

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 444
3034485

BETWEEN ANNA COMBRINK
Applicant

AND D B & P A JAMES LIMITED TRADING AS
NOVUS NEW ZEALAND
Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer Advocate for Applicant
John Shingleton Counsel for Respondent

Submissions received: 21 June 2019 from Applicant
3 July 2019 from Respondent

Determination: 29 July 2019

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

I order DB & PA James Limited trading as Novus New Zealand to pay to Anna Combrink the sum of \$5,200 costs and reimbursement of the filing fee of \$71.56.

Substantive determination

[1] In its substantive determination dated 7 June 2019 the Authority found that the applicant was unjustifiably disadvantaged in her employment and was entitled to payment of unpaid wages and holiday pay that had been withheld. It reserved the issue of costs.

[2] Agreement as to costs was not reached and the Authority now has cost submissions from Ms Oberndorfer on behalf of the applicant and Mr Shingleton on behalf of the respondent.

The applicant's submissions

[3] Ms Oberndorfer submits that the applicant was successful in pursuing her claim. Although the Authority found a claim of unjustified disadvantage and not the unjustified dismissal advanced by the applicant she submits that both related to the same facts and ought not to detract from the cost claim in the way a completely unsuccessful claim should.

[4] She submits that the starting point should be based on the notional daily tariff for a whole day of \$4,500 uplifted by \$1000 to reflect attempts to settle both by way of two open offers and then a Calderbank offer. On the basis that more was awarded by the Authority than the applicant was prepared to settle for, Ms Oberndorfer submits costs that followed the Calderbank offer were unnecessary and should result in an uplift.

[5] Ms Oberndorfer also seeks to recover the GST amount of her costs relying on an Employment Court judgment.¹ Reimbursement of the filing fee is also sought.

Submissions from the Respondent

[6] Mr Shingleton on behalf of the respondent accepts that the applicant was successful in its claim for unjustified disadvantage but that the applicant was unsuccessful for its unjustified dismissal claim.

[7] He refers the Authority to another determination to support that the applicant should be ordered to pay the respondent costs to recognise time spent preparing for and investigating an unjustified dismissal claim that failed.² Mr Shingleton submits in that case the Authority determined the applicant had failed in her personal grievance claim of unjustified constructive dismissal but was successful in a claim for a penalty for an unlawful deduction from wages and a penalty of \$1,000 was paid. In determining costs for that matter, it was found that the majority of the Authority's investigation was conducted in relation to the constructive

¹ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 159

² *Cooke v JKL Entertainment Ltd* [2015] NZERA 5

dismissal claim and the respondent was entitled to a contribution to its costs notwithstanding the penalty awarded.

[8] Mr Shingleton submits that the Authority investigation in this matter was largely conducted in relation to the unjustified dismissal claim and that the applicant should be ordered to pay the respondent costs, or that any cost award should be on the basis that costs lie where they fall.

[9] Mr Shingleton refers to another Authority determination³ where there was consideration whether the Calderbank offer was an effective one.

[10] Mr Shingleton submits that an uplift cannot be considered without addressing whether the Calderbank offer was in fact an effective one and that Ms Oberndorfer has only referred to this in a limited way.

[11] Mr Shingleton submits that because the applicant was successful in her claim for unjustified disadvantage and unsuccessful in her claim for unjustified dismissal the Authority should exercise its discretion and order costs lie where they fall to recognise the applicant was unsuccessful in the unjustified dismissal claim.

Analysis and conclusions

[12] The usual principle in the exercise by the Authority of its discretion with respect to costs is that the successful party is entitled to a contribution towards costs.

[13] Mr Shingleton seeks to persuade the Authority to depart from the usual principle in this case because the applicant, although successful, was not to the extent that she claimed. Mr Shingleton referred to an Authority determination to support his submission. More recent guidance in such a situation can be found in an Employment Court judgment *Coomer v JA McCallum & Son Ltd.*⁴

³ *Clapham v Alexander & Co Limited* [2012] NZERA 396.

⁴ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156

[14] *Coomer* was a challenge to an Authority determination.⁵ The Authority had determined while Mr Coomer was successful there should be an award costs of \$4,500 in favour of the respondent. Mr Coomer had claimed he should be paid wages for work undertaken in the factory; he also sought a penalty for a failure to have a signed employment agreement and further said that he had been constructively dismissed and was entitled to remedies. The Authority did not find that Mr Coomer was constructively dismissed, his claim for wages failed on the basis that he was a volunteer and the Authority declined to impose a penalty. The Authority did find that Mr Coomer had a grievance that he was unjustifiably disadvantaged. Judge Smith in his judgment following the challenge found that Mr Coomer was the successful party and that he was entitled to an award of costs. In that case it was found that the conclusion “*rests entirely on the success he had had with his personal grievance and the award made to him.*”⁶ The cost award ultimately made took into account a limited success.

[15] The applicant in this case was successful and by a greater margin than in the *Coomer* matter. She could not have achieved her success without lodging a claim and having an investigation meeting. Her settlement offers including a Calderbank offer were not accepted. As was stated in *Coomer*, the success ... “could not have been achieved without lodging a claim in the Authority.”⁷

[16] The applicant is therefore entitled to consideration of an award of costs in her favour.

The Calderbank offer

[17] The respondent would have been in a much better position than it was following the Authority determination if it had accepted the first two open offers made on behalf of the applicant on 23 June 2017 and 14 July 2017. It would also have been in a better position by \$1518.44 if it had accepted the Calderbank “without prejudice save as to costs” offer made on 27 February 2019.

⁵ *Coomer v JA McCallum & Son Ltd* [2017] NZERA Christchurch 84

⁶ Above n 5 at [36]

⁷ Above n 5 at [43]

[18] The investigation meeting was set for 8 March and the “without prejudice save as to costs offer” was made on 27 February 2019. The offer was left open until 12pm 6 March 2019 which was, in the circumstances, a reasonable time. The offer was clear that it was made on the basis that if the applicant was awarded remedies the same or higher than the amount offered then the applicant could produce the letter in an application for costs in excess of the daily tariff. A contribution towards costs was also sought of \$4,500 plus GST. The offer was not accepted.

[19] In the exercise of the Authority’s discretion as to costs, a proper question is whether the respondent acted unreasonably in rejecting the offer. That requires an assessment of the circumstances at the time of the rejection, not with the benefit of hindsight viewed against the result.⁸ I find that the offer was made at a time when it was clear what the case against the respondent was and any risks it may have in proceeding. In particular the respondent had engaged counsel at the time of the Calderbank offer, which was based in the main on the unpaid wages for the notice period and deducted holiday pay, but presented as a s 123(1)(c)(i) remedy in accordance with the grievance claimed.

[20] It was an offer worthy of careful consideration and the respondent was in all the circumstances well placed to do so. The decision to reject the offer and proceed to an investigation meeting resulted in the applicant being required to attend a one day investigation meeting whereas acceptance of the offer would have avoided those additional costs. The decision to reject the offer at the time it was made was unreasonable.

[21] Ms Oberndorfer seeks an increase of \$1000 to the daily tariff for the one day meeting of \$4,500. As a starting point that is not unreasonable. I weigh that the unjustified dismissal claim was not successful but essentially the same facts were considered for the unjustified disadvantage found. I do accept that the focus of questioning and the submissions would have been different in some respects. In all the circumstances I find a fair uplift and award of costs is the sum of \$5200.

⁸ *Xtreme Dining Limited trading as Think Steel v Leighton Dewar* [2017] NZEmpC 10 at [28]

GST

[22] Ms Oberndorfer seeks a further uplift for GST as the applicant is not personally GST registered and therefore cannot recover the GST amount of her costs. She relies on the Employment Court judgment referred to earlier.⁹

[23] The Authority exercises its discretion as to costs on the basis that the daily tariff it has set is an all-inclusive GST neutral figure. Therefore I do not intend to make an uplift on that basis. I do however find it appropriate to make an order for the reimbursement of the filing fee of \$71.56.

Order made

[24] I order D B & P A James Limited trading as Novus New Zealand to pay to Anna Combrink the sum of \$5,200 being costs, and \$71.56 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority

⁹ Above n 1

