IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 61
5585612

	BETWEEN	MARY CLAYTON First Applicant
		ANGELA MINTON Second Applicant
		KERRY HEFFEREN Third Applicant
	AND	BOARD OF PROPRIETORS OF SOLWAY COLLEGE Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Jills Angus Burney, Counsel for Applicants Richard Harrison, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	20 June 2017 from the Applicants 22 May 2017 from the Respondent
Determination:	17 July 2017

DETERMINATION OFTHE AUTHORITY

Employment relationship problem

[1] In my determination of 31 January 2017[1] I dismissed Mary Clayton and Angela Minton's claims to have been disadvantaged in their employment by unjustifiable actions taken by their employer, the Board of Proprietors of Solway College (the Board). I also dismissed Ms Clayton and Kerry Hefferen's claims to have been unjustifiably constructively dismissed. I dismissed claims by all three

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applicants that their employer breached good faith in its investigation of complaints they made to it.

[2] Ms Hefferen's claim to have been disadvantaged in her employment by an unjustifiable action on the part of her employer was partly upheld, in respect only of a letter sent to her by the Chair of the Board on 6 November 2014. I awarded Ms Hefferen compensation of $2,400 under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] The issue of costs was reserved and the Board, through its counsel Mr Harrison, now seeks a contribution towards the costs it incurred in view of the lack of success of most claims put forward by the three applicants. It submits an uplift in costs is warranted due to the manner in which the applicants conducted the case. It says this required the Board to incur significantly greater costs than would otherwise have occurred.

[4] The Board's total costs, excluding those relating to mediation, were $47,306.17 inclusive of GST. Invoices have been provided to the Authority. The amount it seeks is $15,750 which represents an uplift to the Authority's notional daily tariff of 50% for a three day hearing.[2]

[5] In support of its request for the uplift the Board submits the applicants lodged a range of claims in a "scatter gun" approach for which it had to prepare responses, although some of those claims were withdrawn or not pursued in the course of the Authority's investigation. It also cites the delays on the part of the applicants in filing evidence in accordance with the Authority's timetable, the disorganised manner of arranging witnesses and the changing nature of the claims with, in the Board's submissions, new claims being introduced in the applicants' closing submissions.

[6] Counsel for the three applicants submits they made out a genuine case. While acknowledging that only the third applicant was successful on (part of) a disadvantage claim, Ms Angus Burney submits their claims were "genuine and reasonable". She rejects the respondent's submission that an uplift to costs is warranted, submitting that the respondent's costs were not significantly greater than would otherwise be the case.

[2] The matter was lodged in the Authority in February 2016 before the increase to the daily tariff took effect

[7] She notes the respondent unnecessarily chose Auckland counsel which added significantly to its costs of travel and accommodation, and that the applicants had sought on two occasions to resolve the matter at mediation. The applicants reject that they employed a "scatter gun" approach to their claims. Any delays were, in counsel's submission, not causative of any significant increase in costs.

[8] Ms Angus Burney submits that the applicants should be treated individually with respect to costs. She says Mrs Clayton is currently employed on a fixed-term, part-time basis and has made a reasonable offer to meet the employer's costs towards a partial day hearing. Mrs Minton is no longer employed and, in counsel's submission, is unable to meet any significant costs from her pension income. With regard to Mrs Hefferen, counsel submits her costs should be contributed to by the respondent, given her success. Ms Angus Burney has provided invoices to establish that Mrs Hefferen incurred costs of $9,711.41. She has provided no evidence to support her assertions in respect of Mrs Clayton or Mrs Minton.

Discussion

[9] Awards of costs in the Authority are discretionary. It is up to the Authority to decide whether they should be awarded and, if so, in what amount. Underpinning the award of costs are principles that were referred to with approval by the Full Court of the Employment Court in *Da Cruz*[3]. Those principles were confirmed ten years later by the Full Court in *Fagotti*[4].

[10] Among the principles are that the discretion to award costs is to be exercised in accordance with principle rather than arbitrarily. Costs will normally follow the event which normally results in the successful party being entitled to a reasonable contribution to its actual costs from the unsuccessful party. They should be modest; and are to be considered in the light of the particular circumstances.

[11] Costs are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. Where a party's conduct has unnecessarily increased costs, that may be taken into account in the award that is made, but costs are not to be used as a punishment or as an expression of disapproval of a party's conduct.

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[3] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC)
[4] *Fagotti v Acme & Co Ltd* [2015] EmpC 135

[12] In this instance I consider it appropriate that costs follow the event. I take as the starting point the Authority's notional daily tariff, which at that time was $3,500 per day. The Authority's investigation took three days in total which results in a preliminary total of $10,500 in costs before any factors supporting uplifts or reductions are considered.

[13] I accept in part counsel for the applicants' submission that the delays and approach to bringing the applicants' claims was not overall a major contributor to the costs incurred by the respondent. I note, however, that in the course of the hearing some claims were withdrawn and this did affect the time spent in preparation by the respondent and therefore the costs it incurred. That warrants an uplift to the daily tariff. I further note the partial success of one applicant in relation to a portion of her claim to have been disadvantaged in her employment by an unjustifiable action of her employer. That justifies consideration of a reduction.

[14] Much of the Authority's investigation meeting was focussed on the Board's investigation of the applicants' complaints. By my reckoning that occupied approximately 50% of the time, with the remaining time being more or less equally apportioned between each applicant's personal grievances. On that basis I calculate the time spent on the withdrawn personal grievances of one applicant to have been 11 percent. That renders an uplift of $385 to the daily tariff taking it to $11,655.

[15] The partial success of one of the applicants in respect to one of her personal grievance claims warrants a reduction to the daily tariff which, using the same basis for calculation as above, I assess at 8 percent. That renders a reduction of $280 to the daily tariff which results in an overall costs award to the respondent of $10,815. The uplift and reduction will be reflected in the respective apportionment of costs against each individual applicant.

[16] Mrs Clayton's claims failed completely and I find it reasonable that she pay $3,500 of the costs award. In the course of the hearing, Mrs Minton withdrew her claim to have been constructively dismissed and to have been disadvantaged by the loss of hours during her employment. I find it appropriate she pay $4,655 of the total costs award. This represents the full amount of the uplift to the daily tariff as referred to above.

[17] Mrs Hefferen succeeded in one part of her claim to have been disadvantaged by an unjustifiable action by her employer. All her other claims failed. I assess the appropriate contribution for her to make to the overall cost award to be $2,660.

Orders

[18] Pursuant to clause 15 of Schedule 2 to the Employment Relations Act 2000 I order:

a. Mary Clayton to pay the Board of Proprietors of Solway College $3,500 as a contribution to costs;

b. Angela Minton to pay the Board of Proprietors of Solway College $4,655 as a contribution to costs; and

c. Kerry Hefferen to pay the Board of Proprietors of Solway College $2,660 as a contribution to costs.

Trish MacKinnon
Member of the Employment Relations Authority