

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 584
3082667

BETWEEN

RAJWINDER KAUR
Applicant

AND

HENDERSON TRAVELS LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Jo Douglas and Suzie England-Hall, counsel for the Applicant
Arunjeev Singh, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 8 October 2021 2021 from the Applicant
18 October 2021 from the Respondent

Date of Determination: 23 December 2021

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 27 September 2021, Rajwinder Kaur was successful in her various claims against Henderson Travels Limited.¹ Ms Kaur now seeks costs against Henderson Travels in respect of her claim.

Application for costs

[2] Counsel for the Ms Kaur seeks an award of costs of \$20,000.00. This is a significant increase to the normal daily tariff that would otherwise be applied. Counsel seeks this increase because:

¹ *Kaur v Henderson Travels Limited* [2021] NZERA 418.

- (a) Henderson Travels failed to accept a Calderbank offer made by Ms Kaur.²
- (b) Ms Kaur incurred additional costs due to Henderson Travels confusing and contradictory evidence and because of an adjournment due to additional witness evidence being produced by Henderson Travels.
- (c) Ms Kaur incurred additional costs in making submissions after the investigation meeting.

[3] Counsel for Henderson Travels says that costs should lie where they fall, i.e. I should not make an order for costs. Counsel submits this is appropriate as the Calderbank offer made by the applicant was rejected and a counter-offer was made on a Calderbank basis; the argument being that Henderson Travels did not unreasonably reject Ms Kaur's Calderbank offer and was constructive in trying to settle this matter by making a counter offer. And counsel submits the financial position of Henderson Travels, including as a result of its own costs incurred in responding to Ms Kaur's claim, is such that no order for costs should be made.

Analysis

Costs in the Authority

[4] 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*³ and other relevant Employment Court and Court of Appeal decisions.⁴ I have applied these principles when determining this costs application.

² 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 to 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.

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

⁴ *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; and *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

Costs for Ms Kaur

[5] The starting point is that costs should follow the event. In rare cases this premise can be displaced. However the impecuniosity of the losing party is not a basis for this, so I reject Henderson Travels' submission that costs should lie where they fall.⁵

[6] Ms Kaur was successful in her claim so she is entitled to an award of costs.

Applying the daily tariff

[7] The next question is whether I should follow the normal practice of the Authority when setting costs of applying the daily tariff – that is, applying a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting. The current daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for every subsequent day.

[8] I will apply the daily tariff to award costs in this case.

Adjusting the daily tariff

[9] I must consider if the daily tariff should be adjusted. The daily tariff amount can be adjusted for various reasons - the factors relevant to my 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;
- (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) Calderbank offers can be considered;

⁵ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* above n 3; *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 2)* [2004] 2 ERNZ 274; and *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

(e) Impecuniosity of the parties 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.

Increasing the daily tariff for rejection of a Calderbank offer

[10] On 30 March 2021 Ms Kaur made a Calderbank offer to Henderson Travels, setting out the payment she would accept in settlement of her claim. On 1 April 2021 Henderson Travels rejected that offer stating it disagreed with the analysis and it made a counter-offer on a Calderbank basis. Ms Kaur rejected that counter-offer.

[11] I am satisfied that Ms Kaur's offer met the requirements for Calderbank offers and the failure to accept the offer was not reasonable despite the counter-offer being made.

[12] Ms Kaur exceeded her Calderbank offer in terms of the outcome in my determination so it is relevant for my consideration of whether the daily tariff should be increased.

[13] Whilst the Court of Appeal⁶ and the Employment Court⁷ advocate adopting a “steely approach” to Calderbank offers, this does not necessarily apply to quantum rather to the concept of reversing costs against a successful party that did not better a Calderbank – this is not the situation here. A number of factors must be considered in terms of adjusting the daily tariff and Judge Inglis observed in *Stevens v. Hapag-Lloyd (NZ) Ltd* that it would be inconsistent with the statutory imperatives for significant costs awards to be imposed on unsuccessful litigants in the Authority.⁸

[14] In *Davide Fagotti v. Acme & Co Ltd* 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.⁹

⁶ *Blue Star Print Group (NZ) Ltd v. Mitchell*, above n 4.

⁷ *Davide Fagotti v. Acme & Co Ltd*, above n 4.

⁸ *Stevens v. Hapag-Lloyd (NZ) Ltd*, above n 4.

⁹ *Davide Fagotti v. Acme & Co Ltd*, above n 4.

[15] Based on the principles in these cases, my view is that an increase of \$1,000.00 per day is a reasonable amount.

Increasing the daily tariff for additional work

[16] Counsel for Ms Kaur says that Henderson Travels put forward confusing and contradictory evidence and this increased Ms Kaur's costs. Counsel also says the addition of a witness at the last minute which led to an adjournment also increased Ms Kaur's costs.

[17] I am not satisfied that the conduct by Henderson Travels unnecessarily increased costs such that an increase in the daily tariff is warranted.

[18] Counsel for Ms Kaur says an uplift should be applied because submissions were done in writing after the investigation meeting and this required additional work and increased Ms Kaur's costs.

[19] I am prepared to increase the daily tariff for work done on submissions after the investigation meeting. The work done was significant and had those submissions been presented orally that would have occupied more time for the investigation meeting which would have resulted in a higher award of costs simply by account of the daily tariff rate being applied to that additional time. In this case I think an uplift of \$1,750.00, reflecting a half day of an investigation meeting, is appropriate.

Reducing the daily tariff for financial hardship

[20] In *Tomo v Checkmate Precision Cutting Tools Ltd*¹⁰ Judge Inglis reviewed various cases dealing with reducing any costs award to account for undue financial hardship that might otherwise occur to the unsuccessful party. Judge Inglis noted that this principle should not be applied without some balance as the principles of equity and good conscience (applying to the exercise of the discretion to award costs) must also account for the countervailing interests of the successful party and broader public policy considerations.

¹⁰ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

[21] So, whilst the financial situation of the losing party is relevant to the level of any costs award by way of possible reduction to the daily tariff, the exercise of my discretion in terms of setting costs requires me to consider not just those financial circumstances but other factors including the successful party's interests and the broader public policy considerations.

[22] I have considered these factors when applying my discretion and have determined that the daily tariff should not be reduced to reflect any impecuniosity of Henderson Travels.

Conclusion

[23] The investigation meeting in this matter took one day and I will uplift the daily tariff of \$4,500.00 for that day by \$2,750.00 for the reasons set out. So the award of costs is \$7,250.00.

Disbursements

[24] Ms Kaur is also entitled to the filing fee of \$71.56.

Order

[25] Henderson Travels is to pay Ms Kaur \$7,250.00 as a contribution to her costs in this matter. Henderson Travels must also pay Ms Kaur disbursements of \$71.56.

Peter van Keulen
Member of the Employment Relations Authority