IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 394
3072192

	BETWEEN	CHRISTINE CROSSEN Applicant
	AND	YANGS HOUSE LIMITED First Respondent
	AND	Liu Yang Second Respondent
Member of Authority:	Geoff O'Sullivan	
Representatives:	James Hobcraft, advocate for the Applicant Paul Brown, advocate for the Respondents	
Investigation Meeting:	On the papers	
Submissions Received:	27 August 2020 from the Respondent 17 September 2020 from the Applicant	
Date of Determination:	1 October 2020	

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 30 July 2020, the Authority decided that Christine Crossen could not pursue her claim for arrears of wages and holiday pay because the parties had entered into a record of settlement under s 149 of the Employment Relations Act 2000 (the Act) which purported to be in full and final settlement of all matters. I held that as claims for arrears of wages and holiday pay were disputed by the respondent, had been raised by Ms Crossen prior to her signing the record of settlement, and had been the subject of negotiation, the full and final settlement provisions of the record of settlement precluded her from proceeding with her further claim for arrears of wages and holiday pay in the Authority.

[2] In that determination costs had been reserved in the hope that the parties would be able to resolve this issue between themselves. Unfortunately, they have been unable to do so, and both parties have filed submissions in respect of costs. Whilst I have not referred to all of the submissions advanced by the parties in this determination, I have fully considered all material placed before the Authority.

Analysis

[3] There is discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to award any party to pay to the other party such costs and expenses as the Authority thinks reasonable.[1] The principles applying to costs are well settled and do not require repeating.[2]

[4] In the assessment of costs the Authority will normally start with the notional daily tariff which is $4,500 for the first day of an investigation meeting and $3,500 for each subsequent day. The investigation meetings took less than one day, finishing at 3pm in the afternoon. Accordingly, I assess the starting point in this case is $4,000.

[5] The Authority will take into account any offers made by the parties to settle matters.[3]

> …the public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[6] The respondent is claiming $4,000 under the daily tariff but also the shortfall between that amount and costs incurred of some $1,810. The respondent is seeking an uplift on the basis of a rejected Calderbank offer and accordingly is seeking total costs of $5,810. The Calderbank offer of settlement was dated 22 October 2019. It was after the telephone directions conference call held by the Employment Relations Authority between the parties. In other words, it was after mediation, the filing of the statement of problem and statement in reply. The respondent offered to pay the applicant $1,000 in full and final settlement and signalled that if the offer was declined, the respondent would be seeking a significant increase in costs.

---

1 Employment Relations Act 2000, Schedule 2, clause 15

2 *PBO Limited v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co. Ltd* [2015] NZEmpC 135 at [105]-[108]

3 As cited in *Bluestar Print Group NZ Limited v Mitchell* [2010] NZCA 385 at [18]

[7] The respondent has forwarded tax invoices showing amounts billed to the respondent after 22 October 2019 totalling $4,340 (plus GST). I have been provided with other invoices which seem to be related to attempts to settle and/or prepare costs submissions. In assessing what degree, if any, I should take the Calderbank offer into account, I have discounted this latest invoice.

[8] However, if Ms Crossen had accepted the offer at the time it was made, the respondent would have saved the sum of $4,340 less the $1,000 offered.

[9] I reiterate I have discounted the latest invoice, issued after 30 July 2020.

[10] In reply, Ms Crossen seems to be submitting I should take into account the fact she has appealed the determination to the Employment Court. The appeal does not operate as a stay and under these circumstances and it would be inappropriate for the Authority not to proceed with a determination as to costs. Ms Crossen has also requested a stay of proceedings pending the decision of the Employment Court. Again, I consider that inappropriate under the circumstances. Ms Crossen also asks that the Authority determine that costs should lie where they fall. This is based on the premise that the respondents repeatedly failed to provide wage and time records and it was necessary for Ms Crossen to bring the proceedings to obtain those records. It was finally submitted that Ms Crossen had limited income and limited resources and that the respondents have threatened to bankrupt her if she did not pay any award that may follow.

[11] The reason given for the rejection of the Calderbank offer was that it was inflammatory.

Conclusion

[12] I accept the submission on behalf of Ms Crossen that it was extremely unlikely she would accept an offer of $1,000. This was because her claim was that when she signed a record of settlement in terms of s 149 of the Act, the claim she was bringing before the Authority was because she said it was not her intention to settle outstanding wages and holiday pay issues when she signed the record of settlement.

[13] Following the signing of the s 149 settlement agreement, Ms Crossen had through her representative, asked for wage and time records to be provided. These were not provided by the respondent, in the mistaken view that as all matters had been settled by the record of

settlement, there was no legal requirement for them to do so. Because I held that that was a genuinely held view, I declined to award a penalty. However, there is merit in the submission that the failure to produce those records was at least an impediment to settlement. Although the respondents have since provided the records, it may well have been that if they had been provided in a timely fashion as the statute required, Ms Crossen would have considered the settlement offer more favourably and/or considered whether she would pursue her claim.

[14] I am disinclined to find that under these circumstances the respondents should be entitled to an uplift in costs because of the rejected Calderbank offer. On the contrary, I consider that a reduction in costs is more appropriate under the circumstances. I have considered the submission made on behalf of Ms Crossen that costs lie where they fall. Ms Crossen's claim was predicated on the basis that despite her claim for wages and holiday pay being part of negotiations prior to the signing of the record of settlement, it remained open to her to pursue those claims. I consider costs should follow the event but there are grounds for a reduction.

[15] Taking into account all the circumstances I have concluded that an appropriate contribution to the respondents' costs is $2,500. Accordingly I order Ms Crossen to pay to the respondents the sum of $2,500 as a contribution towards their costs.

Geoff O'Sullivan
Member of the Employment Relations Authority