IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 161
5448709

	BETWEEN	DENNIS LAGROSA Applicant
	AND	MAXWELL PARTNERSHIP Respondent

Member of Authority:	Christine Hickey
Representatives:	Shonagh Burnhill, Counsel for Applicant No appearance for Respondent
Investigation Meeting:	16 September 2014 Submissions received from the applicant at the investigation meeting. Costs submissions received from the applicant on 18 September 2014. No submissions from the respondents.
Determination:	16 October 2014

DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination the Maxwell Partnership must pay Dennis Lagrosa:

(i) $5,817.70 gross made up of unpaid wages (including half-time payments for work on 5 public holidays), credit for the accommodation allowance plus the wet weather/protective gear allowance, less the amounts already paid; and

(ii) interest of 5% on the full amount owed from 1 June 2013 until the date it is paid; and

(iii) penalties totalling $4,000 for the reasons set out in this determination.

B. The Maxwell Partnership must also pay Dennis Lagrosa $6,000 as a contribution towards his legal costs and reimburse him $71.56 for the cost of the filing fee.

Employment relationship problem

[1] Dennis Lagrosa worked as an Assistant Herd Manager on a dairy farm in North Canterbury run by the Maxwell Partnership (the firm[1]) from the last week of May 2012 until 31 May 2013. The partners in the firm are Simon and Kerry Maxwell.

[2] Mr Lagrosa claims that during his employment:

- he was paid less than the agreed salary and was not paid at regular intervals,
- he was not paid time-and-a-half for the 5 public holidays that he worked rather he was paid his usual rate of pay,
- he was not paid the accommodation allowance,
- he was not paid the wet weather gear allowance, and
- despite asking for time and wages records and holiday and leave records they were not provided.

[3] By way of remedy in the Statement of Problem Mr Lagrosa initially sought a total of $7,490.43 made up of:

- Unpaid salary,
- $387.65, which is the half-time proportion of the 5 public holidays worked, and
- $320.00, untaxable wet weather/protective gear allowance.

He also seeks:

- Interest on the unpaid amounts,
- A penalty for a breach of clause 12.5 of the individual employment agreement,
- A penalty for failure to supply wages and time records,
- A penalty for the failure to supply leave records, and
- Legal costs associated with making this application.

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[1] Section 7 of the Partnership Act 1908 provides that people that have entered into a partnership with one another *are for the purposes of this Act called collectively a "firm"*.

Mr Lagrosa has not sought unpaid holiday pay, which he is likely to have been entitled to on the unpaid portion of salary. Therefore, I have made no order for this.

Procedural background

[4] Mr Lagrosa lodged a Statement of Problem with the Authority on 7 May 2014. Prior to that Mr Lagrosa engaged in direct discussion with the Maxwells and employed an accountant to engage in correspondence with the firm. The parties went to mediation on 18 March 2014 at Mr Lagrosa's initiative. However, no matters have been settled.

[5] On 8 May 2014 the Authority's support officer sent the respondent a copy of the Statement of Problem via the firm's solicitor giving 14 days to file a Statement in Reply.

[6] No Statement in Reply was received within that time. On 12 June 2014 the Authority was advised by a staff member from the respondent's solicitor's office that the Maxwells had been overseas, and their solicitor had also been away. Their solicitor was due back in the office on 16 June 2014.

[7] On 27 June 2014 the respondent's solicitor advised the Authority's support officer that the respondents had received a copy of the proceedings but that he had not received instructions to respond to the Statement of Problem. He later advised that as he had no instructions he was no longer representing the respondent.

[8] On 30 June 2014 the Authority's support officer wrote to the firm at the home address of Mr and Mrs Maxwell on the farm and advised them that the Authority was going to hold a directions conference via telephone on 15 July 2014.

[9] On 1 July 2014 Mr Maxwell contacted the Authority's support officer to advise that Mrs Maxwell would take part in the teleconference.

[10] The teleconference proceeded with Mrs Maxwell's participation. Ms Burnhill represented Mr Lagrosa. Mrs Maxwell advised that she had received the Statement of Problem but that she had been away and she would deal with responding to the Statement of Problem now that she was back.

[11] During the directions conference:

- the Authority set 16 September 2014 as the date for the investigation meeting by consent with the parties;
- the Authority set a timetable for exchange of evidence;
- the Authority directed the firm to provide a Statement in Reply and Mr Lagrosa's time and wages records to the Authority and to Ms Burnhill by 29 July 2014;
- Mrs Maxwell confirmed the Authority had the correct postal and email addresses for further correspondence and notices;
- Mrs Maxwell stated the respondents disagreed with all the claims made in the Statement of Problem and would not pay Mr Lagrosa anything.

[12] After the teleconference on 15 July 2014 the Authority issued a notice of direction recording the points set out at paragraph 11.

[13] Ms Burnhill complied with the direction that Mr Lagrosa's statements of evidence and any other documents he intended to rely on at the investigation meeting were to be provided to the Authority and the Maxwells. She was granted an extension because she had expected to have the Maxwells' time and wages records to assist her to prepare Mr Lagrosa's statement of evidence and accompanying documents. However, they had not been supplied by 29 July 2014 as directed.

[14] In communicating the granting of the extension to Ms Burnhill the Authority's support officer sent the following email from me to the Maxwell's email address:

> *Ms Burnhill should proceed to file her witnesses statements of evidence because the investigation meeting will take place whether or not the respondent provides any documentation. She may have until Tuesday, 26 August to file the evidence which gives the respondent an opportunity to file evidence in reply before the investigation meeting.*
>
> *In the event of the applicant's claim/s being successful Ms Burnhill may wish to consider in applying for costs whether her client has been put to any extra expense as a result of the respondent ignoring the Authority's direction to produce the applicant's time and wage records and a statement in reply by 29 July 2014.*

[15] Mr Lagrosa's evidence was filed and supplied to the Maxwells on 26 August 2014.

[16] On 18 July 2014 the Notice of Investigation Meeting confirming the time, date and venue was sent to both parties and I am satisfied that it was served on the firm. Therefore Mr and Mrs Maxwell would have been advised that:

> *If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*
>
> *You are also advised that any legal costs incurred by the other party may be awarded should you not be successful in bringing or defending the claim.*

[17] The Authority has received no documents from the firm.

[18] At 9am, before I left the Authority's office for the investigation meeting venue I checked with the Authority's support officer whether there had been any messages from the Maxwells. There had not been. I instructed her to contact me immediately if the Maxwells made any contact with her. The Maxwells were not at the investigation meeting at its start time of 9.30am.

[19] Before starting the investigation meeting I waited until 9.40am in case the Maxwells were running late or having difficulty finding parking. At 9.40am I walked to the reception area of the hotel where we were holding the meeting to see if I could find the Maxwells or a representative of the firm. There was no-one there. I came back to the meeting room and checked my email and text messages. There were no messages.

[20] The investigation meeting began at 9.43am in the absence of the respondent and concluded at 10.30am.

[21] At the investigation meeting Mr Lagrosa and his current employer, David Hislop, gave sworn evidence. Mr Hislop had not provided a written witness statement in advance. However, he was willing to give evidence and did so by answering my questions about farming industry practice in relation to provision of accommodation and his understanding of the *Federated Farmers of New Zealand Individual Employment Agreement (Permanent)* form used by the Maxwells for Mr Lagrosa. I am satisfied that Mr Hislop is a farmer who has longstanding experience of employing

staff and providing accommodation to those staff and using the Federated Farmers individual employment agreement. His evidence was relevant and helpful.

[22] Mr Lagrosa presented his IRD summaries of earnings for 2012 and 2013 at the investigation meeting.

[23] At the end of the investigation meeting I was able to give an oral indication to Mr Lagrosa that his claims were largely successful although I had not at that stage decided on the period of time for which interest would be awarded or the quantum of any penalties I would award. I also indicated that I was unlikely to award a penalty for failure to supply time and wages records as well as for a failure to supply holiday and leave records.

Determination

[24] The Authority needs to establish whether Mr Lagrosa's claims are proved. I have Mr Lagrosa's evidence, written and oral, including copies of payments into his nominated bank account, his IRD statements of earnings, his accountant's calculations contained in a letter sent to the Maxwells and a copy of the individual employment agreement (IEA) as well as Mr Hislop's oral evidence to assist me to decide whether the claims are proved.

The relevance of the lack of a wages and time record

[25] Section 132 of the Employment Relations Act 2000 (the Act) says:

> *(1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that –*
> *(a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and*
> *(b) The failure prejudiced the employee's ability to bring an accurate claim under section 131.*
> *(2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that these claims are incorrect, accept as proved all claims made by the employee in respect of –*
> *(a) the wages actually paid to the employee:*
> *(b) the hours, days, and time worked by the employee.*

[26] The firm's failure to participate in the Authority's process means that I have not had any evidence from the Maxwells explaining why they do not agree with Mr Lagrosa's claims.

[27] The firm's failure to produce wages and time records, in breach of s 130 of the Act, prejudiced Mr Lagrosa's ability to make an accurate claim for wage arrears. Therefore, I may rely on Mr Lagrosa's evidence to establish the wages actually paid to him and the hours, days and time he worked and I do so. The calculation method I have used is set out below.

The individual employment agreement

[28] Mr Lagrosa and Mr Maxwell, on behalf of the firm, signed an IEA on 30 March 2012. The IEA contains the following relevant clauses:

> ***38 Entire Agreement***
> *38.1 The parties agree that this Agreement contains everything the parties have agreed on in relation to the employment. Neither party can rely on an earlier document, or on anything said or done by another party (or by a director, officer, agent or employee of that party) before the Agreement was signed.*
>
> ***39 Variation***
> *39.1 The parties may only vary this Agreement in writing.*

[29] There is some suggestion in correspondence from Mr Lagrosa's accountant that the Maxwells wrote to, or told, him that they had entered into another informal agreement to pay Mr Lagrosa only $38,000 or $36,000 per annum. However, Mr Lagrosa says that no other IEA was entered into. I do not have any direct evidence from the Maxwells to that effect. If it was the case that they understood that they were entitled on an orally agreed basis to pay him less than is in the written IEA they were mistaken. Clause 39 of the IEA clearly states that any variation of the agreement had to be in writing. No varied or later written IEA has been produced.

[30] In addition, it is important to note that the essential skills work visa granted to Mr Lagrosa by Immigration NZ to work for the firm as assistant herd manager was granted in reliance on the signed IEA dated 30 March 2014 in which the salary is $43,000. Any employer who has entered into an IEA with a worker who has used that IEA to gain a work visa who then enters into a subsequent IEA, which is less

favourable to the employee, should be aware that the subsequent IEA could be subject to scrutiny at a later date. Legal questions, such as whether the subsequent IEA was entered into under duress, would naturally arise.

Wet weather gear allowance

[31] The IEA provides:

> *9.1.2 The Employee chooses to provide his/her own wet weather gear and/or protective clothing, the Employer will pay the Employee a reimbursement of:*
> *$320.00 per year*
> *9.2 Wet weather gear/protective clothing shall be:*
> *Raincoat or leggings or Gumboots or Gloves ...*
>
> ***10 Reimbursing allowances***
> *10.1 All allowances are to be paid and accounted for in terms of current Inland Revenue policies. (Reimbursing allowances are tax free in the hands of the Employee and tax deductible for the Employer.) ...*

[32] I accept Mr Lagrosa's evidence that he provided his own wet weather and protective gear apart from a pair of gumboots provided by the Maxwells. Despite the provision of the gumboots by the respondent the way clause 9.2 is worded, using the word "or" means that the full reimbursement is payable if Mr Lagrosa provides any one of the listed items, which he did. I accept his evidence that he was not paid the $320.00 he should have been. The Maxwell Partnership must pay Mr Lagrosa $320 for the wet weather/protective gear allowance.

Time and half for public holidays

[33] Clause 19 of the IEA provides:

> ***19 Public holidays***
> ...
> *19.4 If the Employer requires the Employee to work on a public holiday:*
> *19.4.1 The Employee shall be paid the portion of the Employee's relevant daily pay that relates to the time actually worked on the day plus half that amount again.*[2]

[34] Clause 19 and s 50 of the Holidays Act 2003 mean that Mr Lagrosa should have been paid time-and-a-half for working on a public holiday. I accept Mr Lagrosa's evidence that he worked on Labour Day, Canterbury

[2] This is also a statutory requirement under s 50 of the Holidays Act 2003.

Anniversary, Christmas Day, Boxing Day and Easter Monday. From the available evidence it is sufficiently proved that Mr Lagrosa was only paid his usual daily rate. Therefore, Mr Lagrosa must be paid the $387.55 claimed to put the rate paid up to time-and-a-half.

> *Accommodation allowance*
>
> ***ACCOMMODATION***
> ***15 Residential service tenancy and accommodation***
> ...
> *15.5 The Employer provides accommodation to the Employee as part of the Employee's employment. The rental value of the accommodation is agreed at clause 12. ...*
>
> ***16 Accommodation and meals within the Employer's residence***
> *(Cross our this entire section if inapplicable and initial the deletion)*
> *16.1 Where the Employer provides accommodation and meals within the Employer's place of residence the value of the accommodation and meals is agreed at $50/week.*

(This clause was initialled by Mr Lagrosa (DL) and Mr Maxwell (SBM)) ...

[35] Clause 16 records the value of *accommodation and meals* as $50 per week. Mr and Mrs Lagrosa lived in a separate house to the Maxwells. Clause 16 relates to a situation in which an employee shares the employer's residence so it is not applicable to Mr Lagrosa as he was not accommodated within the employers' residence.

[36] It appears from clause 15 that the value of the accommodation should have been recorded at clause 12 instead as $50 per week.

[37] I have relied on Mr Lagrosa's understanding of what the situation was to be with his accommodation, what actually happened in practice, Mr Lagrosa's accountant's calculations and Mr Hislop's evidence of industry practice. I have also had regard to the *contra proferentum* rule to find that the ambiguity in the way the IEA form was completed about how the value of accommodation should be construed must be interpreted against the firm, whose IEA form was used, and in favour of Mr Lagrosa.

[38] I conclude that the proper practice for accounting for the accommodation allowance of $50 per week, or $2,600 per year would have been to include it in the

gross amount to be paid to Mr Lagrosa meaning $43,000 plus $2,600 = $45,600[3] was Mr Lagrosa's gross annual income. PAYE should then be taken off the total amount and then the $2,600 accommodation allowance should be subtracted from the net amount to be paid. It appears that this was not done but that is how I have calculated what is due to Mr Lagrosa.

What amount is owed to Mr Lagrosa in unpaid salary including the amounts above?

[39] Clause 12 of the IEA states that Mr Lagrosa's salary would be paid by way of equal instalments. However, Mr Lagrosa's salary was paid irregularly and in differing amounts. For example, he was paid:

- $1,112.00 on 15 June 2012,
- $1,180.00 on 29 June, 12 July, and 27 July 2012,
- $2,360.00 on 28 August and 24 September,
- $2,193.00 on 23 October and
- $2,310.00 on 20 November 2012.

[40] The quantum of Mr Lagrosa's claim for unpaid salary changed at the investigation meeting because since lodging the Statement of Problem he discovered two more payments which need to be credited to the overall claim. One payment of $1,180.00 was made on 10 August 2012 and one of $255.40 was made on 4 January 2013. Those payments reduce the amount of unpaid salary claimed by $1,435.40.

[41] The $43,000.00 annual salary + $387.65 owed for work on public holidays + $2,600.00 accommodation allowance for 12 months = $45,987.65 gross. The IRD Summaries of Earnings for Mr Lagrosa for June 2012 to June 21013 show tax of $6,299.00 accounted for by the respondent to the IRD on Mr Lagrosa's salary. However, I am prepared to give the respondent credit for paying tax of $7,067.72 as Mr Lagrosa's accountant had evidence by way of an IRD printout that amount had been paid.

[42] Therefore, when I subtract $7,067.72 from $45,987.65 = $38,919.93 - $2,600 accommodation allowance + $320.00 wet weather/protective gear allowance = $36,639.93 gross is owed to Mr Lagrosa overall. I am satisfied that Mr Lagrosa has

[3] This does not allow for any additional payment owed for work done on public holidays.

been paid a total of $30,822.23 net. Therefore there is still $5,817.70 gross owed to Mr Lagrosa, which the firm must pay without deduction. Mr Lagrosa will be responsible for paying any further tax due to the IRD.

Penalties

[43] The orders made for unpaid salary and the wet weather/protective gear allowance have been made to put Mr Lagrosa in the position he should have been in all along. On the other hand, penalties are not intended to compensate or reimburse but focus on the conduct of the party who breaches legislative requirements and/or the provisions of an employment agreement. The dual function of penalties is to punish wrongdoing and to deter it from happening again, both in relation to the Maxwell Partnership and other employers in general.

[44] Ms Burnhill submits that penalties should be awarded for:

- Breach of s 132 of the Act by failing to supply time and wages records, and
- Breach of s 82 of the Holiday Act 2003 by failing to give access to or provide a copy of Mr Lagrosa's holiday and leave record, and
- Breach of clause 12.5 of the IEA by failing to pay the salary in equal instalments.

Penalties for failure to produce time and wages records and for failure to give access to or provide holiday and leave records?

[45] The Maxwell Partnership breached its obligations as an employer by failing to produce wages and time records under s 132 of the Act.

[46] Clause 17 of the IEA states:

> ***17 Wages and time record***
> *17.1 The Employer shall maintain a written record of the Employee's details (or in a form that allows the information in the record to be easily accessed and converted into a written form) including the Employee's holiday and leave record.*[4] ...

[4] This is also a statutory requirement under s 130 of the Act and s 81 of the Holidays Act 2003.

[47] Clause 17 means that the wages and time records had to be kept which were sufficient to also be holiday and leave records, which an employer is bound to keep under 81 of the Holidays Act. Section 81(5) of the Holidays Act 2003 provides that a permissible way of keeping holiday and leave records is to keep them as part of the wages and time records.

[48] Therefore, in requesting the wages and time records Ms Burnhill understood that Mr Lagrosa would also get access to his holiday and leave records. However, no such records were supplied.[5]

[49] Section 135(1)(b) of the Act provides that Mr Lagrosa has the right to bring an action to recover a penalty for any breach of the Act affecting him. The Maxwell Partnership's failure to provide the wages and time records was a breach affecting to Mr Lagrosa.

[50] I consider a penalty for failure to provide time and wages records should be imposed on the Maxwell Partnership to send an *unequivocal message*[6] that breaches of statutory employer responsibilities are unacceptable in New Zealand. However, I do not consider that an additional penalty should be imposed for failure to provide holiday and leave records as those records were not separately requested. However, in setting the quantum of the penalty I take into account that the failure to provide wages and time records not only prejudiced Mr Lagrosa's ability to bring an accurate claim for salary arrears but also to bring an accurate claim in relation to the public holidays worked. I recognise that in applying s 132(2) I have somewhat mitigated the prejudice to Mr Lagrosa but as already stated the purpose of any penalty is not to compensate Mr Lagrosa.

Penalty for breach of the IEA?

[51] Mr Lagrosa's salary was not paid in equal instalments as clause 12 set out it would be. That is a breach of Mr Lagrosa's IEA for which a penalty could be imposed under s 135 of the Act. In addition, Mr Lagrosa's salary was not paid at regular intervals as clause 13 envisaged it should have been:

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[5] In the absence of any cooperation by the Maxwell Partnership in the Authority's process it is impossible to know whether such records were even kept.

[6] Such as in *Tan v Yang and Zhang* [2014] NZEmpC at 65 at paragraph [34] and other cases cited at paragraph [1] of the decision

> ***13 Payment of wages or salary and deductions***
> *13.1 Wages/Salary shall be paid weekly/fortnightly/monthly (Delete inapplicable and initial).*

[52] Unfortunately neither choice was deleted. However, I consider it is an implied term in the employment agreement that as the wages or salary should have been paid in equal instalments they must have been payable at regular intervals; such as weekly, fortnightly or monthly.

[53] I consider the breach of clause 12 of Mr Lagrosa's IEA should attract a penalty.

[54] I accept Mr Lagrosa's evidence that the irregularity of his salary payments meant that more than once there were insufficient funds in his bank account to make automatic payments for car finance and life and car insurances. His bank charged him dishonour fees. He has not claimed reimbursement for the cost of those fees. The combined effect of the failure to pay Mr Lagrosa's salary in equal instalments and at regular intervals was to cause Mr Lagrosa financial insecurity. I take into account the financial insecurity consequent on irregular salary payments in setting the amount of the penalty.

Quantum of penalties

[55] The maximum penalty that can be imposed for breaches of the Act in the case of an individual as an employer, as opposed to a company or other corporation, is $10,000.[7] That is the correct maximum level at which to set the penalty for the firm because a partnership is not an incorporated entity. Instead, under the Partnership Act 1908 the partners are jointly liable for debts and obligations of the partnership.[8] Also if a partner acting the ordinary course of business incurs a penalty the firm is liable for the penalty.[9]

[56] There is an increasing number of cases in which vulnerable migrant workers have been subject to exploitation. Section 3(a)(ii) of the Act states that one of the

[7] Section 135(2)(a) of the Act.
[8] Section 12
[9] Section 13

purposes of the Act is to acknowledge and address the inherent inequality of power inherent in employment relationships. That inherent inequality is greatly increased for workers such as Mr Lagrosa who was able to work only under a work permit specifically issued in relation to working for the Maxwell Partnership, who does not speak English as his first language, and who was initially unaware of his rights as an employee in New Zealand.

[57] In addition, I agree with the view expressed by Member Arthur recently that:

> *In addition to the harm done to such workers, it* [failing to produce time and wages records] *is also an affront to those many other businesses that do make the effort of cost and time to properly observe the expected community standards as expressed in the legislation enacted by Parliament.*[10]

[58] In setting the penalties for the breaches I have taken into account the vulnerability of the applicant, and the length of time he was employed while the breaches were ongoing. I have also considered the fact that the Maxwell Partnership could have had access to professional advisers to allow it to implement proper business practices and to get advice that failure to supply time and wages records was in breach of the law but it apparently did not choose to get professional advice or if it did it did not comply with that advice. In addition, the breaches were not merely technical, were ongoing and I do not believe the failure to provide wages and time records was inadvertent.

[59] I consider a significant penalty should be imposed[11] and I impose a global penalty for the breaches of the IEA and the failure to provide wages and time records of $4,000.

[60] Section 136(2) of the Act allows the Authority to order the whole or any part of a penalty to be paid to any person. In all the circumstances I consider that the entire penalty should be paid to Mr Lagrosa.

Costs

[61] Often in the Authority costs decisions are reserved for separate consideration after the substantive determination has been issued. In this case, particularly in light

[10] *Kate Feeney, Labour Inspector v BY Limited* [2014] NZERA Auckland 208, paragraph [19]
[11] I have considered penalties imposed in other recent cases in setting the penalty amount.

of the non-participation of the respondent, I indicated to Ms Burnhill at the investigation meeting that I would be amenable to deciding costs as soon as possible and within the one determination in the hope of reducing any cost of enforcing the Authority's determination that Mr Lagrosa may face. Ms Burnhill was given until 22 September 2014 to provide a memorandum on costs but provided it on 18 September 2014.

[62] The respondent was given until Monday 29 September 2014 to make any submissions it wished to make in relation to costs and I indicated that the determination would be issued after that date. Therefore, I reserved my consideration of costs until after 29 September 2014. No submissions on costs were received from the firm.

[63] I made my written substantive determination before receiving Ms Burnhill's submissions on costs and so I did not see the 'without prejudice except as to costs' (*Calderbank*) offers made on Mr Lagrosa's behalf before making my substantive determination.

[64] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act. Costs are awarded at the discretion of the Authority and generally follow the event, that is, the unsuccessful party is likely to be ordered to pay a reasonable contribution towards the successful party's costs.

[65] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz,* a judgment of the Full Court of the Employment Court.[12] The Court in the *Da Cruz* case noted that in exercising its discretion the Authority frequently judges costs against a notional daily rate.

[66] The usual starting point for consideration of costs in the Authority is a notional daily tariff of $3,500. Mr Lagrosa's actual costs are $10,375, which includes costs leading up to and including mediation. Ms Burnhill submits for Mr Lagrosa that a costs award of $7,000 is reasonable for the following reasons:

[12] [2005] ERNZ 808, at 819.

- The respondent's lack of engagement with the process, such as failing to supply time and wages records, increased the work that Ms Burnhill needed to do on Mr Lagrosa's behalf to quantify and prove his claims,
- Ms Burnhill prepared for the investigation meeting as if the respondent would attend and defend Mr Lagrosa's claims,
- The legal costs were reasonably incurred,
- The claims were of great importance to Mr Lagrosa, and
- Mr Lagrosa made timely 'without prejudice except as to costs' offers to settle on 11 December 2013 and on 20 May 2014 which, if accepted, would have meant that he would have incurred much lower costs than he now faces.

[67] I consider that if the Maxwell Partnership had been represented at the investigation meeting the matter would have been likely to occupy a half-day; with a corresponding tariff of $1,750. It was not a legally complex matter. However, I agree that the firm's lack of co-operation with or participation in the Authority's process up until the investigation meeting did increase the amount of work required from Mr Lagrosa's counsel. That is a factor that I take into account as increasing the contribution that the respondent should make to Mr Lagrosa's costs upwards from $1,750.

[68] Up until and including mediation on 18 March 2014 Mr Lagrosa incurred approximately $3,930 (ex GST) in legal fees and $255 in administration costs. The Authority does not usually award costs leading up to and including mediation and I do not consider it correct to do so in this case. Nor do I propose to award any contribution to reimburse Mr Lagrosa for administration fees which are not quantified and so have not been proven to be true 'out of pocket' expenses for Tavendale and Partners, apart from the Authority filing fee of $71.56 which the Maxwell Partnership must pay Mr Lagrosa.

[69] On 11 December 2013 Mr Lagrosa made a 'without prejudice except as to costs' offer to settle for $7,253.11 and $5,000 in legal costs. The offer was precise, clear and open for acceptance or counter-offer until 19 December 2013, a reasonable time. On 20 May 2014 Mr Lagrosa made a further 'without prejudice except as to costs' offer to settle for $7,490.43 and $5,433.75 in legal costs. That offer was also precise, clear and open for acceptance for a reasonable period.

[70] Mr Lagrosa has now been awarded $5,817.70, plus 5% interest ($24.24 per month x 18 months to end of September 2014 = $436.33) and $4,000 in penalties. Leaving the costs portion of the offers to settle to one side and taking into account the penalties Mr Lagrosa can be said to have beaten the amounts he was prepared to settle for in December 2013 and in May 2014. However, he has also incurred far greater legal costs and administration fees than the $5,000 he was prepared to settle for in December 2013 and May 2014. The majority of those costs have been incurred since the offers were made.

[71] Having had regard to the principles set out in *Da Cruz*, the time taken for the investigation meeting, the *Calderbank* offers and the conduct of the parties, I consider that a contributory award of $6,000 towards Mr Lagrosa's actual costs is reasonable.

Christine Hickey
Member of the Employment Relations Authority