

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 83  
5623932

BETWEEN                      JACQUELINE PEPPER  
   Applicant  
  
A N D                            AMCOR    FLEXIBLES    NZ  
   LIMITED  
   Respondent

Member of Authority:        Peter van Keulen  
  
Representatives:              Anna Oberndorfer, Advocate for Applicant  
   Richard Harrison, Counsel for Respondent  
  
Submissions Received:        3 May 2017, from the Applicant  
   23 May 2017, from the Respondent  
  
Date of Determination:        30 May 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     In a determination dated 7 April 2017<sup>1</sup> I determined that:

- a. Amcor Flexibles NZ Limited (Amcor) did not unjustifiably dismiss Mrs Pepper.
- b. Amcor did act in an unjustifiable manner causing disadvantage to Mrs Pepper through its flawed consultation over the proposed restructure but it did not act in an unjustified manner causing disadvantage to Mrs Pepper by unilaterally extending her notice period or failing to consider redeployment options as alleged.
- c. There was no basis to award a penalty for any breach of good faith by Amcor.

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<sup>1</sup> [2017] NZERA Christchurch 52

[2] In my determination, I reserved costs in the hope that the parties would be able to reach agreement.

[3] The parties have not reached an agreement on costs and Mrs Pepper now seeks costs. The advocate for Mrs Pepper says:

- a. Costs should follow the event and as Mrs Pepper was successful with an unjustified action causing disadvantage grievance, I should award costs in her favour.
- b. I should apply the daily tariff to the award of costs, on an increased basis due to the respondent's conduct in dealing with the matter and because the damages I awarded Mrs Pepper bettered a Calderbank offer she made prior to the investigation meeting.
- c. For these reasons, I should award Mrs Pepper costs of \$7,000.00 plus disbursements of \$71.56.

[4] Counsel for Amcor says:

- a. Amcor acted appropriately in the conduct of this matter and, in fact, I commented favourably to both parties at the end of the investigation meeting, on their approach, which enabled an efficient and respectful investigation.
- b. Mrs Pepper was not successful with her pleaded claims. The claims for unjustified dismissal, unjustified action causing disadvantage to Mrs Pepper by Amcor unilaterally extending her notice period or failing to consider redeployment options and the claim for a penalty for a breach of the duty of good faith, were all successfully defended by Amcor.
- c. Mrs Pepper's Calderbank offer was based on the failed claims and Amcor cannot be criticised for rejecting an offer based on claims that it successfully defended.
- d. Any costs award should be based on the daily tariff recognising Amcor's contribution to the efficient investigation process and recognising that Amcor successfully defended the pleaded claims.

## Principles

[5] The power of the Authority to award costs is set out in Section 15 of Schedule 2 of the Employment Relations Act 2000:

### 15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[6] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup>.

[7] The Authority must follow the principles set out in *Da Cruz*, when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. Costs generally follow the event.

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<sup>2</sup> [2005] 1 ERNZ 808

- h. That without prejudice offers can be taken into account.
- i. Cost awards will be modest.
- j. Costs are frequently judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[8] In the recent judgement of *Fagotti v Acme & Co Ltd*<sup>3</sup> the Full Court reaffirmed the Authority's use of a notional daily tariff 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.

## **Discussion**

[9] So, in exercising my discretion to award costs I should start with the principle that costs generally follow the event. In this case, Mrs Pepper was successful with a personal grievance, albeit a grievance that she had raised in her grievance letter, but not specifically pleaded in the statement of problem. I see no reason why costs should not follow this event.

[10] The next consideration is whether I should apply the daily tariff to set the quantum of costs awarded to Mrs Pepper. I see no reason to depart from the principle that costs should be judged against the national daily rate. I will therefore start my assessment of quantum with the daily tariff.

[11] For matters lodged in the Authority after 1 August 2016, the daily tariff is \$4,500.00 for the first day of any investigation meeting.

[12] The next step is to consider whether I increase or decrease the daily tariff based on any relevant factors. The factors to consider in this matter are:

- a. The conduct of the parties.
- b. The Calderbank offer made by Mrs Pepper.

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<sup>3</sup> [2015] NZEmpC 135

c. That Amcor successfully defended the claims pleaded by Mrs Pepper.

[13] I am not persuaded by Mrs Pepper's advocate's submission that Amcor's conduct in dealing with the grievances raised or the investigation of the matter warrants an increase in the daily tariff. Rather, as identified by counsel for Amcor, I believe the parties and their representatives' conduct in this matter was appropriate, helpful and respectful, all of which was conducive to a productive and efficient investigation meeting.

[14] The real issue with this matter was that I determined there was a valid grievance that was different to what Mrs Pepper alleged in the statement of problem. And, I determined that the grievances that were alleged in the statement of problem were not valid.

[15] This has two consequences. First, I accept Amcor's rejection of Mrs Pepper's Calderbank offer was reasonable. It did this based on the claims alleged and was ultimately correct on its assessment of the pleaded claims. It did however; fail to assess its potential liability for the unjustified action grievance but, in this case, that does not mean that I should apply the principle applying to Calderbank offers.

[16] Second, I believe this creates a unique situation where the daily tariff should be adjusted to reflect that Mrs Pepper was not wholly successful and benefitted from my assessment that there was a different grievance to those that were claimed by Mrs Pepper.

[17] In reducing the daily tariff, I also take account of the fact that the investigation meeting did not last a full day.

[18] In all of the circumstances, I believe it is appropriate to reduce the daily tariff to \$3,000.00.

[19] Mrs Pepper is also entitled to her disbursements, being the filing fee of \$71.56.

### **Determination**

[20] Amcor Flexibles NZ Limited must pay Mrs Pepper \$3,000.00 as a contribution to her costs in this matter together with \$71.56 for the filing fee.

Peter van Keulen  
Member of the Employment Relations Authority