

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2017] NZERA Wellington 119  
3001451

BETWEEN            RAEENA NAIKER  
                                 Applicant

AND                    PORIRUA            SUPERMARKET  
                                 (1997) LIMITED t/a PAK'N'SAVE  
                                 PORIRUA  
                                 Respondent

Member of Authority:      Trish MacKinnon

Representatives:            Gayaal Iddamalgoda, Counsel for Applicant  
                                 Darren Mitchell, Advocate for Respondent

Investigation Meeting:      On the papers

Submissions Received:      7 and 27 November 2017 from the Applicant  
                                 21 November 2017 from the Respondent

Determination:              28 November 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Raena Naiker succeeded in her personal grievance claim for unjustifiable dismissal against Porirua Supermarket (1997) Limited t/a Pak'n'Save Porirua (Pak'n'Save Porirua or the company).<sup>1</sup> She was awarded three months' wages totalling \$6,739.20 gross and compensation of \$6,000. The issue of costs was reserved.

[2]      The parties have been unable to resolve costs between themselves and First Union (the Union), which represented Ms Naiker, asks the Authority for an award of costs. Mr Iddamalgoda, Legal Organiser for the Union, seeks costs in the sum of \$8,000, citing the "*daily tariff rate at the Authority (of) \$4500 for the first day of*

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<sup>1</sup> [2017] NZERA Wellington 96.

hearing and \$3500 for each subsequent day of hearing". He also seeks reimbursement of the Authority's filing fee of \$71.56.

[3] Pak'n'Save Porirua submits there is no basis for a significant award of costs in the applicant's favour. Mr Mitchell provided evidence of written offers made to Ms Naiker on two separate occasions to resolve the matter. He says her representative did not reply to either offer, both of which were made on a "*without prejudice except as to costs*" basis, commonly referred to as Calderbank offers.

[4] The first offer was made on 22 March 2017. The financial component of the offer was \$5,000 to be paid under s. 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). The second and final offer was made on 10 April 2017 and was for \$6,500 under the same provision of the Act.

[5] Mr Iddamalgoda submits those offers are not relevant as the amounts awarded to Ms Naiker by the Authority exceed the amounts offered by Pak'n'Save Porirua. He also notes both offers expired in accordance with the time limits they contained.

[6] Mr Mitchell notes the Union has provided no information about the actual costs it incurred in bringing the matter and it is seeking costs on the basis of a two day hearing for one that was completed in one and a half days.

[7] He cites the Authority's *Practice Note* on cost which states the importance for a party seeking costs to support its claim by material such as copies of invoices showing fees and other expenses that have been incurred, the time taken by the practitioner or advocate and the relevant hourly rate.

## **Discussion**

[8] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Underpinning the award of costs are principles which have been developed and applied over time. They are well known<sup>2</sup> and it is unnecessary to repeat them all here. Amongst them are that:

- a. the discretion is to be exercised in a principled manner rather than arbitrarily;

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<sup>2</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC), confirmed in *Fagotti v Acme & Co Ltd* [2015] EmpC 135.

- b. costs generally follow the event;
- c. awards will be modest;
- d. the nature of the case can influence costs and are frequently judged against a notional daily tariff; and
- e. Calderbank offers can be taken into account.

[9] I agree with Mr Iddamalgoda that the Calderbank offers are not relevant in this instance to a consideration of costs. Although the compensation offered in the second Calderbank was \$500 more than I awarded to her, Ms Naiker achieved an overall outcome that was \$6,239.20 more favourable due to the three months' wages award she received.

[10] However, I accept Mr Mitchell's submission that the Union has provided no information regarding the costs it incurred in representing Ms Naiker and he is correct that the Authority's investigation occupied one and a half days, rather than the two days for which Mr Iddamalgoda seeks costs.

[11] The Union's submissions on costs were succinct but rather too economical with information. I understand Mr Iddamalgoda is employed by the Union and acted as Ms Naiker's representative in that capacity. That does not preclude an award of costs being made.

[12] However, the cost to the Union of providing representation is likely to be considerably lower than if external counsel were engaged for that purpose. Mr Iddamalgoda noted that the Union agreed to provide representation to Ms Naiker on the basis that it would seek to recover costs at the applicable daily tariff. In the absence of any information whatsoever about the costs the Union incurred, other than in relation to the disbursement of the filing fee, I decline to award costs in the amount it seeks.

[13] The matter was not complex and Ms Naiker's witnesses, in addition to herself, were her partner and one Union official. Extensive preparation by the Union is unlikely to have been required. I find a modest contribution is appropriate.

**Determination**

[14] In the circumstances I assess a reasonable award of costs to be \$2,000 and reimbursement of the Authority's filing fee of \$71.56. That amount is ordered to be paid to Ms Naiker as the applicant in the matter.

[15] I note, however, that the award is made for the purpose of reimbursing the Union for costs it incurred in representing her and I anticipate she will use the award accordingly.

Trish MacKinnon  
Member of the Employment Relations Authority

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