IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 283
3042531

	BETWEEN	VERONICA BYRNE Applicant
	AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Richard Harrison, counsel for the Applicant Greg Cain, counsel the Respondent
Investigation Meeting:	18 February 2019
Submissions received:	30 April 2019 from the Applicant 10 April 2019 from the Respondent
Date of Determination:	14 May 2019

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 23 January 2019 I issued a determination in which I found the New Zealand Transport Agency (NZTA) had not breached a Record of Settlement it had entered into with Veronica Byrne. Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions.

Application for costs

[2] NZTA applies for a contribution towards its legal costs in the amount of $9,000. In doing so it relies on two Calderbank offers it made, as well as Ms Byrne's conduct that it submits unnecessarily increased NZTA's costs.

[3] NZTA's application is opposed by Ms Byrne's representative. In submissions filed on her behalf she takes the position that costs should be based on the Authority's daily tariff amounting to $4,500.

[4] As permitted by 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.

Legal Principles

[5] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and were outlined by a full Court in *PBO Ltd v Da Cruz.* [1]

[6] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.[2] The principles include:

a) There is a discretion as to whether costs will 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.

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[1] *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].
[2] *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

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] In considering costs, the starting point is that the losing party should pay the costs of the successful party, absent exceptional circumstances.[3]

Analysis

[8] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff for a one day investigation meeting is $4,500.[4] The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[9] The investigation meeting took place over 1 day. Using the normal daily tariff the starting point for an award of costs is $4,500.

Should the daily tariff be adjusted upwards?

Conduct unnecessarily increasing costs

[10] The essence of the submissions filed for Ms Byrne was that this matter was a relatively straightforward case that ought not to result in increased costs. Particularly as, in Counsel's submission, she had not acted in any way that extended the hearing time or added unnecessarily to the costs of the investigation process.

[11] For reasons that will become apparent, I disagree. I find that Ms Byrne's conduct did unnecessarily increase NZTA's costs. This conduct included filing three Statements of Problem that resulted in NZTA being required to file three Statements in Reply. In addition, she failed to fully and fairly particularise her claim, despite directions being issued for her to do so, resulting in NZTA being put to the expense of filing various memoranda, attending an additional case management conference, and

[3] *Weaver v Auckland Council* [2017] NZCA 330 at [20].
[4] *Hines v Eastlight Port Limited* [2018] NZEmpC 111 at [25]; *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].

obtaining an affidavit from a summoned witness so as to understand the case against it and to avoid an interim investigation meeting.

[12] A review of the file establishes the following facts relevant to the determination on costs:

a) Ms Byrne filed her first Statement of Problem on 17 October 2018. Her claim alleged employees of NZTA had made disparaging comments about her to various parties. It failed to provide any particulars of who made the comments or what was said.

b) In its Statement in Reply filed on 2 November 2018, NZTA noted that it was unable to provide a full response to Ms Byrne's claims as the Statement of Problem did not set out adequate particulars or even the basic foundations of a claim. It sought further and better particulars of the substance of her claim.

c) On 14 November 2018 I directed Ms Byrne to file an amended statement of problem that identified the persons who were alleged to have made the disparaging comments and particulars of the alleged disparaging comments made.

d) A second Statement of Problem was filed on 30 November 2018. This claim amended the original claim by removing a number of the allegations and pleading, inter alia:

> 2.4 On or about 23 February 2018 an employee of the Respondent contacted WSP-Opus, instructing that the Applicant was not to be involved in contract work related to the Respondent.
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> 2.5 On or about 8 March 2018 WSP-Opus verified this directive with the Respondent who advised "that if the Applicant remained working on [their] contract, WSP-Opus would no longer be engaged to do this work".

e) In NZTA's second Statement in Reply, filed on 10 December 2018, it noted that the amended Statement of Problem did not set out Ms Byrne's allegations with specific particularity to enable it to be fully, fairly and clearly informed so as to enable it to respond. It referred to the failure to identify the NZTA employee who was alleged to have contacted WSP-Opus, as well as the person from WSP-Opus to whom the alleged

comments were made. It also referred to the lack of particulars of the other alleged breaches of the settlement agreement arising out of unsuccessful job applications.

f) During the first case management conference Mr Flaws, who represented Ms Byrne at the time, indicated that the person who had knowledge of what was said and to whom was Peter Houba, WSP-Opus' Business Manager. He requested that Mr Houba be summoned to provide evidence. It was agreed; as the pleadings filed on behalf of Ms Byrne contained insufficient information for the Authority and NZTA to identify relevant witnesses, the most practicable way of investigating Ms Byrne's claim was to have a preliminary meeting to hear Mr Houba's evidence. This investigation meeting was set down for 21 January 2019 with the parties permitted to attend by telephone if they wished.

g) Thereafter, to avoid an investigation meeting, NZTA approached Mr Houba and obtained a detailed affidavit from him. This resulted in the investigation meeting set down for 21 January 2019 being vacated.

h) A second case management conference was convened on 1 February 2019 to address matters relating to the investigation.

i) On 1 February 2019 a third Statement of Problem was filed on Ms Byrne's behalf. This added a further claim, alleging that NZTA had breached the settlement agreement by making disparaging comments about Ms Byrne through a memorandum filed with the Authority on 29 January 2019. It also introduced a claim for a penalty for breach of the settlement agreement. Mr Flaws had previously confirmed to the Authority that a penalty would not be sought.

j) On 4 February 2019 NZTA filed an extensive and detailed third Statement in Reply.

[13] Taking into account the additional attendances required by NZTA, I increase the daily tariff by $1,000.

The Calderbank offer

[14] Where a Calderbank offer is made, and the opposing party does not beat the offer, the Court has found it to be in the broader public interest for there to be a steely response.[5]

[15] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:[6]

> 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.

[16] These comments also apply with respect to Calderbank offers made before an Authority investigation.[7]

[17] In *Xtreme Dining Ltd t/a Think Steel v Dewar* the full Court noted that the correct question in circumstances where a Calderbank offer has been made was whether the party to whom the offer was made had acted unreasonably in rejecting the offer, at the time that it did so.[8]

[18] Prior to the Investigation meeting NZTA made two offers to settle.

The first offer

a) The first offer was made on 24 January 2019, after receipt of Mr Houba's affidavit that particularised his evidence in terms of what was said by NZTA to WSP-Opus. In the offer, NZTA summarised what its position was in relation to Ms Byrne's claim. It assured Ms Byrne that issues that occurred prior to her leaving her employment with it, and the reasons behind the request to remove her from the Northland Bridges Project were not publicly known. It explained that NZTA had been careful to ensure that those matters were not disclosed to any third party, including WSP-Opus. The letter went on to offer not to pursue Ms Byrne for costs if she withdrew her claim.

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[5] *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 (CA) at [53].
[6] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18]-[20].
[7] *Fagotti v Acme &Co Ltd* [2015] NZEmpC 135 at [109].
[8] *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].

b) NZTA submits this offer was a reasonable one in the circumstances. It refers to the fact that, at the time the offer was made, the remedy sought by Ms Byrne for the alleged breach of the settlement agreement was a compliance order and not a penalty.

The second offer

c) The second offer was made on 15 February 2019. By this stage Ms Byrne had filed her third amended Statement of Problem. The remedies she sought in the third amended Statement of Problem were:

i. A declaration that NZTA had breached clause 9 of the settlement agreement;

ii. A compliance order requiring NZTA to comply with the non-disparaging provision in the settlement agreement and a direction that NZTA refrain from any act or omission that may have a detrimental effect on her employment prospects and/or well-being;

iii. A penalty of $10,000 in respect of breaches of the settlement agreement;

iv. Costs.

d) The offer made by NZTA:

i. Addressed Ms Byrne's concerns about future employment with entities that contracted with the NZTA by providing:

> Ms Byrne agrees to inform the Agency if she secures work with an Agency supplier and is likely to be working on an Agency project or programme. Following such disclosure, the Agency will engage directly with Ms Byrne and attempt to negotiate in good faith whether it will be necessary for her to interact with the Agency's staff while working on the Agency project or programme, and if so, how those interactions will be managed. This will not be regarded as a breach of the Agency's obligations (under this Agreement or the ROS) not to disparage Ms Byrne.

ii. To pay Ms Byrne the entire amount she was seeking by way of a penalty ($10,000)

iii. To pay Ms Byrne's reasonable legal costs.

e) NZTA submits:

> … the offer addressed the point that the applicant's counsel made repeatedly at the investigation meeting – that the most crucial issue for her was ensuring that the Agency did not prevent her from working for any other supplier. The offer addressed this by proposing arrangements for how any future situations would be dealt with. Despite the offer providing the applicant with everything she was seeking, and much more than she was likely to be awarded by the Authority even if she was successful, the applicant declined the offer.

[19] In terms of the first of these offers, I am satisfied, on balance, that Ms Byrne's decision to reject NZTA's offer was reasonable. Although the offer, if accepted, may have resulted in Ms Byrne being financially better off, in that she would not have been liable for her own and NZTA's costs, the offer did not address her primary claim being to prevent NZTA from making similar statements in the future to prospective employers.

[20] With respect to the second offer made by NZTA, I find Ms Byrne's decision to reject the offer was unreasonable. Had the offer been accepted by Ms Byrne she would have achieved more than she did both in monetary terms and, importantly to her, certainty as to how future situations would be addressed should she be employed by one of NZTA's suppliers.

[21] While I acknowledge the second offer was made on the Friday afternoon before the Monday on which the Authority investigation was to commence, I find this was sufficient time for consideration. The correspondence exchanged between the parties at the time shows that the offer was made as part of an ongoing process of negotiation. In addition, at the commencement of the investigation meeting, I advised the parties that they could take a break to engage in any settlement discussions during the course of the hearing.

[22] To assess what adjustment, if any, I should make to the daily tariff, to reflect Ms Byrne's unreasonable rejection of NZTA's second offer, I have taken into account the following matters:

a) Had Ms Byrne accepted the second offer then the costs of NZTA attending the investigation meeting itself would have been avoided. However, the costs of earlier attendances would still have been incurred.

b) While a Partner was engaged by NZTA to represent it at the investigation meeting itself, I am aware of no reason why the solicitor, who undertook the preparation work for the investigation meeting, could not have represented NZTA at the investigation itself. That solicitor's hourly rate was $330 as opposed to the Partner whose hourly rate is $448. I agree in this respect with the comments made by Judge Inglis in *Booth v Big Kahuna Holdings Limited*:

> 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 …

c) Indemnity costs are generally reserved for cases where a party's conduct has been especially egregious.[9] There is no evidence of any egregious conduct here.

[23] In the circumstances, and taking into account adjustments made by the Authority to the daily tariff in similar cases, I consider a reasonable uplift to costs, due to Ms Byrne's unreasonable rejection of the second offer, to be $2,000. I increase the daily tariff by this sum.

Should the daily tariff be adjusted downwards?

[24] There are no grounds advanced for adjusting the daily tariff downwards.

Outcome

[25] The overall outcome is:

a) Veronica Byrne is ordered to pay NZ Transport Agency the sum of $7,500 towards its legal costs.

[9] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94].

b) The sum of $7,500 must be paid within 28 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority