IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 670
3056699

	BETWEEN	ROBERT MCMAHON Applicant
	AND	SMART ENVIRONMENTAL LIMITED Respondent
	AND	3056833
	BETWEEN	RANDAL MCMAHON Applicant
	AND	SMART ENVIRONMENTAL LIMITED Respondent
Member of Authority:	Jenni-Maree Trotman	
Representatives:	John Burley, Counsel for the Applicants Maria Green, Counsel for the Respondent	
Submissions and further information received:	8 November 2019 from the Applicant 15, 18 and 20 November 2019 from the Respondent	
Date of Determination:	21 November 2019	

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination arises as a result of an application by Smart Environmental Limited (Smart) for indemnity, or increased costs, following the discontinuance of Robert and Randal McMahon's claim against it.

[2] The McMahons challenge the application. They maintain that no costs should be awarded or otherwise any costs should be minimal.

[3] By consent the issue of costs has been addressed on the papers.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Relevant background

[5] On 19 March 2019 Robert and Randal McMahon each filed a Statement of Problem with the Authority alleging they had been unjustifiably dismissed and that Smart had breached its duty of good faith. Their claims followed correspondence between the parties where they each explained their positions and exchanged multiple offers to settle their dispute.

[6] On 15 April 2019 Smart filed a single Statement in Reply that addressed its response to both claims. It maintained that the McMahons were both independent contractors and therefore the Authority did not have jurisdiction to hear any of their alleged claims.

[7] On 18 April 2019 the Authority directed the parties to attend mediation and to attempt in good faith to reach a resolution of their differences. This mediation took place on 7 August 2019 but was adjourned to enable further discussions to take place.

[8] Thereafter, further offers of settlement were exchanged between the parties in an attempt to settle the McMahons' claims, however settlement was not achieved.

[9] On 21 October 2019 the McMahons withdrew their claims from the Authority.

Authority's Approach to Costs

[10] The Authority has a broad general discretion to order any party to a matter to pay to any other party such costs and expenses as the Authority considers reasonable. [1]

[11] In *PBO Ltd v Da Cruz,* the full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs. [2] These principles

[1] Employment Relations Act 2000, Schedule 2 clause 15.
[2] *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.[3] 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.

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.

What is the starting point for assessing costs?

[12] Smart was not put to the expense associated with attendance at an Authority investigation. Nonetheless it was put to some expense in taking steps to defend the claims made by the McMahons. These steps include filing a statement in reply and attending mediation. In terms of the latter, I note the judicial consensus is that it is

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

open to the Authority to award costs in respect of mediation that has been directed by the Authority, as occurred in the present case.[4]

[13] In the circumstances, I set a provisional starting point of $1,500 representing one third of the Authority's normal daily tariff for the first day of an investigation meeting.[5]

Should there be an adjustment to costs?

[14] Smart maintains that the Authority should depart from its traditional tariff based approach and order the McMahons to pay it indemnity or increased costs. The essence of the submissions filed for Smart was, first, that the McMahons' application was an abuse of process and unreasonable. Second, the McMahons turned down Calderbank offers that were a genuine and reasonable effort by Smart to resolve the dispute by agreement.

[15] For the reasons that follow, I am satisfied that an uplift in costs ought to be made. However, indemnity costs are not warranted.

Applicants' conduct

[16] Smart submits that the McMahons knew, or ought to have known, that their claim lacked merit as there was clearly no employment relationship between the parties. The difficulty with Smart's argument is two-fold.

[17] First, the McMahons' claims have not been heard in the Authority in order to determine their merit. Whether they were employees or contractors has not been tested in evidence and therefore I cannot, with any certainty, decide the strengths and weaknesses of the parties' opposing positions.

[18] Second, and as the Court said in *PBO Ltd v Da Cruz*, costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct. In the present case there is no evidence of conduct by the McMahons that increased costs unnecessarily. The conduct undertaken in bringing their claims to the Authority, and pursuing those claims through mediation and by way of negotiation between Counsel, were within the normal range that have been taken into account by

[4] Illustrated by Court judgments such as *RHB Chartered Accountants v Rawcliffe* [2012] NZEmpC 31 at [30] and [36].
[5] Practice Note 2, Costs in the Employment Relations Authority.

the Authority in setting its daily tariff. The McMahons discontinued their claims within two weeks of post mediation discussions concluding.

[19] I make no adjustment to the costs that would otherwise have been payable by the McMahons under this head.

Calderbank offer

[20] A Calderbank offer is a factor that can be taken into account when considering costs. Where an offer is made, and that offer is not beaten, the Courts have repeatedly stated that there should be a steely response, as that would be in the broader public interest.[6] These comments also apply with respect to Calderbank offers made before an Authority investigation.[7]

> It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement 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.[8]

[21] In the present case, the offers made by Smart were for a sum of $10,000 plus GST. The first offer was made on 21 August 2019. This offer was then renewed on 10 October 2019. The offers were rejected by the McMahons.

[22] I am satisfied in the circumstances that the McMahons' acted unreasonably in rejecting Smart's offer. The offer was made after mediation had occurred and at a time when the McMahons were in a position to consider the merits of their claim. Had the offer been accepted, the McMahons would have received more in these proceedings than what they achieved by discontinuing.

[23] I consider an increase to the daily tariff is warranted.

[24] A review of the invoices provided to the Authority by Smart, show Smart was charged just over $1,200 plus GST for attendances by its Counsel from the date of the expiry of the first settlement offer. These attendances appear to be based on an hourly

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[6] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 at [53].
[7] *Fagotti v Acme &Co Ltd*, above n 3, at [109]; *Spillman v Tandam Skydiving* [2018] NZEmpC 32 at [37].
[8] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18]-[20].

rate of $600 per hour plus GST which is well above the hourly rate that is normally seen in the Authority. As the Court said in *Booth v Big Kahuna Holdings Limited*:[9]

> 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 …

[25] In the circumstances, I consider a reasonable uplift to costs to be $500.

McMahons' financial position

[26] In submissions filed on behalf of the McMahons they raise issues about their ability to pay costs, maintaining that the Authority should use its discretion to decline any award of costs.

[27] Generally the issue of a parties' ability to pay is addressed by the Authority when a successful party applies for compliance. However, I note the comments expressed in the decision of *Scarborough v Micron Security Products Ltd* where Judge Inglis (as she then was) said:[10]

> I proceed on the basis set out in *Tomo v Checkmate Precision Cutting Tools Ltd*, namely that Ms Scarborough's financial position is relevant to determining a just award of costs but it is not decisive and must be weighed against other relevant factors…

[28] *Scarborough* was approved by the Court in *Smith v Director General of the Ministry of Primary Industries.*[11] In that case the Court also referred to the following observation in *Scarborough* about costs:[12]

> There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make

[9] [2015] NZEmpC.
[10] *Scarborough v Micron Security Products Ltd* [2015] ERNZ 812 at [36] (footnotes omitted).
[11] At [22]-[23].
[12] *Scarborough*, at note 11 at [36].

> decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[29] In the present case, I was not provided with sworn evidence supporting the financial difficulties that the McMahons' said they were facing. I was however provided with a letter from Randal McMahon, and an email from Robert McMahon, which expressed some of the financial difficulties they were experiencing, as well as some other supporting material. Although the Authority has the ability to take into account such information and evidence as in equity and good conscience it thinks fit, it is impossible at this stage to ascertain the McMahons' assets, income and outgoings so as to make a determination that an award of costs should be reduced.

[30] In the circumstances, I make no reduction to costs.

Outcome

[31] Robert and Randal McMahon are jointly and severally ordered to pay Smart Environmental Limited the sum of $2,000 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