

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 22
3078032

BETWEEN NIX
 Applicant

AND AWF LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Sarah McKenzie, counsel for the Applicant
 June Hardacre, counsel for the Respondent

Submissions Received: 14 December 2020 from the Applicant
 23 November 2020 from the Respondent

Date of Determination: 21 January 2021

COSTS DETERMINATION OF THE AUTHORITY

A I order NIX to pay to AWF Limited the sum of \$3,375 being costs.

Non-publication order

[1] The order for non-publication of the applicant's name in the substantive determination dated 2 November 2020 continues for the purposes of this determination.¹

Substantive determination

[2] The Authority found in favour of the respondent in its substantive determination. The applicant's unjustified action claims were not made out. Costs were reserved. The parties have attempted to resolve the issue of costs but have been unable to do so. Submissions have now been received on behalf of both parties.

¹ *NIX v AWF Limited* [2020] NZERA 450.

Respondent's submissions

[3] Ms Hardacre on behalf of the respondent refers to clause 15 of the second schedule of the Employment Relations Act 2000 (the Act) and the discretion the Authority is given to direct any party to pay to the other party such costs and expenses as the Authority thinks reasonable.

[4] She sets out the principles to be considered when determining costs with reference to the Employment Court judgment in *PBO Limited (formerly Rush Security Limited) v de Cruz*.²

[5] Ms Hardacre submits that the starting point for assessing costs is the daily tariff of \$4,500 uplifted by \$3,000 on the basis that there was an unreasonable rejection of a Calderbank settlement offer made by the respondent on 22 July 2020 and restated on 28 July 2020. The respondent seeks an order for a contribution towards costs incurred since the Calderbank settlement offer. The respondent incurred \$17,081.50 plus GST following the rejection of the Calderbank offer and seeks a contribution towards that sum in the sum of \$7,500.

[6] Ms Hardacre submits that there are no factors which would justify a reduction in the uplifted daily tariff.

Applicant's submissions

[7] Ms McKenzie submits that if the Authority is minded to award costs, then the starting point should be half of the usual daily tariff for an investigation meeting being \$2,250 assessed on about four hours for investigation between 9.30am to 1.30pm. She refers to an Employment Court judgment where a half day starting point for an investigation meeting was adopted when it ran from 10.00am to 2 pm with an intervening lunch break.³

[8] Ms McKenzie does not consider that uplift is appropriate to the daily tariff. She submits that the Calderbank offer presented to the applicant came three weeks before the scheduled investigation meeting and 19 months after the grievance was raised. She places weight on the fact that the offer was only presented after the applicant sent a letter offering to settle the matter on 10 July 2020.

² *PBO Limited v de Cruz* [2015] 1 ERNZ at 808.

³ *Mattingly v Strata Title Management Limited* NZEMPC Auckland [2014].

[9] She submits that given quantum and timing, it cannot be said the offer was unreasonably rejected. Ms McKenzie submits that aside from preparing a bundle of documents, and submissions and attending at the investigation meeting, all preparatory work had been completed prior to the Calderbank offer.

[10] Further she says the proceedings were not complex, there was limited factual material and the matters for investigation were narrowed to two main issues. Ms McKenzie referred the Authority to a decision in *Beatty v Protective Paints Limited* in which the Authority had refused to take the rejection of a Calderbank offer into consideration as it had only been presented two weeks prior to the date of the scheduled hearing.⁴

Analysis and conclusion

[11] The Authority is required to exercise its discretion as to whether costs are awarded and if so in what amount. In doing so it exercises its discretion in accordance with principle and not arbitrarily. Costs generally follow the event. The respondent was the successful party and there is no good reason not to consider a contribution towards its costs in this matter.⁵

[12] There are different views by counsel about the appropriate starting point for an assessment of costs. I have had regard to the duration of the investigation meeting from my minute book.

[13] The meeting commenced at 9.30 am and I have recorded that it concluded at 2.20pm. There was a short adjournment of about 20 minutes between 1.30pm and 1.50pm following the completion of the evidence and before final submissions. There was also a 15 minute morning adjournment however that would not normally be taken into account and I do not do so on this occasion. Putting the short morning adjournment to one side therefore the meeting occupied about 4 and half hours. It was less than what would normally be characterised as a full day by about 2 and a half hours depending on the length of any adjournment for lunch.⁶

[14] Ms Hardacre submits that although the hearing finished earlier than a full day the costs of preparation were for a full day hearing. I find that the earlier finishing time for the

⁴ *Beatty v Protective Paints Limited* [2018] NZERA Auckland 236.

⁵ Above n 3 at [44].

⁶ A full hour or half an hour.

investigation meeting reflects the narrowing nature of the issues for investigation and the lack of factual complexity and the preparation requirements were not therefore as extensive as they may have been for some cases.

[15] I conclude in the exercise of my discretion that is appropriate for these reasons to start any assessment of costs at three quarters of the daily tariff of \$4,500. That is the sum of \$3,375.

[16] I have now considered whether there should be any adjustment to that amount. The Authority can take without prejudice (save as to costs) offers into account and has been asked by the respondent to do so in this case. It was stated in *Mattingly* that a somewhat diluted approach to the “steely approach” endorsed by the Court of Appeal as appropriate in the Employment Court where a Calderbank offer has been unreasonably rejected may be appropriate in the Authority.⁷ There was reference to the observation in *Da Cruz* that Authority awards will be modest.⁸

[17] In the exercise of the Authority’s discretion as to costs, a proper question is whether the applicant acted unreasonably in rejecting the offer. That requires an assessment of the circumstances at the time of the rejection, not with the benefit of hindsight viewed against the result.⁹

[18] Statements of evidence had been provided as part of the Authority investigation process. The respondent declined the applicant’s Calderbank offer to settle in a letter dated 22 July 2020 and after setting out reasons why it did not consider there was merit in the applicant’s claim made its Calderbank offer of \$1,000 which was open for acceptance until 4pm 28 July 2020. On 28 July 2020 Ms McKenzie on behalf of the applicant declined the offer and counter offered for the sum of \$1,000 together with a contribution towards costs of \$2,500 and GST. This was declined and the Calderbank offer was restated in an email from Ms Hardacre dated 28 July as open until 10am the following day. This time was later extended to 4pm following a request by Ms McKenzie. The offer was then declined. The investigation meeting was on 11 August 2020.

⁷ Above n 4 at [27].

⁸ Above n 1 at [44].

⁹ *Xtreme Dining Limited trading as Think Steel v Dewar* [2017] NZEmpC 10 at [28].

[19] The Calderbank offer was only open for a limited period for acceptance however that was not unreasonable given the approaching investigation meeting and further preparation required.

[20] I have considered whether the applicant acted unreasonably in rejecting the offer. The applicant had a different view of the merits to that of the respondent. She considered from the correspondence at the time the offer was rejected that there had been an attempt to dissuade her from taking legal advice which was a significant part of her claim.

[21] The respondent clearly set out the merits from its perspective. I weigh that an assessment of merit on a narrow evidential point may tend to be less objective. Further, the offer was made close to the investigation meeting and for a minimal sum. It did not include a separate component for costs and a claim for that in addition to the \$1,000 was put by the applicant in a counter offer. I weigh that by that stage a considerable amount of preparation for the investigation meeting had already taken place with the provision of witness statements.

[22] I do not conclude when considering the above that the applicant acted unreasonably in rejecting the offer and I do not increase costs on that basis.

[23] There are no other factors that persuade me to increase or decrease the starting point for an assessment of costs. A fair and reasonable award for costs is the sum of \$3,375.

[24] I order NIX to pay to AWF Limited the sum of \$3,375 being costs.

Helen Doyle
Member of the Employment Relations Authority