

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 7
5547826

BETWEEN YUVAL SHOSHANY
Applicant
AND 4RF LIMITED
Respondent

Member of Authority: Michele Ryan
Representatives: Paul McBride, Counsel for Applicant
David Burton and Alastair Espie, Counsel for
Respondent
Submissions received: 1 October 2015 from the Applicant
15 October 2015 from the Respondent
19 October 2015 'In Reply' from the Applicant
Determination: 18 January 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination issued on 30 June 2015 I found Mr Yuval Shoshany had a personal grievance against his former employer, 4RF Limited (4RF).¹ Mr Shoshany was awarded remedies corresponding to his unjustified dismissal but was not reinstated. Claims for special damages and penalties were also not upheld. Costs were reserved. The Authority has now received detailed submissions as to costs from both parties.

[2] Mr McBride reports the actual costs associated with Mr Shoshany's applications before the Authority amount to \$40,439 (GST excluded). He submits that 4RF's conduct before and after Mr Shoshany's dismissal, including at the investigation meeting, warrant an award of three quarters of solicitor/client costs. Alternatively, Mr McBride suggests that if the Authority assesses costs using its daily tariff approach, it is appropriate to uplift the quantum of the daily tariff to \$5,000 per

¹ *Shoshany v 4RF Limited* [2015] NZERA Wellington 63

day and quantify the Authority's investigation as equivalent to 5 days. He further submits that costs for preparation time should additionally be awarded at a rate equal to a two day investigation. Contribution to the cost of mediation is also sought alongside the full cost of disbursements comprising the Authority's filing fee²; photocopying and binding; and travel and accommodation expenses.

[3] 4RF properly accepts that costs in this matter should follow the event but takes issue with each methodology Mr McBride proposes to assess costs. 4RF refers to two *Calderbank* offers made to Mr Shoshany which were not accepted³. Other than the unique circumstances of the first day of investigation, it says there is no reason for the Authority to depart from its ordinary daily tariff approach and quantum.

Background

[4] 4RF Limited is a New Zealand registered company having its head office in Wellington. Mr Shoshany worked at 4RF's office in Israel where he lives. He was dismissed on 11 March 2015. An urgent application for interim reinstatement was made on 13 March 2015. During discussions at a case management conference call on the same date the parties were directed to attend mediation. Mr McBride advised Mr Shoshany's substantive claims could be investigated in one day which resulted in agreement that the Authority would conduct an investigation meeting on 14 April 2015.

[5] Further case management conference calls were convened on 31 March and 8 April 2015 to deal with matters regarding how witnesses would provide evidence, the correct identity of the employer and the provision and exchange of information.

[6] The length of time allocated to conclude Mr Shoshany's claims was underestimated. The first day of investigation lasted approximately 14 hours in circumstances where Mr Shoshany's return flights to Israel committed him to leaving Wellington the following morning. The meeting was reconvened on 29 April 2015 to interview Mr Shoshany's manager by telephone⁴ and an additional witness for 4RF

² Reimbursement of hearing fees were also requested but these were never charged.

³ Mr Shoshany's statement of problem sought \$266,153.80 USD in remedies. 4RF says the remedies sought by Mr Shoshany were unrealistic and prohibitive to obtaining mutual agreement to resolve matters. It notes Mr Shoshany was awarded a sum less than 20% of the amount he claimed.

⁴ Mr Shoshany was also present via a third party conference call.

presented for questioning. Final submissions were furnished orally and in writing between 29 April and 5 May 2015.

Issues

[7] The following needs to be examined:

- (i) how should costs be assessed;
- (ii) if the daily tariff is appropriate how should it be applied;
- (iii) are there any other factors which warrant an uplift or reduction to the daily tariff;
- (iv) should the full costs of Mr Shoshany's disbursements be awarded.

How should costs be assessed?

[8] I am satisfied that costs should follow the event and a contribution to Mr Shoshany's costs is appropriate. I am not, however, persuaded that the matter warrants a departure from the Authority's usual approach to first evaluate costs using a notional daily tariff, followed by an assessment as to whether the circumstances of the case justify an uplift or reduction to an award. The practice has been applied since at least 2005 when the Full Court endorsed the Authority's notional daily tariff.⁵ The Full Court recently revisited the utility and value of the Authority's notional daily rate in *Fagotti v ACME & Co Ltd*⁶ and agreed:

*...there is a significant value in a commonly applied and well publicised notional daily rate for costs in the Authority. This enables parties and their representatives to assess more accurately from the outset what may be a very important element of the litigation (costs) when undertaking the regular economic analyses that parties and their representatives should undertake during that process”*⁷

[9] The daily tariff approach remains a helpful starting point in an assessment of costs. Keeping in mind that the tariff should not be applied in a rigid manner, I intend to then assess on a principled basis whether the tariff should be raised or lowered

⁵In *PBO Ltd (formerly Rush Security Ltd v Da Cruz* [2005] ERNZ 808 at [46]

⁶*Fagotti v ACME & Co Ltd* [2015] NZEmpC 135

⁷*Ibid* at [108]

depending on the nature of this case, in accordance with the broad principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.⁸

How should the daily tariff be applied?

[10] In the particular circumstances of this matter neither the facts nor the law support an increase to the daily tariff for additional preparation time beyond what could objectively be anticipated, and I am unwilling to allocate the tariff towards counsel's preparation as a stand-alone activity.

[11] Nor do I agree to apportion the Authority's daily tariff to costs associated with directed mediation. In *RHB Accountants, Kenneth Brown and Steven Wilkins v Rawcliffe*⁹ Judge Inglis noted there are mixed views as to whether, and when, costs associated with mediation should be awarded. She observed where costs for mediation had been ordered, these tended to be in circumstances where parties had been directed to mediation but refused to attend.¹⁰ In the absence of an attempt by the parties to resolve matters by mediation prior to a direction to do so, as occurred in this matter, I do not consider it is appropriate to treat directed mediation as if it formed a portion of the Authority's investigation or to award costs associated with it.

[12] The investigation meeting comprised in total approximately 17 hours over two non-consecutive days. The duration of the meeting is equal to two full days of investigation and I consider it appropriate to apply, as a starting point, \$7,000.¹¹

Are there any factors in the circumstances of this case that should raise the tariff?

[13] Mr Bride submits the rate of the daily tariff should be increased to \$5,000 per day. The grounds for this request are largely on the basis that Mr Shoshany was successful with his substantial claim and that 4RF was on notice that its preliminary view to dismiss was substantially and procedurally unfair. Mr Shoshany has been already been compensated for 4RF's actions resulting in his unjustified dismissal. It is inappropriate to make further orders about those matters.

⁸ *Da Cruz*, above at n 1

⁹ [2012] NZEmpC 31

¹⁰ above at [21] to [41]

¹¹ The daily tariff rate is currently \$3,500

[14] Counsel for Mr Shoshany alleges 4RF introduced additional witnesses beyond those foreshadowed at the first case management call telephone, and prolonged the duration of the Authority's investigation with arguments that did not advance its position. I do not accept 4RF unnecessarily increased the length of the investigation meeting. A significant plank to Mr Shoshany's claim is that he was dismissed for actions which were common practice amongst 4RF staff. 4RF was entitled to produce witnesses to challenge that claim.

[15] Next, Mr McBride cites 4RF's failure to produce documentation in the lead up to the investigation meeting as reason to increase an award. 4RF says the information sought was unreasonable. While 4RF was tardy in responding to information requests I am not satisfied that 4RF's delay should result in an increased costs award where the issues were resolved over two brief case management calls prior to the investigation commencing.

Are there any factors in the circumstances of this case that should lower the tariff?

[16] 4RF made two *Calderbank* offers but Mr Shoshany received a proportionally much greater award following the Authority's investigation and I take the matter of those offers no further.

[17] Mr Shoshany was not reinstated and did not receive all remedies sought, but he was predominantly successful and there is insufficient cause to lower the daily tariff in the circumstances.

Should the full cost of Mr Shoshany's disbursements be awarded?

[18] Mr Shoshany seeks disbursements associated with photocopying/binding (\$134.80), a filing fee (\$71.96) and for return travel and accommodation to attend the Authority's investigation (\$3,795 USD).

[19] I do not accept 4RF's submissions that Mr Shoshany should bear his own travel and accommodation costs on grounds that he freely entered into an arrangement governed by New Zealand law and must be taken to accept any costs that accompany that selection. In direct contrast I consider 4RF's decision to have the employment relationship governed by New Zealand law obliged it to assume responsibility for

actual and reasonable disbursements associated with resolving a dispute in the jurisdiction it chose. Invoices reflecting Mr Shoshany's travel and accommodation costs were not provided, but the amounts recorded in submissions appear modest. 4RF must reimburse those expenses.

[20] In the absence of a GST invoice I regard the cost of photocopying and binding as normal office overheads and not recoverable as a disbursement.¹² However I accept the filing fee is a true disbursement involving payment of money to third party.

Determination

[21] I have not been persuaded that there are any other factors to warrant an increase or decrease to the Authority's daily tariff approach and have found no justification for departing from an award that reflects the standard notional daily rate.

Summary of Order

[22] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order 4RF Limited to pay Mr Yuval Shoshany the sum of \$7,000 (NZD) as a contribution towards costs; \$3,795 (USD) for travel and accommodation; and \$71.56 (NZD) for the filing fee.

Michele Ryan
Member of the Employment Relations Authority

¹² *New Zealand Professional Firefighters Union v The New Zealand Fire Service Commission* EMC, Wellington, WC9A/08, 3 October 2008 and *Air New Zealand Ltd v Kerr* [2013] EmpC 237