

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 50
5639917

BETWEEN CHRISTOPHER HUTCHING
Applicant

A N D FOURTH ESTATE HOLDINGS
(2012) LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Andrew Shaw, Counsel for Applicant
Simon Dench, Counsel for Respondent

Submissions Received: Written submissions for Applicant on 27 March 2017
Written submissions for Respondent on 13 March 2017

Date of Determination: 3 April 2017

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 15 February 2017¹ I determined that Mr Hutching was not an employee of Fourth Estate Holdings (2012) Limited (Fourth Estate) and therefore I did not have jurisdiction to determine his claim.

[2] In my determination, I reserved costs in the hope that the parties would be able to reach agreement on costs but they have been unable to do so.

[3] Fourth Estate now seeks costs of \$4,500.00, being the current daily tariff. Counsel for Fourth Estate says:

- a. Fourth Estate was successful in defending the preliminary matter of whether Mr Hutching was an employee and costs should follow the event.

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- b. Whilst I dealt with the matter on the papers there was extensive evidence and comprehensive submissions required from both parties taking up considerable time.
- c. Fourth Estate made a Calderbank offer, which was not accepted, but had Mr Hutching accepted it the parties would have avoided the costs incurred in pursuing the application.

[4] Counsel for Mr Hutching says:

- a. Mr Hutching was entitled to seek a determination that he was an employee.
- b. Mr Hutching sought to have that issue dealt with as a preliminary matter, on the papers and in doing so he has not increased costs but actively sought to reduce costs for both parties.
- c. Both parties filed extensive evidence and comprehensive submissions as is their right and as was appropriate for the matter in issue. Mr Hutching cannot be criticised for the manner of his participation in the preliminary matter.
- d. There was still a significant saving of time, and therefore costs, in dealing with the preliminary matter on the papers as opposed to dealing with the substantive claim in an investigation meeting.
- e. Mr Hutching rejected the Calderbank offer made by Fourth Estate by making a counter-offer, which Fourth Estate rejected. Fourth Estate then ended any negotiations by formally withdrawing its Calderbank offer and rejecting the further attempts at settlement by Mr Hutching. In these circumstances, Fourth Estate cannot rely on its Calderbank offer.
- f. As Mr Hutching has not been unreasonable in his pursuit of this matter, as costs were kept down or at least lower than would have been incurred in an investigation meeting and because the Calderbank offer cannot be relied upon, costs should lie where they fall.

[5] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*².

[6] Based on clause 15 and *Da Cruz* and other relevant Employment Court and Court of Appeal decisions³, the approach to be adopted by the Authority includes:

- a. An award of costs is discretionary and the exercise of that discretion should be made in accordance with principle and not arbitrarily.
- b. Costs will generally follow the event but in some instances this will not be the case where, for example, the nature of the case is such that costs should lie where they fall or alternatively where an applicant has not bettered the terms of a *Calderbank* offer which he or she unreasonably rejected prior to the investigation meeting.

[7] In this case, costs should follow the event. This is not a case where each party should bear their own costs and I will make an award of costs for Fourth Estate.

[8] Once a decision has been made by the Authority to award costs in favour of one party then the starting point for quantum is the daily tariff. The Authority can depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a *Calderbank* offer are more appropriate.

[9] This is not a case in which I should depart from the daily tariff.

[10] If the daily tariff is to be applied then the Authority should consider whether that tariff should be increased or decreased. 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.

² [2005] 1 ERNZ 808

³ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *Victoria University of Wellington v. Alton-Lee* [2001] ERNZ 305, *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

- 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.

[11] The applicable daily tariff is \$4,500.00. I will not increase the daily tariff based upon the rejection of the Calderbank offer made by Fourth Estate. In the circumstances, I accept counsel for Mr Hutching's submission that Fourth Estate withdrew the offer before negotiations were properly exhausted thereby negating the ability to rely on the rejection of the offer.

[12] There are no other factors that support raising or lowering the daily tariff. However, I accept that this preliminary matter does not warrant applying the daily tariff for a full day. Considering the conduct of this matter I am satisfied that the parties must have incurred less cost than if it had been conducted through an investigation meeting. I am prepared to apply the daily tariff for two thirds of one day and award costs of \$3,000.00 to Fourth Estate.

[13] Accordingly, Mr Hutching is to pay Fourth Estate the sum of \$3,000.00 towards its legal costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Peter van Keulen
Member of the Employment Relations Authority