

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 304  
3062975

BETWEEN                      KYLIE STEVENSON-WRIGHT  
Applicant

AND                              HOTEL CHATHAMS LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             David Cain, advocate for the Applicant  
Toni Croon, advocate for the Respondent

Submissions Received:      11 June 2020 from the Applicant  
Email 30 June 2020 received from the Respondent

Date of Determination:      5 August 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A        I order Hotel Chathams Limited to pay to Kylie Stevenson–Wright the sum of \$4,500 costs and \$1,751.24 being disbursements.**

**Substantive Determination**

[1]        The Authority in its substantive determination dated 28 May 2020 found that the applicant had made out a grievance that she was unjustifiably dismissed and awarded remedies. The issue of costs was reserved.

[2]        The Authority has now received submissions on behalf of the applicant. The respondent did not provide submissions in accordance with the timetable set however advised

in an email that there was no money to pay the applicant and her representative's expenses and that the Hotel was closed due to Covid-19.

### **The Applicant's Submissions**

[3] Mr Cain on behalf of the applicant seeks an award of costs in excess of the daily tariff.

[4] In support of an uplift Mr Cain attaches to his memorandum a "Calderbank offer" in which the applicant offered to settle for \$3,000 under s 123(1)(c)(i) and \$3,000 plus GST costs.

[5] Mr Cain seeks on behalf of the applicant a cost award in the sum of \$6000. Actual costs were \$7,350 plus GST. He also seeks disbursements in the sum of \$1,751.24 which includes travel to and accommodation on the Chatham Islands

### **Analysis and conclusions**

#### *The basic tenets for assessing costs*

[6] The leading judgment on costs in the Authority is that of the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.<sup>1</sup> The full Court listed some basic tenets for assessing costs in the Authority that were held to be consistent with the Authority's functions and powers.<sup>2</sup>

[7] Costs in the Authority are discretionary. The discretion must be exercised in accordance with principle and not in an arbitrary manner. Costs generally follow the event. Awards in the Authority are frequently assessed on the basis of a daily tariff which is \$4,500 although this is not to be rigidly applied but regard is to be had to the characteristics of each case. Costs in the Authority will be modest. Without prejudice [save as to costs] offers may be taken into account.

[8] The broad principles in *PBO* about costs in the Authority were not departed from or altered by a subsequent full Court judgement in *Fagotti v Acne & Co Ltd*.<sup>3</sup>

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<sup>1</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.

<sup>2</sup> At [44].

<sup>3</sup> *Fagotti v Acne & Co Ltd* [2015] ERNZ 919 at [108].

[9] The applicant was the successful party and is entitled to consideration of a contribution towards her costs.

*Duration of the investigation meeting*

[10] The investigation meeting commenced at 10am and concluded at 2.30pm with an adjournment of a little less than three quarters of an hour so did not occupy a full day of investigation.

*Without prejudice save as to costs offer*

[11] The offer to settle the matter on the basis set out earlier was put in an email dated 20 February 2020. The letter set out that the applicant considered she had a clear claim and that she would be successful. The offer was made on a “full, fair and without liability basis.” Although it was not marked “without prejudice as to costs” it did set out that it was “filed on a Calderbank basis.” Further it provided that should the expected result come from the investigation meeting then the applicant would apply for uplift to costs above the daily tariff. The terms of the offer were clear and certain.

[12] The offer was made a few days before the statements of evidence from the applicant and respondent were to be lodged and the investigation meeting was scheduled for 11 March 2020 and involved travel arrangements. There were five days provided for consideration of the offer with clear and certain terms for acceptance. In the circumstances I find that was adequate time for consideration.

[13] It would have been beneficial for the respondent to have accepted the offer in light of the award made and would have prevented the cost to the applicant of preparation of evidence, travel and an investigation meeting. In the circumstances the offer was unreasonably rejected.

[14] The “without prejudice save as to costs offer” is a factor that can be considered in the exercise of the discretion as to costs in this matter.

*Investigation meeting on the Chatham Island*

[15] Mr Cain submits that the respondent increased costs by requiring the matter be heard on the Chatham Islands. That is where employment took place and the respondent was entitled to have the meeting held there.

*Increase for costs submission*

[16] The fact of preparation of a costs submission does not usually result in an increase to the daily tariff. I do not find that there are any circumstances in this case where an increase is fair and reasonable on that basis.

*Ability to pay*

[17] There is some limited information before the Authority about the respondent's ability to pay. There is not the level of information before the Authority to satisfy it that any cost award could not be met even if by way of instalment. As a matter of common sense the Authority does accept that the respondent because of its business will be impacted by Covid-19 because of the lack of overseas tourists and the impact of the period of lockdown. That will be weighed.

*Conclusion on costs*

[18] Looking at all matters in the round it is appropriate to start with the daily tariff of \$4,500 notwithstanding it was not a full day of investigation. This takes the "Calderbank offer" into account that I have found was unreasonably rejected. I find that it is an increase that properly reflects all matters including the financial difficulties that face the respondent.

*Disbursements**Air flights and accommodation*

[19] Generally for out-of-town counsel an application for cost for airfares and accommodation will not be permitted. That is usually on the basis that it was a choice to engage counsel from elsewhere rather than a necessity. In this matter I accept that there would not have been a choice of a representative on the Chatham Islands. I allow disbursements for Mr Cain's airfares to and from mainland New Zealand in the combined sum of \$982.26 and accommodation in the sum of \$697.42.

*Filing fee*

[20] I also accept the claim for reimbursement of the filing fee in the sum of \$71.56.

**Orders made**

[21] I order Hotel Chathams Limited to pay to Kylie Stevenson-Wright costs in the sum of \$4,500 and disbursements in the sum of \$1,751.24.

**Helen Doyle**  
**Member of the Employment Relations Authority**