

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 441
3236639

BETWEEN MARC MITCHELL
 Applicant

AND MOORE EXCAVATIONS LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Steven Mitchell, advocate for the Applicant
 Shannon Hollis, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 5 July 2024 from the Respondent
 No submissions received from the Applicant

Date of Determination: 24 July 2024

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 10 June 2024,¹ I found that Marc Mitchell was engaged as a contractor to Moore Excavations Limited and, as a result, I did not have jurisdiction to investigate his claims against Moore Excavations.

¹ *Marc Mitchell v Moore Excavations Limited* [2024] NZERA 339.

[2] In my determination I reserved costs so that the parties could try to agree costs. The parties have not agreed costs and now Moore Excavations seeks costs.

Application for costs

[3] Moore Excavations seeks an award of costs of \$9,600. Moore Excavations seeks this amount based on the application of the daily tariff for a one day investigation meeting with an uplift for a Calderbank offer it made that Mr Mitchell refused.

Analysis

Costs in the Authority

[4] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined in the Authority's practice note on costs.²

Costs follow the event

[5] The starting point is that costs should follow the event. A successful party should be awarded costs from the other party.

[6] Moore Excavations was successful in defending Mr Mitchell's claims based on its assertion that Mr Mitchell was a contractor. As it was the successful party Moore Excavations is entitled to an award of costs.

Applying the daily tariff

[7] The normal practice of the Authority when setting costs is to apply a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff.

² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

[8] The current daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for every subsequent day of an investigation meeting.

[9] There is no reason to depart from this normal approach so I will calculate the award of costs based on the daily tariff.

[10] The investigation meeting for this matter took one day so the starting point for any costs award is \$4,500.

Adjusting the daily tariff

[11] The daily tariff can be adjusted for relevant factors, including any Calderbank offers.

The Calderbank offer

[12] Moore Excavations refers to a Calderbank offers that it made to Mr Mitchell that it says is relevant to the question of costs.³

[13] The Calderbank offer in this case was an offer made by Moore Excavations on 2 October 2023. The offer was for payment of \$5,000 in full and final settlement. This was not accepted by Mr Mitchell.

[14] The Calderbank offer in this matter is relevant to the award of costs for Moore Excavations. Mr Mitchell rejected the Calderbank offer and continued with claims that were unsuccessful and therefore unnecessary. If he had accepted the Calderbank offer Mr Mitchell would have received a payment in settlement of his claims, which was more than he received as a result of my determination, and he would have avoided the ongoing costs for both parties by ending his claims at that time.

³ A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked “without prejudice save as to costs”. The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court’s (or in this case the Authority’s) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

[15] In the circumstances I am satisfied that the Calderbank offer made by Moore Excavations is relevant and it justifies and increase to the daily rate of \$1,000.

Conclusion

[16] Moore Excavations was the successful party in this matter and is entitled to receive an award of costs. The daily tariff should be applied to calculate the quantum of the award but subject to an increase of \$1,000. This means Moore Excavations is entitled to an award of costs of \$5,500.

Order

[17] Marc Mitchell is to pay Moore Excavations Limited \$5,500 as a contribution to its costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority