

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 300
3053312

BETWEEN EMMA McALPINE
 Applicant

AND STONEWOOD GROUP
 LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Danny Gelb, advocate for the Applicant
 Brent Gilchrist, on behalf of the Respondent

Investigation Meeting: On the papers

Submissions Received: 16 April 2019 from the Applicant
 03 May 2019 from the Respondent

Date of Determination: 23 May 2019

COST DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 11 April 2019 I issued an oral determination in which I found that Emma McAlpine had been unjustifiably dismissed by Stonewood Group Limited (Stonewood). Stonewood was ordered to pay Ms McAlpine lost wages, and compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act (the Act), totalling \$66,077.

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions. Submissions were filed by Ms McAlpine on 16 April 2019 and by Stonewood on 3 May 2019.

Application for costs

[3] Ms McAlpine applies for a contribution towards her legal costs in the amount of \$6,750. In doing so she relies on a Calderbank offer she made, as well as Stonewood's conduct that she submits unnecessarily increased her costs. In particular, she submits she incurred additional costs in her representative preparing for questioning of John Chow, Stonewood's director and a material witness in the investigation, who then did not appear at the investigation meeting.

[4] Ms McAlpine's application is opposed by Stonewood. It takes the position that an uplift for the calderbank letter is warranted but this should amount to no more than the daily tariff being allowed.

[5] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Legal Principles

[6] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and were outlined by a full Court in *PBO Ltd v Da Cruz*.¹

[7] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.² The principles include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.

¹ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

² *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[8] In considering costs, the starting point is that the losing party should pay the costs of the successful party, absent exceptional circumstances.³

Analysis

[9] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500 for the first day of an investigation meeting. The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[10] The investigation meeting took place over three quarters of a day. Using the normal daily tariff the starting point for an award of costs is \$3,375.

Should the daily tariff be adjusted upwards?

Conduct unnecessarily increasing costs

[11] On 1 March 2019, at a case management conference with the parties, I directed that Mr Chow provide a witness statement to the Authority. This direction was reiterated in a minute issued that same day that confirmed that all witnesses were

³ *Weaver v Auckland Council* [2017] NZCA 330 at [20].

expected to attend the investigation meeting at the commencement of the investigation and, under oath or affirmation, answer questions about their evidence.

[12] A witness statement for Mr Chow was thereafter filed and served. However, and without warning, Mr Chow failed to appear at the investigation meeting.

[13] At the commencement of the investigation meeting I was informed that Mr Chow had a doctor's appointment later in the afternoon. In those circumstances I organised for Mr Chow to be advised by his personal assistant, who attended the investigation meeting and informed me she was in contact with him, to notify him that the Authority would phone him to take his evidence. Attempts to contact him at the scheduled time were unsuccessful. No medical certificate was provided for his absence despite this being directed.

[14] Mr Chow's failure to appear briefly extended the investigation meeting but I am satisfied that this conduct is taken into account in the daily tariff. However, I accept that Ms McAlpine's representative had attended to preparation of questions of Mr Chow in the expectation that he would appear. In those circumstances I consider a small uplift to the daily tariff is warranted. I uplift the daily tariff by \$300.

The Calderbank offer

[15] Where a Calderbank offer is made, and the opposing party does not beat the offer, the Court has found it to be in the broader public interest for there to be a steely response.⁴

[16] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:⁵

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.

[17] These comments also apply with respect to Calderbank offers made before an Authority investigation.⁶

⁴ *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 (CA) at [53].

⁵ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18]-[20].

⁶ *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [109].

[18] In *Xtreme Dining Ltd t/a Think Steel v Dewar* the full Court noted that the correct question in circumstances where a Calderbank offer has been made was whether the party to whom the offer was made had acted unreasonably in rejecting the offer, at the time that it did so.⁷

[19] On 29 January 2019 Ms McAlpine made an offer to settle her dispute with Stonewood on the basis of a payment of \$20,000 plus a contribution towards her costs of \$4,000 plus GST. The offer was open for acceptance until 6 pm on 7 February 2019 and expressly advised Stonewood that:

In accordance with the principles in the Calderbank case, this letter is without prejudice, but if this offer to settle is rejected, then my client reserves the right to refer to this letter when the matter of costs arise, and depending on the outcome of the hearing, to seek full representation costs from your client from the date of this letter.

[20] I find Stonewood's decision to reject this offer was unreasonable in all the circumstances. Had the offer been accepted it would have resulted in Stonewood paying less than 50% of the amount found payable by it to Ms McAlpine in the Authority's determination.

[21] To assess what adjustment, if any, I should make to the daily tariff to reflect Stonewood's unreasonable rejection of Ms McAlpine's offer, I have taken into account the following matters:

- a) Had Stonewood accepted the offer then Ms McAlpine's costs from 8 February 2019 would have been avoided. Invoices produced by Ms McAlpine's representative show that, following the date of expiry of the Calderbank offer, Ms McAlpine was charged a sum of \$9,318.34 including GST.
- b) The relatively simple nature of the case.
- c) The comments made by Judge Inglis in *Booth v Big Kahuna Holdings Limited*:

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particularly apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and

⁷ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].

readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

[22] In the circumstances, and taking into account adjustments made by the Authority to the daily tariff in similar cases, I consider a reasonable uplift to costs, due to Stonewood's unreasonable rejection of the offer, to be \$2,000. I increase the daily tariff by this sum.

Should the daily tariff be adjusted downwards?

[23] There are no grounds advanced for adjusting the daily tariff downwards.

Outcome

[24] The overall outcome is:

- a) Stonewood Group Limited is ordered to pay Emma McAlpine the following amounts within 14 days of the date of this determination:
 - i. The sum of \$5,675 towards her legal costs;
 - ii. The Authority's filing fee of \$71.56.

Jenni-Maree Trotman
Member of the Employment Relations Authority