

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 48
5358145

BETWEEN MONIQUE TONI GALLAGHER
Applicant

A N D PRESBYTERIAN SUPPORT
SERVICES (OTAGO) INC
Respondent

Member of Authority: M B Loftus

Representatives: Werner van Harselaar, Counsel for Applicant
Rachel Brazil, Counsel for Respondent

Submissions Received: 13 February 2013 from Respondent
27 February 2013 from Applicant

Date of Determination: 5 March 2013

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 22 January 2013 I issued a determination rejecting Ms Gallagher's claim she had been unjustifiably dismissed by the respondent, Presbyterian Support Services (Otago) Incorporated (PSS). Costs were reserved and PSS, as the successful party, now seeks reimbursement of those it incurred.

[2] Normally the Authority will use a daily tariff approach when addressing costs (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 a day and from there adjustment can occur depending on the circumstances.

[3] The hearing took approximately a day and a half which would, applying the above formula, mean a contribution in the order of \$5,250. PSS, however, seeks a greater sum. It incurred costs of \$6,840 plus GST and would like that amount in its entirety. It relies on an assertion Ms Gallagher's claim had no substance, yet she ignored numerous attempts at resolution by PSS. These included a Calderbank offer

dated 28 March 2012. As an alternate, and in the event I reject the claim for full reimbursement, it is suggested \$4,000 would be an appropriate award.

[4] In response Ms Gallagher accepts costs follow the event but argues full reimbursement is inappropriate and urges I take a *reasonable contribution* approach. Ms Gallagher argues her response to PSS settlement approaches was reasonable and that led to part of the claim being withdrawn. She responds to the Calderbank by suggesting it was unreasonable given the losses incurred by that date far exceeded the offer given they included three months wages.

[5] First there is the argument indemnity costs should be awarded on the basis of Ms Gallagher having pursued a case devoid of substance. I can not agree. There was enough inconsistency in PSS's conduct around the issuing and withdrawing of warnings for her to be confused and while her claim failed, I would suggest there were grounds for doubts about her future with PSS.

[6] I also note the Court has urged a steely approach in respect to Calderbanks (*Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 CA) but this can only extend to an award of indemnity costs where a reasonable offer has been rejected (*Chen v New Zealand Sugar Co Ltd* [2010] NZEmpC 81). Had there been any merit to Ms Gallaghers claim, the Calderbank would have been manifestly inadequate – it was little more than *you're a nuisance – go away* and would have fallen far short of the mark had Ms Gallgher had any measure of success.

[7] The rejection of the argument I consider full indemnity costs leaves me with PSS's suggestion an award of \$4,000 is appropriate. There can be little argument with that given the amount is less than a scale award.

[8] Therefore, and for the foregoing reasons, I order the applicant, Ms Monique Gallagher, pay the respondent, Presbyterian Support Services (Otago) Incorporated, the sum of \$4,000 (four thousand dollars) as a contribution toward costs.

M B Loftus
Member of the Employment Relations Authority