

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 218
3052912

BETWEEN

KAYLA MILLER
Applicant

A N D

HARBOUR VIEW REST HOME
(2005) LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Louise Laming, counsel for the Applicant
Philip de Wattignar, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 13 May 2020 from the Applicant
25 May 2020 from the Respondent

Date of Determination: 3 June 2020

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 29 April 2020¹, I determined that Harbour View Rest Home (2005) Limited had unjustifiably dismissed Kayla Miller. I ordered Harbour View to pay \$15,000.00 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and \$3,091.00 for lost remuneration pursuant to s 123(1)(b) of the Act.

[2] I also reserved costs so that the parties could try to agree costs. The parties have not been able to agree costs and Ms Miller seeks costs.

¹ *Miller v Harbour View Rest Home (2005) Limited* [2020] NZERA 172.

Application for costs

[3] Counsel for Ms Miller seeks an award of costs of \$11,000.00 plus disbursements of \$71.56. In support of this counsel says:

- (a) Costs should follow the event and as Ms Miller was successful she should be awarded costs.
- (b) This matter was complex involving a number of historic incidents requiring extensive written evidence.
- (c) The award of \$15,000.00 for compensation is the basis on which Ms Miller offered to settle her claim when she first raised her personal grievance and again before the investigation meeting.
- (d) Ms Miller incurred costs in excess of \$11,000.00, such costs being reasonably incurred, and to award costs simply on the basis of the daily tariff of \$4,500.00 would undermine the benefit of Ms Miller's success.

[4] Counsel for Harbour View accepts that costs should follow the event but says that there was nothing exceptional in this case or my investigation that warrants a departure from the daily tariff, either by awarding costs on some other basis or by increasing the daily tariff amount.

Analysis

Costs in the Authority

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. In *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² and other relevant Employment Court and Court of Appeal decisions,³ the Employment Court and the Court of Appeal have

² *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

³ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127

set out the principles I should apply and the approach I should adopt when exercising my discretion to award costs under clause 15 of Schedule 2 of the Act.

Costs should follow the event

[6] The first principle I should apply is that costs should follow the event, unless there is some accepted reason why this should not happen.

[7] In this case there is no reason to depart from this principle. Ms Miller was successful in her claim and is entitled to an award of costs in her favour.

Applying the daily tariff

[8] The next principle to apply is that quantum of any costs award should be based on the daily tariff; this is a set amount for each day of the investigation meeting used to calculate quantum based on the time spent in the investigation meeting.

[9] Using the daily tariff is the standard approach in the Authority. In some rare cases the Authority can award costs on a different basis. For example, indemnity costs may be appropriate if a party's behaviour in its conduct of the claim was particularly bad or actual costs from a particular point may be appropriate where an offer to settle has been unreasonably rejected.

[10] In this case counsel for Ms Miller is seeking an amount, which is essentially indemnity costs, based on the amount of costs Ms Miller has incurred. However, I am not persuaded that there is a basis to award indemnity costs; there is no suggestion that Harbour View's conduct of this claim meets the exceptionally bad behaviour threshold for indemnity costs.⁴ To be clear, in any event, I found the conduct of this claim by Harbour View to be appropriate, with Harbour View's advocate being constructive throughout and Ms Jeffares of Harbour View being open and cooperative the investigation meeting.

⁴ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.

[11] In terms of awarding actual costs since the rejection of an offer, counsel for Ms Miller refers to two open offers of settlement⁵ made:

- (a) In a letter dated 12 November 2018, setting out Ms Miller's personal grievance, Ms Miller requested three months lost wages, compensation of \$15,000.00 and legal costs on a "solicitor-client basis".
- (b) In a letter dated 17 June 2019, Ms Miller offered to settle her personal grievance for payment of legal fees of \$3,500.00 plus GST, compensation of \$15,000.00 and lost wages of \$6,717.17.

[12] Harbour View did not accept either offer, and I was not provided with an explanation for this. However, on a straight forward analysis of the two offers compared to the remedies I awarded Ms Miller, Ms Miller did not achieve the same remedies as she sought nor did she better them. The key difference is, Ms Miller sought three months wages in her first offer and \$6,717.17 in her second offer. I awarded Ms Miller \$3,091.00 for lost remuneration, just over \$3,600.00 less than what she offered to settle for. On this basis, Harbour View cannot be criticised for rejecting the offers and there is no reason to consider these offers in terms of the costs to be awarded to Ms Miller.

[13] In conclusion, in this case there is no reason to depart from the usual approach of awarding costs on the basis of applying the daily tariff.

Length of the investigation meeting

[14] The investigation meeting took just under one day and applying the daily tariff rate this amounts to \$4,500.00.

Adjusting the daily tariff

[15] The final principle to apply is to consider if the daily tariff should be adjusted. In this regard the submissions made by counsel for Ms Miller may be relevant.

⁵ Neither offer was made on a without prejudice basis and can therefore be referred to in cost submissions.

Offers to settle

[16] I have already considered the two offers made by Ms Miller and have concluded they are not relevant for my consideration of the costs application.

Complexity of the case

[17] Counsel submits that the factual background of the case canvassed a number of historical matters which were complex, requiring extensive written briefs to be produced.

[18] I accept that Ms Miller's written evidence was detailed and it covered a number of incidents over a period of time. However, I do not believe this warrants an increase in the daily tariff. The amount of detail and the number of events addressed by the written evidence, including in Ms Jeffares' evidence for Harbour View, was not excessive nor was it out of line with the amount of written evidence often produced in a one day investigation meeting. The amount of work undertaken is therefore covered in the daily tariff and there is no reason to increase it.

Inequity of costs awarded for successful parties

[19] Counsel's final submission is that awarding only the daily tariff to Ms Miller when she made reasonable offers to settle and was wholly successful, would "significantly impede the benefits of her success." Breaking this down there appears to be three aspects to the submission, which I will address:

- (a) The question of offers made and rejected is not relevant in this costs application.
- (b) Being wholly successful does not warrant an increase in the daily tariff.
- (c) That there might be some impediment to, or diminishing of, the benefit of success because the daily tariff does not cover all of the costs incurred by the successful party is not a basis to increase the daily tariff.

[20] There is no reason to adjust the daily tariff in this case.

Conclusion

[21] I award costs to Ms Miller based on the daily tariff for a one day investigation meeting being \$4,500.00.

Disbursements

[22] Ms Miller is also entitled to be paid for the disbursement she has incurred in this matter, being the filing fee of \$71.56.

Order

[23] Harbour View Rest Home (2005) Limited must pay Kayla Miller \$4,500.00 plus disbursements of \$71.56 as a contribution to her costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority