

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 83
5419931

BETWEEN

EDDIE MARRIOTT
Applicant

A N D

ALLIED SECURITY LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: David Beck, Counsel for Applicant
Stephen Langton, on behalf of Respondent

Submissions Received: 24 March 2015 from Applicant
2 April 2015 from Respondent

Date of Determination: 17 June 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] On 12 February 2015 I issued a determination¹ concluding Mr Marriott had a personal grievance in that he was unjustifiably dismissed by the respondent, Allied Security Limited (Allied).

[2] Costs were reserved and as the successful party Mr Marriott seeks a contribution of \$10,485.21 toward those he incurred in attaining that outcome.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

¹ [2015] NZERA Christchurch 18

[4] The investigation took about one and two third days. That would, applying the tariff, see a contribution in the order of \$5,850 but as already said Mr Marriott seeks a greater sum.

[5] Mr Marriott bases his claim on the existence of a without prejudice except as to costs (Calderbank) offer he made prior to the investigation meeting. He was willing to settle for a total of \$9,330 which was less than the \$13,434.86 plus costs I awarded.

[6] He also refers to obstructive conduct by Allied and seeks to include within the equation some recognition of the costs incurred at mediation. In support of that he refers to *Waugh v Commissioner of Police*.²

[7] Allied's response is that unless I award 'tariff costs' I defer the decision till after the Court has considered its challenge. This is because Allied will be put to considerable cost preparing a full submission and that would be wasted should the challenge succeed.

[8] Waiting is not a course of action I will take. It is normal practice in the employment jurisdiction is to conclude all outstanding questions including costs pending an appeal or challenge (*Swales v AFFCO New Zealand Ltd*³) and this is normally done by the Authority (*Sandilands v Chief Executive of the Department of Corrections*⁴). This recognises it is desirable the Court be in a position to dispose of all matters once a challenge has been made and the successful party's expectation the Authority's process has come to an end.

[9] In any event the argument is undermined by the suggestion a costs determination is acceptable if the outcome is the one Allied seeks. Similarly I reject the cost argument. The chance was given.

[10] Turning to the arguments I increase the tariff.

[11] These fail to convince.

² [2004] 1 ERNZ 450

³ EmpC Auckland AC19/01 23 March 2001

⁴ ERA Wellington WA67A/09, 10 September 2009

[12] First I note the Employment Court is no longer endorsing a steely approach⁵ with respect to Calderbanks but instead suggesting their existence is simply a factor to be considered when exercising the discretion in respect to costs.⁶ Trying to settle is something that is expected as a matter of course and that is what appears to have happened here.

[13] Second I accept Mr Langton's argument Mr Marriott has failed to put any flesh on the allegation of obstructive conduct and it is therefore difficult to consider.

[14] Third *Waugh* simply notes there might be an issue about costs incurred in mediation given previous case law decided under the Employment Contracts Act 1991. That issue appears to have now been resolved with little evidence costs incurred in mediation will be considered unless the mediation was Court ordered.

[15] For the above reasons I consider application of the tariff appropriate and order the respondent, Allied Security Limited, pay the applicant, Eddie Marriott, \$5,850 (five thousand, eight hundred and fifty dollars) as a contribution toward the costs incurred in attaining his success.

M B Loftus
Member of the Employment Relations Authority

⁵ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA)

⁶ See for example *Mattingly v Strata Title Management Limited* [2014] NZEmpC 15