

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 87
3148301

BETWEEN

DENNIS MAGILL
Applicant

AND

SLT COMPANY LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Robert Morgan, advocate for the Applicant
Sarah Wadworth, counsel for the Respondent

Submissions Received: 19 January 2023 from the Applicant
23 January 2023 from the Respondent

Date of Determination: 27 February 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 11 January 2023 I issued a determination in which I concluded SLT Company Limited (SLT) had successfully defended a claim from Mr Magill that he had been unjustifiably dismissed.¹ Costs were reserved and as the successful party SLT now seeks a contribution toward those it incurred.

[2] The Authority's jurisdiction to order a contribution toward a party's costs is exercised by applying well-established principles.² Those principles recognise that:

¹ *SLT Company Limited v Magill* [2023] NZERA 6

² *Employment Relations Act 2000, Schedule 2, clause 15, Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 and www.era.govt.nz/assets/Uploads/practice-note-2.pdf

- (a) a successful party should receive a contribution toward reasonably incurred costs and expenses;
- (b) costs should generally be modest and may not be used to punish the substantive conduct of the unsuccessful party;
- (c) the nature of a case may allow for an order that costs lie where they fall; and
- (d) the Authority may use a notional daily tariff as its starting point. From there adjustment may occur either up or down depending on the circumstances of the case. Such adjustment may be to take account of settlement offers, particularly “calderbanks,” the financial means of the liable party and whether or not a party unnecessarily increased the costs incurred by the other.

[3] The current tariff is \$4,500 for a one day investigation but SLT seeks considerably more. Indeed it seeks both “costs and disbursements on a full solicitor-client basis from 4 August 2021” which was approximately when proceedings were initiated. The amount sought is \$12,405 with that sum being supported by the requisite invoices.

[4] Interestingly the initial submission on costs came from Mr Magill though this appears to have been a response to his having been approached about costs by SLT. He says that while unsuccessful and therefore liable for some contribution toward SLT’s costs “... based on the daily tariff” the amount should equate to a half day’s tariff.

[5] In support of this he argues that is because the investigation concluded at 2.20pm meaning its length was closer to a half day. With this I cannot agree as my notes show the investigation went well into the afternoon with the presentation of submissions not commencing till after 3pm. A full day is far more appropriate as SLT submits.

[6] As further support for his position Mr Magill argues he took the claim in good faith expecting he would be vindicated and did nothing to delay the process. I cannot fault either assertion.

[7] More importantly however Mr Magill refers to evidence he tendered during the investigation that the dismissal had caused financial hardship. Again I agree. The evidence was relatively strong but included references to an ability to access some funds so the exact situation was unclear but that is not the issue. It is asserted that hardship remains and any award of costs will have to be paid on an instalment basis.

[8] In making its claim SLT relies on two Calderbank offers which were tendered as follows.

[9] On 4 August 2021 SLT responded to Mr Magill's grievance by suggesting it would most likely be successful and if not that would only be the result of minor procedural faults which would, after application of the compulsory requirement the Authority consider contribution, see Mr Magill receive little if any recompense. SLT offered to replace the dismissal with a resignation, provide a certificate of service, and pay \$2,000. Perhaps crucially SLT put Mr Magill on notice rejection would see it use the letter to claim all costs thereafter.

[10] The offer was rejected.

[11] On 16 June 2022 SLT sent its second offer. It again proposed the dismissal be rescinded, there be a certificate of service and increased the financial offer to \$8,000 (compensation and costs combines).

[12] There was no response and SLT subsequently withdrew the offer some four weeks later.

[13] The submission in respect to the Calderbanks is a compelling one when it comes to considering an increase to the tariff. The underlying principle of a Calderbank is that a rejected 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. Here, there can be little doubt that is the case given SLT's success. It is well established rejection of what proved to be a reasonable offer should be reflected in later a costs award – indeed the Courts have previously held a steely approach should be taken in this regard.³

[14] The question is how much and in this regard I consider there are two important considerations. The first is the evidence suggests an award of the magnitude SLT seeks would see a result close to indemnity costs given the first Calderbank was tendered close to the initiation of proceedings. A costs award is a contribution and not indemnity absent a compelling rationale and evidence of flagrant misconduct which unduly put the other party to

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20]

additional cost.⁴ Rejection of the Calderbanks aside there is no evidence of such conduct so the Calderbanks will only go so far when it comes to increasing the tariff.

[15] On the other hand and arguing against an increase is the issue of impecuniosity. As already said there was evidence Mr Magill faced financial hardship. Its extent however was uncertain and there is no evidence it is continuing though that produced at the investigation strongly suggests continuing issue are likely. Furthermore and when seeking instalment payments there is an onus on the requestee to show the need and provide evidence about means. To that end Mr Magill was asked to provide further information but has failed to do so.

[16] All this leads to a conclusion the Calderbanks warrant an increase in the tariff but not to the extent sought. I consider a third appropriate. The lack of a response about Mr Magill's financial situation means there will be no order regarding instalment payments though it is accepted this may yet become an issue.

Conclusion

[17] I order Dennis Magill pay SLT Company Limited the sum of \$6,000.00 (six thousand dollars) as a contribution toward the costs SLT incurred defending itself against Mr Magill's claims. Payment is to be made within 28 days of this determination.

Michael Loftus
Member of the Employment Relations Authority

⁴ *Westpac Banking Corporation* [2009] 3 NZLR 400