

[4] Air NZ sought an uplift of the Authority's tariff on two bases.

[5] First, Ms Rachelle had not accepted a settlement offer it had made well before the Authority's investigation meeting.

[8] Second, Air NZ said its costs had been increased significantly by Ms Rachelle's failure to properly identify and particularise the nature of her claim and correctly identify the appropriate respondent, requiring both Air NZ and Mt Cook Airlines Limited to be involved in the proceedings.

[9] Ms Rachelle was given the opportunity by the Authority to provide evidence about her ability to pay an award of costs but declined to do so. There were no other factors identified by either party that required a downward adjustment of costs.

[10] In Ms Rachelle's view, the issue of costs should not be decided by the Authority at this time because she has lodged a challenge with the Court. However, the normal practice of the Authority is to finalise all proceedings before it to allow the Court to deal with all matters between the parties, if and when it comes to that.

Evaluation

[9] The investigation meeting on 19 April 2017 lasted approximately four hours. A "day" in the Authority is seven hours. Four-sevenths of \$4500 is \$2520. This figure is the appropriate notional tariff in this matter.

[10] Shortly after mediation Air NZ had made its offer to settle Ms Rachelle's claim. The offer was made *without prejudice save as to costs*. It was made in writing on 15 December 2016 to Ms Rachelle's then legal representative. The offer did not express a time limit and was open for Ms Rachelle to accept any time up to the Authority issuing a determination. The offer was clear and complete. The Court has said such offers should be taken into account in considering the relevant costs principles.¹

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[11] Those principles normally require uplift on the usual tariff, in the absence of any greater countervailing factors. Both parties could have been saved the cost and/or time of preparing for and attending the Authority investigation meeting if Ms Rachelle had agreed to the offer.

[11] In all the circumstances, including those identified in paragraph [8] above, the appropriate uplift of the notional tariff of \$2520 is to the Authority's full daily tariff of \$4500. This costs outcome did not provide Air NZ with the cost award it was seeking but was a significant increase on what would have been the expected award if made on a notional tariff basis only.

Result

[12] The sum of \$4500 in costs must be paid by Ms Rachelle within 28 days of the date of this determination.

Andrew Dallas
Member of the Employment Relations Authority