

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 636  
3056262

BETWEEN            THOMAS MOKARAKA  
Applicant

AND                 DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority:    Jenni-Maree Trotman

Representatives:        Gregory Bennett, Advocate for the Applicant  
John Rooney, Counsel for the Respondent

Submissions Received:    30 October 2019 from the Applicant  
7 October 2019 from the Respondent

Date of Determination:    06 November 2019

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**COST DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]    On 23 September 2019 I issued a determination in which I found Thomas Mocaraka was not unjustifiably dismissed from his employment with the Department of Corrections.

[2]    Costs were reserved with the parties being encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions. Submissions were filed on behalf of Corrections on 7 October 2019. Submissions were filed on behalf of Mr Mocaraka on 30 October 2019.

## **Application for costs**

[3] Corrections claims indemnity costs in the sum of \$45,171 plus GST. This sum relates to legal costs it incurred for the period from the expiry of a Calderbank letter to the end of the investigation meeting and was supported by invoices and a time breakdown. In the alternative, it submits an increase in the daily tariff to \$9,000 per investigation day is appropriate.

[4] Submissions made on Mr Mokaraka's behalf submitted that the daily tariff should be maintained or should be adjusted downward.

## **Authority's Approach to Costs**

[5] The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority considers reasonable.<sup>1</sup>

[6] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs.<sup>2</sup> These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.<sup>3</sup> The principles 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 is 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 increases 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.

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<sup>1</sup> Employment Relations Act 2000, Schedule 2 clause 14.

<sup>2</sup> *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

<sup>3</sup> *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- 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.

[7] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting.<sup>4</sup> The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[8] This matter took place over two and a half days. The starting point for consideration of costs is therefore \$9,750.

#### **Should there be an adjustment to costs?**

[9] I was not persuaded by the submissions advanced on behalf of Mr Mocaraka that a downwards adjustment to the daily tariff for costs was appropriate. However, for the reasons that follow, I find costs should be adjusted upwards by \$5,000, representing an increase of \$2,000 per day to the daily tariff.

#### ***Calderbank offer***

[10] In considering costs, the starting point is that the losing party should pay the costs of the successful party, absent exceptional circumstances.<sup>5</sup> However, if a Calderbank offer is made, and the Applicant does not beat the offer, there should be a steely response by the Courts, as that would be in the broader public interest.<sup>6</sup>

[11] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:<sup>7</sup>

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement

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<sup>4</sup> Practice Note 2, Costs in the Employment Relations Authority.

<sup>5</sup> *Weaver v Auckland Council* [2017] NZCA 330 at [20].

<sup>6</sup> *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA) at [53]

<sup>7</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18]-[20].

offers, proceed with litigation and then fail to achieve any more than was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[12] These comments also apply with respect to Calderbank offers made before an Authority investigation.<sup>8</sup>

*The relevant facts*

[13] On 21 June 2019 Corrections' Solicitor wrote to Mr Mokaraka's representative setting out an offer to settle Mr Mokaraka's claims. The letter was marked "Without Prejudice except as at Costs". The letter explained what was meant by the offer being tendered on a without prejudice except as to costs basis, advising that if Mr Mokaraka was unsuccessful in his claim, or received an award of the same or less than the sums offered, Corrections would seek full indemnity costs from the date of the expiry of the offer.

[14] The letter went on to express Corrections' view that it had strong prospects of success in the Authority. It maintained that its decision to dismiss Mr Mokaraka was both substantively and procedurally justified and set out the "strong evidence" that it had that supported its decision that he had engaged in serious misconduct.

[15] The letter expressed the benefits of a pragmatic resolution before the parties commenced preparation for the investigation meeting and set out the following offer on a without admission of liability basis:

- (a) The Department will pay Mr Mokaraka three months' lost remuneration (less tax),
- (b) The Department will pay Mr Mokaraka compensation of \$5,000 under section 123(1)(c)(i) of the Employment Relations Act 2000;
- (c) The Department will pay a contribution towards legal costs of up to \$10,000 plus GST on receipt of a tax invoice from Abbey Employment Law Specialists;
- (d) Mr Mokaraka will withdraw his statement of problem before the Employment Relations Authority (being described as file number 3056262) and will confirm that there is no issue as to costs between the parties;
- (e) The existence and terms of the agreement, and negotiations leading to the agreement, would remain confidential between the parties;

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<sup>8</sup> *Fagotti v Acme & Co Ltd*, above n 3, at [109]; *Spillman v Tandam Skydiving* [2018] NZEmpC 32 at [37].

- (f) The parties will make no disparaging comment of the other;
- (g) The Record of Settlement entered into would be endorsed by a Mediator from the Ministry of Business, Innovation and Employment.

[16] The offer was open for acceptance until 4 pm on 27 June 2019 at which time it expired. No response or counter-offer was received from Mr Mocaraka.

### *Analysis*

[17] Having considered the offer, I am satisfied that it was very fair, especially given Corrections' assessment of the strength of its case which was ultimately validated by the Authority's determination. The issue then is whether, notwithstanding the fairness of the offer, and Mr Mocaraka's lack of success, his rejection of the offers was reasonable at the time.<sup>9</sup>

[18] The reason why Mr Mocaraka failed to respond to Corrections' offer, or make any counteroffer, was not explained in the submissions filed on Mr Mocaraka's behalf. Indeed the existence of the Calderbank offer was not addressed at all. I have no information then on which to conclude whether the rejection of the offer was reasonable.

[19] In the circumstances, I find Mr Mocaraka's rejection of the offer was unreasonable. The offer was clear and transparent and was made in sufficient time to allow Mr Mocaraka time to consider it and take advice on it if necessary.

[20] An uplift to the daily tariff is appropriate.

[21] To assess what adjustment, if any, I should make to the daily tariff I have taken into account the following matters:

- a) The increase in costs applied by the Authority and the Court in similar cases.
- b) The additional costs incurred by Corrections that would have been avoided had Mr Mocaraka accepted the offer made, and the reasonableness of those costs taking into account the nature of this case.

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<sup>9</sup> *Xtreme Dining Ltd t/a Think Steel v Dewar*[2017] NZEmpC 10 at [28].

- c) The comments made by Judge Inglis in *Booth v Big Kahuna Holdings Limited*, namely:<sup>10</sup>

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 ...

[22] In the circumstances, I consider a reasonable uplift to costs to be \$3,000.

### ***Applicant's conduct***

[23] Although the purpose of a costs award is not to punish, I find that Corrections' legal costs were unnecessarily increased by Mr Mokaraka (though his representative Mr Bennett) failing to adhere to timetabled directions, including filing his witness statements late, and by pursuing a claim of unjustified disadvantage that was then withdrawn part way through the investigation meeting.

[24] In terms of the withdrawal of Mr Mokaraka's disadvantage claim, at the end of the first day of the investigation Mr Bennett advised the Authority that Mr Mokaraka did not wish to pursue his unjustified disadvantage claim. As this submission was unexpected, and rendered much of the evidence provided that day redundant, the Authority requested Mr Bennett to take instructions overnight and advise the Authority of his client's position the following day. Mr Bennett confirmed at the commencement of the second day that Mr Mokaraka did not wish to pursue his claim for unjustified disadvantage.

[25] I accept that Corrections' costs were unnecessarily increased as it:

- a) Had to request the Authority to direct Mr Mokaraka to provide further and better particulars in relation to the unjustified disadvantage claim;
- b) Following the Authority's direction, filed an amended statement in reply to defend the allegations raised;

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<sup>10</sup> [2015] NZEmpC.

- c) Had to prepare and file additional evidence and documents that were relevant to the disadvantage claim but were not relevant to the unjustified dismissal claim. I note that the investigation was scheduled to last 4 days

[26] I consider a reasonable contribution towards these costs is \$2,000.00.

***Indemnity Costs***

[27] Taking into account the comments made by Judge Inglis in *Booth v Big Kahuna Holdings Limited* noted earlier, I am satisfied that the uplift in costs that I have ordered is sufficient to address the legal costs incurred by Corrections. Indemnity costs are not warranted.

**Outcome**

[28] Mr Mocaraka is ordered to pay Corrections the sum of \$14,750 towards its legal costs. This sum must be paid within 28 days of the date of this determination.

Jenni-Maree Trotman  
Member of the Employment Relations Authority