

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 151
3030830

BETWEEN REBECCA ADAMS
Applicant

A N D PAPER PLUS NEW ZEALAND
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Jane Taylor and Jeff Goldstein, Co-Counsel, for
applicant
Mary-Jane Thomas, Counsel, for respondent

Submissions Received: 19 February 2019 from Applicant
27 February 2019 from Respondent

Date of Determination: 13 March 2019

**COSTS DETERMINATION OF THE
AUTHORITY**

[1] By way of a determination dated 26 November 2018¹, the Authority found that Ms Adams had not been unjustifiably dismissed, and that it was not appropriate to impose a penalty upon the respondent. Costs were reserved, and the parties directed to try to agree how they were to be dealt with. They have been unable to agree, and the Authority must now determine the matter of costs.

[2] Both parties agree that the appropriate starting point is the first day's daily tariff of \$4,500, despite the investigation going into a second day, as the total number

¹ [2018] NZERA Christchurch 172

of hours of investigation did not materially exceed seven hours. However, the respondent seeks from Ms Adams an uplifted costs award of \$17,336.71, plus GST, which includes disbursements. The respondent seeks an uplifted award of costs in reliance upon a letter marked “without prejudice save as to costs” (the Calderbank letter).

[3] The respondent’s costs break down as follows, according to the copy invoices produced by the respondent:

- (a) Preston Russell’s fees of \$990, plus GST, plus office administration expenses of \$49.50, billed on 30 April 2018;
- (b) Preston Russell’s fees of \$1,000, plus GST, plus office administration expenses of \$50, billed on 28 June 2018;
- (c) Preston Russell’s fees of \$3,000, plus GST, plus office administration expenses of \$150, billed on 28 September 2018;
- (d) Preston Russell’s fees of \$2,860, plus GST, plus office administration expenses of \$143, billed on 31 October 2018;
- (e) Preston Russell’s fees of \$9,000, plus GST, plus office administration expenses of \$450, billed on 14 November 2018;
- (f) Ms Thomas’ travel costs of \$364.34 plus GST for her flights between Invercargill and Christchurch for the investigation meeting; and
- (g) Ms Gunn’s² travel and time costs of \$837.41 plus GST.

[4] These total (excluding GST) \$16,850 in legal costs, \$842.50 office and administration costs, \$364 counsel’s travel costs, and \$837.41 witness costs. I cannot see from these figures how the respondent calculates the uplifted figure of \$17,336.71 plus GST that it seeks.

² Ms Gunn gave evidence on behalf of the respondent.

[5] Ms Taylor objects to the costs sought by the respondent on various grounds, as follows:

- (a) The percentage uplift is unreasonable, and the total costs claimed to have been incurred appear to include costs of \$4,360 (including GST) incurred after 15 January 2019;
- (b) The costs incurred appear to include the costs of attending mediation;
- (c) One invoice states it included costs for drafting and finalising a statement in reply when the statement of problem was only lodged the day before;
- (d) The basis of the precise uplift is unclear, and counsel's hourly rate has not been disclosed, so it is not possible to assess whether the costs incurred are reasonable;
- (e) The respondent should not be entitled to recover GST on its costs incurred;
- (f) Ms Adams was not aware that Ms Gunn was charging for attending the investigation meeting, and Ms Gunn could have given evidence remotely in any event;
- (g) Ms Adams' claim was not untenable, as claimed by the respondent, and the respondent has not particularised what aspect of the claim caused extra costs to be unreasonably incurred;
- (h) The Calderbank offer did not give Ms Adams a reasonable time to respond, and did not state the consequences of rejecting the offer. It was not unreasonable for her to reject the offer in any event;
- (i) Ms Adams has limited means to pay a costs award.

[6] Ms Taylor submits that costs should either lie where they fall, or should be limited to an award of \$4,500 in favour of the respondent.

Discussion

[7] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[8] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*³ when setting costs awards. These 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 are 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 increased 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.

³ [2005] 1 ERNZ 808

- (g) That costs generally follow the event.
- (h) That without prejudice offers can be taken into account.
- (i) That awards will be modest.
- (j) That frequently costs are judged against a notional daily rate.
- (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.

[9] I see no basis for determining that costs should lie where they fall. The respondent was entirely successful in its defence of Ms Adams' application, and costs should follow the event. That is, the respondent is entitled to recover a contribution towards its costs in defending itself. The question is, should there be an uplift from the \$4,500 first day's tariff?

[10] In considering the Calderbank letter, I have to decide whether it was reasonable for Ms Adams to have rejected it. If it was, then the Authority has to adopt the 'steely approach' which the Employment Court has confirmed applies to the Authority⁴ when a successful Calderbank offer has been sent.

[11] The Calderbank letter, dated 23 April 2018, and sent from Ms Thomas to Ms Ryder of Goldstein Ryder, was very brief. It was marked "without prejudice save as to costs", and stated:

- 1 We have instructions to offer in full and final settlement the sum of \$4,500.00 pursuant to section 123 of the Employment Relations Act.
- 2 This offer will remain open for acceptance until **5pm on Tuesday 24 April 2018**, at which time if not accepted, it will lapse.

⁴ See, for example, *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, [2015] ERNZ 808 (EmpC), at [109].

[12] The problem I have in assessing whether it was reasonable for Ms Adams to have rejected the Calderbank letter is that it does not give any reasons for the level of settlement sum being offered. It may be that there were background discussions against which the Calderbank letter should be examined, but these have not been made known to the Authority.

[13] Therefore, all that I know is that a settlement offer of \$4,500 was made which had to be accepted by Ms Adams within 26.5 hours (having been sent by email to Ms Ryder on 23 April at 2.35pm). No mention is made of how Ms Adams' costs were to be dealt with, and no mention is made why the sum of \$4,500 was deemed by the respondent to be a reasonable offer. Whilst brevity is often commendable, it is not always appropriate in a Calderbank offer.

[14] I am therefore unable to conclude that Ms Adams was unreasonable in rejecting the Calderbank offer. I therefore decline to take it into account in fixing costs.

[15] Is there any other compelling reason to uplift the \$4,500 contribution? I cannot see any. Ms Adams' claim, whilst problematic in parts, was not clearly hopeless, as there was enough complexity in the factual matrix to merit a thorough investigation of her employment status by reference to the respondent, and of the way that her employment ended.

[16] I therefore fix the costs award due to the respondent at \$4,500. I agree with Ms Taylor that the respondent cannot recover GST as well.

[17] Should the claimed disbursements be awarded? With regard to counsel's travel expenses, comprising return flights between Invercargill and Christchurch, all of the respondent's witnesses reside in the North Island, and could legitimately have engaged Auckland based representation. The fact that Ms Thomas is based in Invercargill therefore has not caused costs to be incurred unnecessarily. In addition, the travel costs, at \$364.34 (excluding GST) are modest, and do not include accommodation, which is not claimed for. I therefore allow them.

[18] Turning to Ms Gunn's costs of \$837.41, excluding GST, I agree with Ms Taylor that it was not made known in advance that Ms Gunn would be billing the respondent fees for the time taken by her in preparing her brief of evidence, her travel time and her being in Christchurch, nor that the respondent would seek to recover those costs from Ms Adams if she was unsuccessful.

[19] Furthermore, it appears that Ms Gunn has charged the respondent for 14 hours of her time simply for being in Christchurch, whereas the investigation meeting lasted no more than seven hours in total. It is by no means reasonable to expect Ms Adams to indemnify the respondent for that cost.

[20] I would have been prepared to have awarded the respondent the reasonable out of pocket expenses incurred by Ms Gunn in travelling from Te Puke to Christchurch, as otherwise the respondent would have had no one physically in Christchurch to instruct Ms Thomas. However, the respondent is not seeking to recover any such disbursement from Ms Adams. I decline to order Ms Adams to contribute towards Ms Gunn's fees.

Order

[21] In conclusion, I order Ms Adams to pay to the respondent within 14 days of the date of this determination:

- (a) The sum of \$4,500, plus
- (b) The further sum of \$364.34.

David Appleton
Member of the Employment Relations Authority