed for the substantive investigation and written submissions provided after the investigation meeting in a case where the outcome was extremely important to both parties.

[21] In the exercise of my discretion I find that it would be fair and reasonable to adjust the daily tariff upwards and assess costs on the basis of three days at $6000 per day.

[22] The applicant is entitled to reimbursement of disbursements. These will generally be limited to disbursements in the true sense of payment to a third party. I order reimbursement of the filing fee of $71.56 and the hearing fees of $306.66.

[23] I order the Vice-Chancellor of Lincoln University to pay to Steven James Gibbs the sum of $18,000 costs and disbursements in the sum of $378.22.

Helen Doyle
Member of the Employment Relations Authority