IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2020] NZERA 183
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5644230

	BETWEEN	DIANE MARY SMITHSON Applicant
	AND	WELLINGTON COLLEGE BOARD OF TRUSTEES Respondent

Member of Authority:	Michael Loftus
Representatives:	Barbara Buckett, counsel for Applicant Carolyn Heaton, counsel for Respondent
Submissions Received:	11 September 2019 and 11 February 2020 from the Respondent 31 January 2020 from the Applicant
Date of Determination:	6 May 2020

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 20 August 2019 then Member Crichton issued a determination in respect of claims Ms Smithson brought alleging various unjustified disadvantages.[1] Ultimately Mr Crichton concluded *Ms Smithson's claim fails in its entirety*.

[2] Costs were reserved and the college, as the successful party, now seeks a contribution toward those it incurred defending the claims.

[1] [2019] NZERA 489

[3] Normally the Authority will use a daily tariff when addressing costs with the starting point being $4,500 for an investigation's first day and $3,500 for each subsequent day.[2] From there adjustment may occur depending on the circumstances.

[4] While the investigation convened on four separate days the college advises two of those were part days and Ms Smithson does not dispute its estimate of the time taken. It says application of the tariff would see Ms Smithson ordered to pay a contribution in the vicinity of $11,500 but argues an increase is warranted given the existence of Calderbank offers which were *unreasonably refused* and allegations of other behaviour which created unnecessary cost. Its costs were significantly greater than the tariff with that being evidenced with copies of the invoices.

[5] The claims were triggered by a dispute between Ms Smithson and a colleague on 30 March 2015 which developed into an argument about her ability to work constructively with others and the college's alleged failure to address what Ms Smithson saw as the colleagues' inappropriate behaviour.

[6] Ms Smithson's first grievance was raised on 3 September 2015 by which time she was no longer attending in the workplace. The claim was mediated on 16 December and that was followed by a Calderbank letter dated 24 February 2016. It proposed Ms Smithson resign with all entitlements plus a significant compensatory payment and a reference. No reply was received and according to the substantive determination the parties continued to discuss Ms Smithson's return. That was unsuccessful and led to a second grievance.

[7] The claim was the subject of an Authority telephone conference on 20 December 2016 at which an investigation was scheduled and which appears to have prompted the college to advise the February Calderbank offer remained open. That occurred on 23 December 2016 with a reply, rejecting the offer, coming within five minutes.

[8] The other behaviour referred to and then discussed in the submission was Ms Smithson's failure to furnish evidential briefs in accordance with the Authority's timetable. This meant the original investigation dates had to be vacated and led to a six month postponement.

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[2] refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[9] Ms Smithson's position is costs should lie where they fall. In support it is submitted the college does not have clean hands[3] and its *contributory conduct … left the applicant in an untenable position with no option but to seek the assistance of the authority.*[4]

[10] It is also noted that despite an absence of nearly five years the employment remains ongoing and in an endeavour to return Ms Smithson has challenged Mr Crichton's determination.

[11] It is further submitted the college is seeking indemnification for costs it did not incur and if it did they were not associated with the hearing. The argument the college did not incur costs relates to correspondence about the fact it was insured.[5] The colleges reply was, and remains, the issue is irrelevant given the doctrine of subrogation and the Court's decision in *McCammon v Wellington Free Ambulance.*[6]

[12] Ms Smithson now submits the doctrine of subrogation does not apply, at least in respect to any costs incurred after 30 November 2015, as it was not *…pleaded, either in the Respondent's costs submission or in the Statement of Reply that the costs to the insurer are recoverable in the Respondent's name*.[7] Here it should be noted the bulk of costs were incurred after that date and it is also prior to the first Calderbank. It is further submitted that while earlier invoices were sent to the college the insurer probably paid those retrospectively.

[13] Assuming I conclude costs were incurred it is argued they are not adequately broken down which means it is impossible to ascertain whether or not they are attributable to the litigation.

[14] It is submitted that should I reject the proposition costs lie where they fall then the tariff should be applied and not exceeded. In support of this it is argued that fits with the underlying principles of the Act and a quote from *Fagotti*[8] promoting the certainty of a tariff approach and suggesting large invoices such as those faced here are inappropriate in this jurisdiction.

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[3] Applicant's submission at [6]
[4] Above n 3 at [5(a)]
[5] See for example email Buckett Law to Heaton dated 28 August 2019 and Memorandum from Buckett Law to the Authority seeking disclosure of information, including that pertaining to the colleges insurance arrangements, dated 24 September 2019
[6] *McCammon v Wellington Free Ambulance (Inc)* [2003] NZEmpC 77 at [4]
[7] Applicant's submission at [20]
[8] Above n 2

[15] Finally, and applicable to both approaches, is Ms Smithson's view the Calderbank is of no value as it proposes her resignation and there are decisions which support a conclusion that where reinstatement is sought it would be unjust to place value on a Calderbank that did not address that.[9] Reference is also made to various decisions which hold a Calderbank does not automatically expose an unsuccessful litigant to solicitor client costs (at least those incurred after its rejection).

[16] In closing Ms Smithson also asks she be granted costs for having had to go to the avoidable length of having to provide a response to the colleges' unrealistic and disproportionate costs application.[10] She seeks $1,500.

[17] Finally it should be noted that while there as a reference to ability to pay in earlier correspondence that was not pursued in Ms Smithson's submission and no evidence was offered. It will be considered no further.

[18] The college has provided a fulsome reply but that I will not paraphrase.[11]

Discussion

[19] The above raises three issues for determination. They are:

(a) Whether or not the college should receive a contribution toward its costs;

(b) If so whether or not there should be an increase on the tariff; and

(c) Whether Ms Smithson should receive a contribution toward the cost of having to reply to the costs application.

[20] Having considered the submissions and the Authority's file on this matter I reach the following conclusions.

[21] The college is entitled to a contribution toward its costs with Ms Smithson's argument they should lie where they fall failing. That argument relies on two main planks: the college did not incur costs – the insurer did and the college does not have clean hands.

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[9] *Gaut v BP Oil New Zealand Limited* [2011] NZEmp C 111 at [24] and *Pathways Health Limited v Moxon* [2013] NZEmpC 18 at [26] to [30]
[10] Applicants submission at [64] and [65]
[11] Section 174E(b)(ii) of the Employment Relations Act 2000

[22] I am of the view the Courts comments in *McCammon*[12] provides a complete answer to the argument the college did not incur costs. There it was said:

> The short answer to this point is that it is not relevant whether the defendant is insured or not … it is no answer to say, even if such is the case, that the defendant did not incur the expense by reason of the fact that it was insured.

[23] The clean hands argument also fails if for no other reason than it appears no more than an attempt to re-litigate the substantive issues. That is now for the Court and in any event there appears nothing in Mr Crichton's determination that supports the submission. The simple fact is costs follow the event and the event, at least as far as the Authority is concerned, is that the college has had complete success.

[24] As is well established that means the starting point is the tariff which raises the second issue – is an increase justified? Here the college's argument relies on two planks – the Calderbank and the investigations initial postponement.

[25] In reply to Ms Smithson's submission the Calderbank should be rejected the college refers to Mr Crichton's observation it did not behave inappropriately in concluding the employment relationship was irretrievably broken and that was primarily attributable to Ms Smithson's attitude throughout the dispute. To that it added, in its reply, various references to parts of the determination which led to that conclusion.[13]

[26] On this I find favour with Ms Smithson's submission. As with the insurance issue the Court's decisions to which I was referred in respect to this argument are clear.[14] Also clear is the fact Ms Smithson sought reinstatement to her position and the right to work.[15] Indeed she still does and that is one of the issues central to the challenge. I am of the view that to propose the opposite, which is still to occur at least officially, negates the value of the Calderbanks.

[27] Similarly I not enamoured with the argument about delay if for no other reason I can see no evidence it increased costs in any significant way.

[28] The conclusion the argument supporting an increase in the tariff fails to convince also means Ms Smithson's argument the billings are insufficiently detailed becomes nugatory. The

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[12] Above n 6
[13] Above n 1 at [105]
[14] Above n 9
[15] Amended Statement of Problem dated 10 August 2018 at [3.8]

tariff is deemed reasonable and in this case is far less than both the costs incurred and what I would reasonably have expected.

[29] That then leaves the argument Ms Smithson should be recompensed for having to address the costs application. Again the answer is no. Her response is primarily predicated on her position costs should lie where they fall. On that she was unsuccessful.

Conclusion and orders

[30] For the above reasons I conclude the college is entitled to a contribution toward the costs it incurred in defending Mr Smithson's claims and it is appropriate the tariff be applied. I therefore order Diane Smithson pay the Wellington College Board of Trustees $11,500 (eleven thousand, five hundred dollars) as a contribution toward costs.

Michael Loftus
Member of the Employment Relations Authority