

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 534
3121992

BETWEEN

MAURICE ROCHE

Applicant

AND

CRESWICK GARAGE (2004) LIMITED

Respondent

Member of Authority: Michael Loftus

Representatives: Matt Belesky, counsel for the Applicant
Rajesh Parbhu for the Respondent

Submissions Received: 21 October and 8 November 2021 from the Applicant
4 November 2021 from the Respondent

Date of Determination: 29 November 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] On 27 July 2021 I issued a determination in which I concluded Mr Roche had a personal grievance having been unjustifiably dismissed.¹

[2] Costs were reserved and as the successful party Mr Roche now seeks a contribution toward those he incurred pursuing his claims.

¹ [2021] NZERA 322

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim, with the current starting point being \$4,500 for the first day and \$3,500 for each day thereafter.² From there adjustment may occur depending on the circumstances.

[4] The investigation took just over half a day which, applying the tariff, would see a contribution in the order of \$2,500 to \$2,750. Mr Roche, however, seeks more. He seeks a full days recompense at the tariff plus a further uplift along with reimbursement of the Authority's filing fee.

[5] In support of his claim Mr Roche primarily relies upon a calderbank proffered well before the hearing and which would have seen Mr Roche settle for a total of \$10,500 which is significantly less than he ultimately achieved via the Authority. After a delay Creswick countered by advising it would settle if Mr Roche withdrew his claim and pay a contribution toward its costs.

[6] Mr Roche also refers to the fact significant costs have been generated in trying to address the issue of costs between the parties. Initially approaches were made to the Creswick's previous representative who responded, after some weeks, he was no longer instructed. Two subsequent attempts to communicate with Creswick directly went unanswered thus forcing an application to the Authority.

[7] Creswick's response does not address the submissions tendered on Mr Roche's behalf but instead advises that *in light of the claimant's application for costs* it decided to make a weekly payment though it does not specify whether this is to address the substantive award, costs or perhaps both. Nor does the response advise how much. To justify this action Creswick argues it suffers from cashflow difficulties as 40% of its invoices relate to automotive parts or consumables with the unstated implication being it must pay for these before it can invoice, let alone receive payment. Reference is also made to difficulties caused by covid.

[8] Buckett Law advises some \$5,800 has been received but that payment started before the costs application which strongly suggests it is to address the substantive award and has nothing to do with costs. I agree.

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[9] The submission in respect to the Calderbank is a compelling one when it comes to considering an increase to the tariff. The underlying principle of a Calderbank is that a rejected offer would have led to a more beneficial outcome for the party against whom costs are sought, thus putting the other party to costs that, albeit with the benefit of hindsight, could have been avoided. Here, there can be little doubt that is the case as once costs are added acceptance by Creswick would have seen Mr Roche receive about half the amount finally attained. It is well established rejection of what proved to be a reasonable offer should be reflected in later a costs award – indeed the Courts have previously held a steely approach should be taken in this regard.³

[10] There is also some merit to the argument Mr Roche was put to unreasonable costs by having to repeat his attempts to address the issue three times as a result of having his advances ignored.

[11] Turning to Creswick's reply. Simply put there is no response to the submission meaning there is no argument against an increase, let alone a counter argument for, perhaps, a reduction.

[12] I also disregard the argument payment is already being made, albeit by instalment. As already said the evidence is this was already underway and therefore addresses the substantive award and not costs. In any event I note such an approach is fraught absent agreement by Mr Roche and he remains entitled to enforce the award should he choose to do so.

[13] Finally I note the arguments regarding cashflow which for two reasons I also disregard. The first is there is no supporting evidence. The second is I have already concluded Creswick's accounts fail to evidence a serious financial situation⁴ and in the absence of further evidence I conclude there is nothing to actually show Creswick is unable to pay other than an arbitrary decision by its director to pay its debts piecemeal. That is far from adequate.

[14] That then leads me to conclude an increase is warranted. The question is how much?

[15] The evidence leads me to conclude a full day's tariff is appropriate, which I note effectively amounts to close to a doubling. In reaching this conclusion I find Creswick should have been far more active in responding to various approaches from Mr Roche regarding

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20]

⁴ Above n 1 at [19] and [20]

settlement of both the substantive matter and costs. In failing to respond Creswick has significantly increased Mr Roche's costs.

[16] Reimbursement of the Authority's filing fee is a given.

Conclusion and Orders

[17] For the above reasons I order Creswick Garage (2004) Limited pay Maurice Roche \$4,571.56 (four thousand, five hundred and seventy-one dollars and fifty-six cents) as a contribution toward the costs Mr Roche incurred in pursuing his claims.

Michael Loftus
Member of the Employment Relations Authority