



is said to have been a failure to engage in settlement discussions and the ignoring of *Calderbank* offers.

[4] It is submitted for Ms Brown that the appropriate upper limit of Ms Marks costs is no more than \$8,131. That is calculated on the basis that the fee agreement provided for a fee of one-third of the award plus an additional \$1,500 fee. It is submitted that the upper limit in this case relating to a contingency fee “no win, no fee” agreement, and excluding any fee said to be tied to any costs award, is limited. It is also submitted for Ms Brown that Ms Mark would be unjustly enriched by any award of costs having regard to the contingency agreement.

[5] In relation to the alleged *Calderbank* offer, Ms Brown submits that the offer was made late and after most of the relevant work was completed. She also contests the basis for some of the invoices provided as relating to matters not in issue before the Authority or claims that were otherwise withdrawn.

### **Costs principles**

[6] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.<sup>2</sup>

[7] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that *Calderbank* offers may be taken into account, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party’s conduct.<sup>3</sup>

[8] The daily tariff is usually taken as a starting point,<sup>4</sup> although not used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

### **Consideration**

[9] The investigation meeting consumed, in effect, a full day. A timetable was put in place for the exchange of written submissions following the investigation meeting and it is appropriate and consistent with the approach to costs taken by the Authority to

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>3</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

<sup>4</sup> Employment Relations Authority Practice Direction, August 2023, <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

make an allowance of a half day for that process. The daily tariff approach would see a contribution of \$4,500 for the first day and \$1,750 for the half day used for submissions, the total being \$6,250. I am satisfied that is the appropriate starting point.

[10] There is no basis for indemnity costs in this case and they are not claimed. The submissions lodged contained some focus on the issue of Ms Mark's contingency agreement and contentions as to the appropriate upper limit of the costs actually and reasonably incurred.

[11] Such as issue is taken with the contingency agreement, I do not consider there is inherently anything about such an agreement that necessarily limits the costs that should be awarded where otherwise appropriate. Further, I am not satisfied that Ms Mark would be unjustly enriched by an appropriate award of costs.

[12] Ms Mark submits that the upper limit of the costs actually incurred totals \$12,957.42 and that that sum would increase based on any costs recovered in excess of the Authority's daily tariff.

[13] Invoices provided by Ms Mark totalled \$9,393.32, \$10,802.32 including GST. Ms Brown's submissions took issue with two of those invoices, one for \$264.53 and the other for \$719.34, as relating to matters not relevant to the calculation of costs in the Authority. If those sums were excluded, the total would be \$9,818.45 including GST.

[14] Having considered the invoices, the contingency fee arrangement, and the submissions, I am satisfied that the following costs were actually incurred by Ms Mark in relation to matters that are properly to be taken into account when considering the issue of costs relating to the Authority's investigation:

- (a) one third of any financial outcome (that being, at present and excluding any award of costs, being \$6,698.66, one third of total \$20,096 award relating to the substantive determination);
- (b) an additional \$1,500 fixed fee charged on the basis of a financial award being made;
- (c) a \$300 fee charged relating to progressing the matter in the Authority;
- (d) a fixed fee of \$62.22 charged in relation to the filing fee; and
- (e) the GST charged on the above sums.

[15] The total of the above, excluding the filing fee, is \$8,498.66, \$9,773.45 including GST. I am satisfied that the costs incurred, as reflected by that sum and the above list, were actually and reasonably incurred. \$9,773.45 is the relevant upper limit of Ms Mark's costs that were actually and reasonably incurred.

[16] It was submitted for Ms Mark that her claimed upper limit of \$12,957.42 would increase based on any costs recovered. I do not agree. While the conditional agreement between Ms Mark and her representative may factor in a percentage fee relating to any award of costs, I am not satisfied such costs should be factored into the Authority's assessment. First, the Authority does not generally award costs in relation to the issue of costs. There is no basis to depart from that approach here. Second, I do not consider the additional claimed component is otherwise referable to any costs actually and reasonably incurred having regard to the information before the Authority.

[17] The upper limit of Ms Mark's total costs actually and reasonably incurred is \$9,773.45. The relevant total of the starting point for the daily tariff is \$6,250.

[18] Having regard to the upper limit and the starting point for the Authority's tariff approach, an increase of any form would result in the award approaching indemnity costs.

[19] I do not accept the submission made for Ms Brown that the *Calderbank* offer was made late in the proceedings and that the relevant work had largely been completed. That is simply not the case. The 23 July 2024 offer was made in a timely manner, prior to the lodgement of any written material in the Authority. However, for the reasons below, I do not consider any upward adjustment to the tariff is warranted.

[20] I am not satisfied that the rejection or ignoring of the 23 July 2024 offer resulted in Ms Mark incurring quantifiable additional costs that were reasonably incurred. I am satisfied that the upper limit noted above comprises costs reasonably incurred overall. However, I do not consider that it is a matter for the Authority to undertake an assessment the costs reasonably incurred at the time of the rejection of the offer and to compare those to costs reasonably incurred overall. The nature of the conditional agreement, together with the otherwise relatively limited information as to the work undertaken at various stages, is not conducive to any meaningful assessment of the impact of the rejection of the *Calderbank* offer. I decline to make any uplift on that basis.

[21] An award of costs to Ms Mark based on the daily tariff is appropriate.

[22] Ms Mark is also entitled to reimbursement of \$71.55 relating to the filing fee.

**Orders**

[23] I order Joanne Brown to pay Deahn Mark, within 28 days, the sum of \$6,250 as a contribution towards the costs she incurred in pursuing her claims, and \$71.55 as reimbursement of the filing fee.

Rowan Anderson  
Member of the Employment Relations Authority