

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 240
5635002

BETWEEN KERRY MACDONALD
 Applicant

AND TKR PROPERTIES LIMITED
 T/A TOP PUB & ROUTE 26
 BAR AND GRILL
 Respondent

Member of Authority: Robin Arthur

Representatives: Alex Kersjes, Advocate for the Applicant
 Russell Mead, Advocate for the Respondent

Memoranda: 21 July 2017 from the Applicant and 2 August 2017
 from the Respondent

Determination: 16 August 2017

COSTS DETERMINATION OF THE AUTHORITY

A. TKR Properties Limited (TKRPL) must pay Ms MacDonald \$6,500 as a contribution to her reasonably incurred costs of representation in successfully pursuing her personal grievance application in the Authority and the further sum of \$515.13 to reimburse her for expenses incurred for the Authority's investigation.

[1] By determination on 7 July 2017 the Authority found TKR Properties Limited (TKRPL) unjustifiably dismissed Kerry MacDonald. She was awarded remedies of \$2200 in lost wages and \$12,000 in compensation for humiliation, loss of dignity and injury to her feelings.¹

[2] The parties were encouraged to resolve any issue of costs themselves. They were unable to do so. Ms MacDonald sought an Authority determination of costs.

¹ *MacDonald v TKR Properties Limited* [2017] NZERA Auckland 199.

Her advocate's memorandum said her costs of representation totalled \$18,289 and sought an award of costs of an indemnity basis. Alternatively Ms MacDonald sought an uplift of the Authority's usual daily tariff because the remedies awarded to her were larger than earlier offers she made to TKRPL, on a without prejudice basis, to settle the matter rather than go ahead with an Authority investigation. Two such *Calderbank* offers were made – one on 20 October 2016 and one on 4 May 2017.

[3] TKRPL opposed the costs award sought on either the indemnity basis or due to the *Calderbank* offers made. It said Ms MacDonald and her representative were responsible for delays in pursuing her claim. It also said her claim and *Calderbank* offers made to settle it were confusing and the costs sought were “grossly inflated”.

[4] Three questions had to be resolved:

- (i) Was an award of costs on an indemnity basis warranted?
- (ii) If not, should the tariff be lifted due to the without prejudice offers to settle?
- (iii) And, if an uplift was warranted, were the costs sought reasonable?

Indemnity costs?

[5] Ms MacDonald submitted indemnity costs were warranted as TKRPL had met the threshold of having behaved badly or very unreasonably, referring to *Bradbury v Westpac Banking Corporation* [2009] NZCA 234. In that case the Court of Appeal said indemnity costs required exceptionally bad behaviour and, to justify such an order, the misconduct must be flagrant.² It noted that an “imprudent refusal of an offer of compromise” did not fall under the indemnity costs rule but might justify increased costs above the courts' usual scales. While that case concerned the application of costs rules in the High Court rather than the employment relations institutions, the principles stated regarding indemnity costs guide the Authority.

[6] The Authority's determination of Ms MacDonald's grievance found TKRPL acted wrongly in ending her employment in the way that it did and for the reasons that it did. However Ms MacDonald did not establish TKRPL then behaved very unreasonably or engaged in flagrant misconduct in resisting her claim of unjustified dismissal. In short, there were no grounds to award her indemnity costs.

² At [28].

[7] Ms MacDonald's advocate raised her grievance in April 2015 and in early June 2015 advised TKRPL mediation assistance would be sought. TKRPL heard nothing further until, more than a year later, Ms MacDonald's statement of problem was lodged in the Authority on 11 July 2016. In August 2016 the matter was referred to mediation. It was held in October 2016. Even if TKRPL were responsible for some or all of the delay between August and October 2016, the company was not responsible for the unexplained lengthy delay in Ms MacDonald pursuing her case between June 2015 and July 2016. Ms MacDonald's advocate advised the Authority in early November 2016 that the matter had not settled in mediation and she wished to proceed to an investigation of her application. However no further steps were taken about that request until February 2017 due to an administrative oversight at the Authority. TKRPL was not responsible for that further delay.

An uplift on the daily tariff due to earlier offers to settle?

[8] The Authority's assessment of costs typically starts from a notional daily tariff which may be adjusted upwards or downwards to account for relevant factors or particular circumstances in the case. The applicable tariff for this one-day investigation meeting was \$4500.

[9] One factor that may warrant an upward adjustment of the tariff is where the successful party made an earlier offer to settle for an amount less than the Authority's eventual determination ordered to be paid in remedies. This occurred here because Ms MacDonald twice offered to settle for an amount that was effectively for less than the total of \$14,200 she was awarded by the Authority in July 2017. In October 2016 she proposed a settlement totalling \$9,700. This included a \$3500 contribution for costs which was not a component of the eventual Authority determination which had left costs as a matter yet to be resolved. In May 2017 a further settlement offer was made that, on my calculation, totaled \$15,600. Two aspects of the May offer required some explanation. Firstly, it had a claim for six weeks' lost wages that was worth \$6,600, based on the figure for weekly wages of \$1,100 used in the Authority's July 2017 determination. Secondly, it included \$4000 as a contribution to costs. Deducting the costs component, the May 2017 settlement offer was also below the amount eventually achieved in remedies.

[10] If TKRPL had accepted either the October 2016 or May 2017 settlement offers, all parties would have been spared the subsequent costs of preparing for and participating in the July 2017 investigation meeting. As a result TKRPL was liable to pay more than the daily tariff to meet costs Ms MacDonald incurred because it had not accepted her offer to settle for less than what the Authority subsequently determined were appropriate remedies.

[11] Calculating the appropriate “uplift” of that tariff required an assessment of what costs were reasonably incurred and then what would be a reasonable contribution to those costs.

Reasonable costs?

[12] Ms MacDonald sought an order for \$10,131.73 along with disbursements of \$515.13. This was said to comprise around 70 per cent of her costs of \$14,473.90 incurred following mediation in October 2016.

[13] An invoice from Ms MacDonald’s advocate showed the costs were calculated on the basis of a unit price of \$350. It does not state the length of the unit. I have taken it to be an hourly rate. Costs awards are meant to allow for a modest contribution to reasonably incurred costs. An hourly rate of \$350 would be high for a lawyer operating with the additional duties of the regulatory regime for client care and conduct and the expenses of professional indemnity insurance. A June 2016 survey by the New Zealand Law Society found the average hourly charge-out rate for a lawyer was \$292.70.³ For a small legal practice the average was less than \$250. In the case of an unregulated advocate, without the expenses and obligations carried by qualified and registered professionals, a rate of \$350 was not reasonable for the purposes of the Authority’s assessment of costs.

[14] The unreasonableness of the level of costs incurred at that rate can also be seen by comparison with the claim for lost wages and \$15,000 distress compensation set out in the statement of problem. By the time that the statement of problem was lodged in June 2016 the applicant and her advocate knew her period of loss for the

³ <http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-893/charge-out-rates-information-released> (retrieved 15 August 2017).

assessment of lost wages was two weeks. The amount claimable for that period, which was awarded, was \$2200. Talled, the remedies sought were \$17,200.

[15] Incurring total supposed costs of \$18,289 in pursuit of \$17,200 was not reasonable. It was contrary to the following caution sounded by a full bench of the Employment Court in its decision in *PBO v Da Cruz*:⁴

... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

[16] Dividing the amount claimed to be incurred as costs since mediation by the unit price stated on the invoice gave a total of 41 hours said to have been spent working on the matter. Applying a still relatively generous rate of \$250 to those 41 hours tallied \$10,250. Ms MacDonald had sought a costs order for 70 per cent of those 41 hours. In this recalculation to estimate a fair value for reasonably incurred costs, 70 per cent was \$7,175.

[17] Some of those costs included time spent on generating statements from some additional witnesses who had no helpful evidence. Those statements were set aside. Deducting \$675 for time wasted in preparing those statements left a total of \$6500.

[18] Allowing \$6500 as an award of costs gave an uplift of \$2000 on the daily tariff. It was a reasonable and modest contribution to reasonably incurred costs and was a sufficiently 'steely' additional amount to mark TKRPL's failure to accept the earlier settlement offers.

[19] TKRPL must pay Ms MacDonald costs of \$6500. TKRPL must also pay Ms MacDonald \$515.13 to reimburse the expenses of the Authority filing fee and printing costs associated with preparing documents for the investigation meeting.

Robin Arthur
Member of the Employment Relations Authority

⁴ [2005] ERNZ 808 at [47].