

Issues

[3] The following issues are to be determined:

- (a) What is the starting point for assessing costs?
- (b) Are there any factors that warrant adjusting the notional daily tariff?

What is the starting point for assessing costs?

[4] The starting point for assessing costs in the Authority is the notional daily tariff² which is currently \$3,500 per hearing day. This matter involved a one and a half day investigation meeting. The starting point for assessing costs is therefore \$5,250.

Are there any factors that warrant adjusting the notional daily tariff?

[5] The respondent was wholly successful in defending the personal grievance and penalty claims. They seek an increase in costs because of two *Calderbank* offers seeking to settle the parties dispute about the constructive dismissal and to agree costs.

[6] The first *Calderbank* offer was made on 10 June 2015 following mediation in Kaitaia. The respondent offered to pay the applicant \$3,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in full and final settlement. This offer was rejected. The respondent was subsequently successful in defending Mrs Renata's claims.

[7] The second *Calderbank* offer was made on 14 January 2016 seeking agreement to an award of costs of \$4,750. Mrs Renata through her lawyer made a counterproposal to pay \$3,750 towards costs. It appears this was not accepted.

[8] The respondent now seeks to recover all of its legal costs from 22 June 2015 of \$8,750 plus GST which are set out in the invoice filed.

[9] Mrs Renata complains the bill has not been itemised and may include mediation costs. A bill itemising the services provided has been provided to the

² *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16].

Authority. It does not include mediation costs. Based upon an average Counsel rate of \$250 plus GST per hour, the bill reflects 35 hours work. The respondents produced two witnesses and written submissions. Removing the 1 ½ days hearing time (9 hours), preparation of 26 hours for hearing is not unreasonable for this matter which was originally set down for 2 days. Respondent counsel is also a senior employment lawyer. In my view the bill was reasonable and the work appropriate to this matter and forum.

[10] Costs are discretionary but generally follow the event.³ Weight is to be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure in excess of the amount awarded in the litigation.⁴ The scarce resources of the Authority 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 offered⁵.

[11] The respondent seeks indemnity costs from the point of the *Calderbank* offer was refused on or about 10 June 2015. Indemnity costs may be ordered where a party has behaved either badly or very unreasonably.⁶ There is no evidence of bad behaviour or conduct that was very unreasonable. Ms Renata may have held a firm view about the employer's conduct leading to termination of her employment but it does not fall within the conduct requiring indemnity costs to be awarded.

[12] Proceedings in the Authority as being intended to be low level, cost effective, readily accessible and non-technical. Parties whom instruct Counsel or advocates should be aware that costs awards in the Authority are usually modest having regard to the daily rate.⁷

[13] The general rule is that costs awards are GST neutral.⁸ There is no stated legal basis for the respondent to recover its taxation as part of this costs awards and I decline to make any award in this regard.

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808 (Emp C) at [35].

⁴ *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601

⁵ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [19] and [20]

⁶ *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 at [27].

⁷ Above n 3; *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94]; *Fagotti v Acme & Co Limited* [2015] EmpC 135 at [107].

⁸ *Burrows v Rental Space Ltd* (2001) 15 PRNZ 298 (HC).

[14] An increase of \$1,000 to the daily rate is justified to reflect the *Calderbank* offers. Based upon an increased daily rate of \$4,500 for 1 ½ days a costs award of \$6,750 is appropriate.

[15] At hearing Ms Renata gave evidence she could not work due to her grief over the loss of her husband following termination. Her financial circumstances justify exercise of my discretion to order payment of costs by instalments.

[16] Accordingly, Jennifer Winsome Renata is ordered to pay Hartnell Grond Walker the sum of \$6,750 towards its actual legal costs. Payment is to be by way of instalments of \$50 per week starting within 21 days of the date of this determination.

TG Tetitaha
Member of the Employment Relations Authority