

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 74
5632476

BETWEEN MS A
Applicant

AND RAELENE AND DEAN REES
PARTNERSHIP trading as
RAELENE REES
ACCOUNTING
Respondent

Member of Authority: Christine Hickey

Representatives: Adam Gallagher and Grace Hall, Counsel for the
Applicant
Jeff Goldstein, Counsel for the Respondent

Costs submissions received: From the Applicant on 5 April 2017
From the Respondent on 18 April 2017
Last information from the Applicant received on 2 May
2017

Determination: 12 May 2017

COSTS DETERMINATION OF THE AUTHORITY

The respondent must pay Ms A \$5,000.00 as a contribution towards her legal costs and \$71.56 for the filing fee.

[1] On 8 March 2017 I issued a determination finding that the respondent had breached a settlement agreement, and ordering it to pay, within 28 days of the determination:

- wages for 17 days of annual holiday leave not paid out (\$7,480.00 gross);

- 8% holiday pay on amounts paid during closedown periods (the amount was to be agreed between the parties, and has been agreed and paid at \$1,126.40 gross);
- Interest at 5% (paid at \$359.62); and
- part of a penalty I imposed for breach of an agreed term of the settlement agreement (\$1,500).

[2] I reserved costs and set a timetable for submissions on costs if the parties could not agree on them. The due date for submissions from the applicant was Monday, 5 April 2017.

[3] On 5 April 2017, I received the applicant's submissions seeking costs of \$13,300.00. The submissions set out the calculation of the 17 days annual leave pay and the 8% holiday pay on the amounts paid during the closedown periods, which the respondent agreed with and paid.

[4] On 5 April 2017, just two hours after the applicant's submissions were supplied, the respondent sent payment of the amounts I ordered to be paid. Mr Goldstein, on the respondent's behalf also offered to pay "tariff costs" of \$4,500 to the applicant.

[5] Actually, daily tariff costs of \$4,500 only apply to matters lodged on or after 1 August 2016. This matter was lodged on 1 July 2016, when the daily tariff was \$3,500.

[6] On 2 May 2017, I received confirmation from Mr Gallagher that the respondent had paid all amounts ordered in the determination, some of which had been calculated by the applicant and notified to the respondent on 5 April 2017.

The law

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[8] The principles the Authority applies are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.¹ In *Fagotti v Acme & Co Limited*,² the Employment Court recently affirmed these principles.

[9] Costs principles include:

- a. A discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case-by-case basis.
- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct that 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. 'Without prejudice' offers can be taken into account.
- h. Awards of costs will be modest, and must be reasonable.
- i. Frequently costs are judged against a notional daily rate.
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[10] The starting point for my consideration is \$3,500.

¹ [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

² [2015] NZEmpC 135

Applicant's submissions

[11] The applicant's submissions give a number of reasons why I should uplift the tariff amount almost four-fold for the one-day meeting:

- Ms A's actual costs were \$19,500 excluding GST and disbursements of \$81.28.
- The amount sought in costs is two-thirds of the applicant's actual and reasonable costs.
- Ms A has incurred additional costs in having to calculate the quantum of unpaid arrears after the investigation meeting.
- The case required careful and detailed analysis of dates, hours of work and amounts paid in the absence of time and wages records.
- The respondent was unreasonably unwilling to resolve matters short of litigation.
- The respondent's conduct of the matter materially and unreasonably increased the applicant's costs.
- The respondent did not accept and "did not engage on" the applicant's settlement offers, made on 17 February and 15 March 2017. The respondent did not make any counter-offer meaning the applicant had to proceed to the Authority hearing.

Respondent's submissions

[12] Mr Goldstein submits that:

- The applicant's submission seeks to penalise the respondent for its failure to pay holiday pay as claimed. An order for costs is not meant to punish the losing party.
- The applicant was "spectacularly unsuccessful" in her claims.
- The costs incurred by the applicant were not reasonable. The investigation meeting lasted one day and was relatively straightforward.

- The settlement offers were for amounts in excess of the amounts awarded. In addition, the second offer closer to the hearing date was for an amount larger than had originally been sought. That does not demonstrate that the applicant was prepared to compromise her position. That, and the applicant's failure to meet the amounts she sought to settle does not justify any uplift in the tariff costs.
- There is no basis for an uplift in the daily tariff.

Determination

[13] I consider Ms A the successful party despite Mr Goldstein's submission that she was spectacularly unsuccessful. She obtained a finding that the respondent had breached the settlement agreement, leading to a penalty being imposed and she gained further holiday pay, although not as much as she had claimed.

[14] I deal with each of the applicant's submissions in the order that I have listed them at paragraph [11].

Actual costs

[15] Parties and their counsel need to be aware that the recovery of no more than the daily tariff rate towards their costs is the most likely outcome for a successful party in Authority proceedings. Recently in *Booth v Big Kahuna Holdings Limited*³ Judge Inglis wrote:

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...⁴

³ [2015] NZEmpC 4

⁴ *Booth*, at [15]

[16] Judge Inglis' further like comments in *Stevens v Hapag-Lloyd (NZ) Ltd*⁵ were cited with approval by the Full Court of the Employment Court in *Fagotti v Acme & Co Ltd*:⁶

...Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's assessment of an appropriate notional daily rate...) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to ... apply significant legal resources to the pursuit or defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate ...⁷

[17] The Authority does not award two-thirds of actual costs.

[18] At paragraph [74] of my determination, I suggested the respondent calculate how much it owed Ms A, re 8% on top of amount paid during the closedown periods, and seek her agreement. It did not do that and so I accept that Ms A or Mr Gallagher/Ms Hall has had to calculate the amounts owed after the investigation meeting. However, Ms A's own professional skills were more relevant to that exercise than her counsel's are.

[19] Because of the lack of discussion between the parties as to costs and the amounts owed before 30 March 2017 Ms A's counsel was required to make written submissions on costs on 5 April 2017, increasing the cost to Ms A somewhat.

[20] I will consider that when considering an uplift to the tariff.

Absence of a time and wages record

[21] Although there are payroll records there are not time and wages records as required under the Act. The applicant submits that meant that Ms A and he spent considerable time comparing the payroll records against the diary entries of time worked kept by Ms A in preparation for the Authority meeting.

⁵ [2015] NZEmpC 28

⁶ [2015] NZEmpC 135, at [107]

⁷ *Stevens*, *ibid*, at [94]-[95], footnotes omitted.

[22] I accept that this took time that would not have been expended if the respondent had kept the records it was statutorily obliged to keep. I will consider that when considering an uplift to the tariff.

The respondent was unwilling to resolve matters short of litigation

[23] This is not grounds for increasing costs. No criticism can be made of a respondent to proceedings putting an applicant to proof through the litigation process.

The respondent's conduct unreasonably increased costs

[24] A party's conduct of the case can have a bearing on costs awarded if the conduct resulted in unnecessary costs for the other party.

[25] The submissions criticise the respondent for vigorously denying wrongdoing. That is not something that could increase costs.

[26] Counsel submits that a major cause of Ms A's unnecessary costs was because of the respondent's failure to comply with its statutory record keeping obligations. I agree, and have already considered this. I cannot account for it twice.

[27] Counsel submits that he requested such information that did exist relating to Ms A's annual holidays and the annual closedown periods early and repeatedly, and that the Authority directed its provision as well. However, the information was either not provided at all or provided late. Counsel submits that the respondent presented additional material not previously anticipated or signalled late, which increased the time he had to spend in preparation for the investigation meeting.

[28] In addition, further wage records were provided on 2 December 2016, when the respondent had requested such information in January 2016. These had to be checked against the earlier provided records to identify any discrepancies.

[29] I agree that these things unnecessarily increased the applicant's costs. I will consider this when considering an uplift to the tariff.

[30] In addition, counsel submits that the respondent provided scurrilous and irrelevant evidence, such as incorrect and irrelevant comments about the applicant being dyslexic. Counsel also submits that the respondent's wish to rely on evidence about Ms A's past, which was irrelevant to the investigation, meant he had to make an

application for non-publication to protect Ms A's personal and professional reputation. I accept that took time that he would not otherwise have had to spend. However, the main aspect of that evidence that I prohibited from publication was first raised by Ms A and not by the respondent. I do not consider this should lead to an uplift in the daily tariff.

[31] The applicant's last head of submissions relates to the respondent raising a concern that Ms A had wrongly claimed extra hours of work. Mr Gallagher says he was obliged to prepare to answer this accusation despite the respondent not having kept the time records it was supposed to keep, failing to adduce any evidence to support its allegations and failing to raise a counter-claim. That was an allegation made by the respondent, raised in Mr Rees' submissions, and supported by late provision of documents. Ultimately, it was not proved. No counter-claim was raised but if the allegation had been proved, I could have considered it in my equity and good conscience jurisdiction.

[32] I consider the late provision of the documents supporting Mr Rees' allegation did require some further late preparation that unnecessarily raised Ms A's legal costs.

Settlement offers

[33] Ms A made two offers to settle. Ultimately, she did not manage to gain as much from the Authority's determination as the lower of the two offers to settle she made. Counsel submits that the offers made by the applicant should have resulted in negotiation by the respondent in the way of a counter-offer. There is no legal requirement for the receiver of an offer to settle to counter-offer or enter into negotiations. The respondent was correct to turn down the settlement offer.

[34] Mr Goldstein's correspondence to Ms Hall suggests that Ms A's offers were significantly more than the amount she was awarded which "can result in the tariff costs being reduced".

[35] In all the circumstances of this case, I do not consider the settlement offers have any impact on the matter of costs.

Conclusion

[36] Overall, I consider that a costs award of \$5,000 is a reasonable contribution that the respondent should make to the applicant's costs.

Christine Hickey
Member of the Employment Relations Authority