

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 65
5452062

BETWEEN

LYNDA MCHUGH
Applicant

AND

CHIEF EXECUTIVE OF THE
NEW ZEALAND FIRE
SERVICE
Respondent

Member of Authority: Vicki Campbell

Representatives: Stephen Langton & Angela Evans for Applicant
Geoff Davenport for Respondent

Submissions received: 27 January and 18 February 2015 from Applicant
9 February 2015 from Respondent

Determination: 3 March 2015

COSTS DETERMINATION OF THE AUTHORITY

- A. The Chief Executive of the New Zealand Fire Service is ordered to pay to Ms McHugh the sum of \$3,500 as a contribution to her costs within 14 days of the date of this determination.**
- B. The Chief Executive of the New Zealand Fire Service is ordered to pay to Ms McHugh disbursements in the sum of \$761.55 within 14 days of the date of this determination.**

[1] In a determination dated 16 December 2014¹ I held that Ms McHugh had been unjustifiably disadvantaged during her employment with the Chief Executive of the New Zealand Fire Service (NZFS) and awarded \$5,250.00 in compensation (after a reduction for contributory conduct).

¹ [2014] NZERA Auckland 514.

[2] I also held the Authority lacked jurisdiction to investigate claims that NZFS had breached Ms McHugh's employment agreement as the claims had not been raised within 90 days of the action giving rise to the claims.

[3] The question of costs was reserved. As the parties have been unable to reach any agreement on this Ms McHugh, as a partly successful party, now seeks an order from the Authority for a contribution to her legal costs.

[4] Counsel has submitted that Ms McHugh's legal costs totalled \$11,000 plus disbursements of \$761.55. Counsel submits Ms McHugh's total legal bill would have exceeded this but for an arrangement capping her account. This means that additional time was spent working on this matter pro bono (or for no fee). Ms McHugh seeks to uplift the usual daily tariff of \$3,500 to an order for \$19,250 which includes an amount of \$2,000 for the preparation of costs submissions, plus disbursements amounting to \$761.55.

[5] NZFS opposes the uplift and instead seeks an order that costs lie where they fall or alternatively seeks a reduction in the award for costs to \$3,500 plus disbursements of \$71.56 being the filing fee.

[6] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

Calderbank offers

[7] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal²:

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer with any consequences as to costs.³

[8] As was held by the Employment Court in *Mattingly v Strata Title Management Limited*⁴:

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court

² As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

³ *Ibid* at [18].

⁴ [2014] NZEmpC 15; [2014] ERNZ 1.

of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a “steely approach” ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court’s observation in *Da Cruz* that Authority awards will be “modest”. What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a *de novo* challenge, having regard to the circumstances of the particular case.⁵ [my emphasis]

[9] Both parties exchanged a number of Calderbank offers in their efforts to resolve matters on an agreed basis.

[10] The earliest Calderbank offer was made by NZFS on 26 February 2014 where NZFS offered to pay Ms McHugh the sum of \$5,000 within seven days in full and final settlement of all matters. This offer was left open for acceptance until 7 March 2014.

[11] No response to this offer was made on Ms McHugh’s behalf. It seems the letter, while emailed to Ms McHugh’s legal Counsel, may not have been received or was mislaid.

[12] On 22 May 2014 Ms McHugh made an offer, which was open to acceptance until 6 June 2014, to resolve matters as follows:

- a) NZFS revokes the warning;
- b) Payment of a sum of \$10,000; and
- c) Reimbursement of legal costs of \$15,000.

[13] It does not seem from the submissions of the parties, that this offer was responded to by NZFS.

[14] On 5 August 2014 the Calderbank offer made by NZFS on 26 February 2014 was resent to Ms McHugh. This was then followed by a further Calderbank offer by NZFS dated 11 August 2014 in which NZFS made the following increased offers:

- a) Payment of \$6,500; and
- b) Payment of \$3,500 as a contribution to the costs incurred by Ms McHugh as at that date.

⁵ *Ibid* at [27].

[15] Ms McHugh responded that same day with a counter offer similar to the offer made on 22 May 2014. The exception was a reduction in the costs contribution from \$15,000 to \$10,000.

[16] Ms McHugh was awarded a total of \$5,250.00, \$250 more than the first offer by NZFS; \$1,250 less than the second offer by NZFS; and \$4,750 less than Ms McHugh was offering.

[17] More importantly to Ms McHugh though, was the finding of the Authority that the oral warning was unjustified. Ms McHugh was seeking more than money. She was seeking to have the oral warning removed from her file so that it no longer jeopardised her employment and/or transfer opportunities within NZFS. This is never acknowledged by NZFS in its Calderbank communications with Ms McHugh.

[18] I find Ms McHugh's rejection of the Calderbank offers from NZFS was reasonable and should not affect the exercise of my discretion in determining an appropriate award for costs.

[19] Because the Authority awarded significantly less than the level of compensation Ms McHugh was offering by way of settlement it was not unreasonable for NZFS to reject Ms McHugh's offers to settle. The rejection of the offers should not affect the exercise of my discretion in determining an appropriate award for costs.

Determination of costs

[20] As held recently by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.⁶

[21] As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁷ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. The Court urged representatives to be conscious of the costs that are accumulating as a matter proceeds, noting that cases should be approached

⁶ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

⁷ (2006) 7 NZELC 98,128; [2005] ERNZ 808; (2005) 3 NZELR 1 (EMC).

economically and in a way that is likely to leave a successful party with a satisfactory outcome.⁸

[22] Ms McHugh was partially successful in her claims in the Authority. Of two claims before the Authority Ms McHugh was successful on the claim for disadvantage. The second claim, for which the Authority received extensive evidence and documents, was not successful.

[23] Also relevant to the Authority's consideration of costs is the background of events once the matter was before the Authority for determination.

[24] On 11 April 2014 during a case management call and in accordance with the Authority's usual practice, a timetable was discussed and agreed with the parties to progress this matter in a timely way.

[25] Investigation dates of 15 – 17 July 2014 were agreed and subsequently confirmed by the parties as being suitable dates. The applicant agreed to lodge and serve her witness statements by 23 May 2014, with the respondent lodging and serving its witness statements by 20 June 2014. It was also agreed that a common bundle of documents would be lodged and served by 20 June 2014.

[26] On 26 June 2014, after the agreed date for lodging a common bundle of documents, Ms McHugh identified three further documents which she believed would be of assistance to the Authority. The additional documents to be lodged and served included:

- a) a digital recording of the conversation Ms McHugh had with Mr O'Donoghue on 26 March 2013;
- b) various emails; and
- c) a file note made by Ms McHugh of discussions she had with an NZFS witnesses.

⁸ Ibid at [47].

[27] On 3 July 2014 the Authority, by Minute, requested more information from Ms McHugh about the documents she wished to produce. Both parties were provided with the opportunity to make submissions on the disclosure of the documents.

[28] After hearing from the parties, the Authority adjourned the investigation meeting as it had not received copies of the additional documents and had been unable to assess their relevance to the claims from Ms McHugh. In its email on 9 July 2014 the Authority advised the parties that the delays in investigating the matter would be dealt with when assessing costs. The Authority also reiterated its serious concerns (as advised to the parties and confirmed in an email from the Authority dated 27 June 2014) about the level of costs already incurred by Ms McHugh and their recoverability.

[29] The Authority's investigation took place on 18, 19 and 20 August 2014. The first day and a half was spent investigating Ms McHugh's claims by working through the witness statements and documents with the witnesses. On 20 August 2014 the Authority reconvened to hear oral submissions from both parties. In total the Authority's investigation process took two full days.

[30] The Authority has been provided with evidence that Ms McHugh incurred costs associated with the Authority's investigation of Ms McHugh's claims of \$11,000. Ms McHugh has submitted that unbilled costs amounting to \$26,130.28 were also incurred by legal Counsel in preparing for and attending the investigation meeting.

[31] Ms McHugh's total claims before the Authority amounted to \$35,000, \$20,000 of which was associated with the claim that NZFS had breached its obligations to Ms McHugh. As already set out in this determination, Ms McHugh was not successful in the second claim.

[32] Ms McHugh was on notice very early on in the Authority's investigation process that she had barriers to overcome in order to pursue her second claim.

[33] I consider it appropriate that NZFS makes a contribution to the costs incurred by Ms McHugh. Given the length of the investigation meeting, the pre litigation

indications given to Ms McHugh, and taking into account that Ms McHugh's success was limited to one of the two claims, the Chief Executive of the New Zealand Fire Service is ordered to pay to Ms McHugh the sum of \$3,500 as a contribution to her costs within 14 days of the date of this determination.

[34] Ms McHugh also seeks disbursements of \$761.55. This amount is made up as follows:

- a) \$230.00 for faxes, photocopying and telephone expenses;
- b) \$459.99 being the extra hearing time necessary to complete the matter; and
- c) \$71.56 being the filing fee.

[35] I am satisfied Ms McHugh should receive payment for the disbursements she seeks. The Chief Executive of the New Zealand Fire Service is ordered to pay to Ms McHugh disbursements in the sum of \$761.55 within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority