

[3] Mr Ngawaka has filed a non-de novo challenge to the Authority's determination in the Employment Court.

Global's claim

[4] Global seeks a contribution to its costs. Although the company was not externally represented at the investigation meeting, it received advice and assistance from a lawyer before the investigation meeting.

[5] Two invoices from the lawyer were filed along with a letter from the lawyer making a "without prejudice save as to costs" (*Calderbank*) offer. The invoices include work drafting the statement in reply and reviewing and amending witness statements.

[6] The *Calderbank* letter was sent to Mr Ngawaka's physical and email addresses as set out in the statement of problem. A bounce-back was received from the email address but the letter was also emailed to Mr Ngawaka's then representative.

Mr Ngawaka's response

[7] Mr Ngawaka does not agree that he should have to make a contribution towards Global's costs. He is challenging the Authority's determination and considers that Global caused him suffering. He also says that he is unable to afford to pay anything to the company.

[8] No comments were received about the *Calderbank* offer although there was no denial that it was received.

Conclusion on costs

[9] Under clause 15 of Schedule 2 of the Employment Relations Act 2000 the Authority has the power to award costs. The principles governing the Authority's discretion are described by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*². These include that costs will usually follow the event as well as that the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Also, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

² [2005] 1 ERNZ 808.

[10] Costs usually follow the event, meaning that the unsuccessful party will be required to make a contribution towards the successful party's costs. Mr Ngawaka's claims were not established so Global was successful in its defence.

[11] The filing of a challenge against the Authority's determination does not amount to a stay of the proceeding.³ The Authority's usual approach is to deal with a costs application despite a challenge being filed. A party may then add a challenge to the costs determination to the challenge to the Authority's substantive determination, if he or she wishes.

[12] The investigation meeting was held over two days although neither were full days. The notional tariff is \$4,500 for the first day and \$3,500 for the second day, totalling \$8,000 for two days. However, given the short days, I take \$6,000 as the starting point had the company been represented throughout the Authority's process. As Global only received assistance for part of the process a reduction should be made.

[13] Via its lawyer, Global made Mr Ngawaka a 21 June 2019 offer which was clearly marked "without prejudice save as to costs". The investigation meeting began in late September so the offer was sent well before that time. The effect of a *Calderbank* offer is explained in the letter. Mr Ngawaka had seven days to accept the offer. As he was unsuccessful in the Authority, the offer of \$2,000 was obviously for more than he received from the Authority's determination. An increase in costs is therefore justified.

[14] The bills from Global's lawyer totalled \$3,627.67 (incl GST). If that amount was awarded Global would effectively be receiving indemnity costs, or full reimbursement of its costs. There is no justification for that in this case.

[15] I order Rio Ngawaka to pay Global Security Solutions Limited within 28 days of the date of this determination, the sum of \$2,700 as a contribution to its costs.

Nicola Craig
Member of the Employment Relations Authority

³ The Act, s 180.