IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 429
3081455

BETWEEN	MEIYING FAN Applicant
AND	VICTORXIE NZ TRADING LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Maria Green, counsel for the Applicant Garry Pollak, counsel for the Respondent
Submissions:	9 and 12 October 2020 from the Applicant and 12 October 2020 from the Respondent
Determination:	19 October 2020

COSTS DETERMINATION OF THE AUTHORITY

A. Victorxie NZ Trading Limited must pay costs of $6,300 to Meiying Fan.

[1] Meiying Fan sought an award of costs after succeeding in her personal grievance application. The Authority found she was unjustifiably dismissed and ordered her former employer Victorxie Trading NZ Limited (VTL) to pay her remedies of $7,257 for lost wages and $11,000 as compensation for humiliation, loss of dignity and injury to her feelings.[1] The parties were unable to agree the issue of costs between themselves and lodged memoranda for consideration by the Authority in setting costs.

Relevant principles

[2] The Employment Relations Act 2000 (the Act) authorises the Authority to "order any party to a matter to pay to any other party such costs and expenses … as the

[1] *Fan v Victorxie NZ Trading Limited* [2020] NZERA 405.

Authority thinks reasonable”.[2] Exercise of that discretionary power to award costs is guided by well-established “basic tenets” applied to the particular circumstances of each case.[3] Those tenets refer to exercise of the discretion in a principled and not arbitrary way, considering equity and good conscience on a case-by-case basis, increasing or reducing an award to take account of party conduct that unnecessarily added to costs, considering whether any of the costs sought by the successful party were unnecessary or unreasonable, taking account of without prejudice offers made to settle the matter that (if they had been accepted) would have spared costs for both parties, and applying the general rule that costs follow the event.

[3] Each case is considered on its merits.

[4] This assessment typically starts from a notional daily tariff set according to the length of the investigation meeting. The tariff is currently $4,500 for a matter requiring a one-day investigation meeting, with an additional $3,500 for each subsequent day.

[5] Principled adjustment of that rate, upwards or downwards, is made to account for particular characteristics or factors in each case and to avoid undue rigidity in applying the tariff. These variables may include the means of a liable party to pay costs, preparation required in particularly complex matters and the conduct of the parties.

Uplift for failure to accept reasonable settlement offer

[6] Only one such factor was identified as significant for the purposes of considering an adjustment to the daily rate in this case – the effect of a settlement offer that Ms Fan made, through her lawyer, to settle her claim for an amount that proved to be less than she was eventually awarded after the Authority investigation.

[7] In early February 2020 Ms Fan offered to settle her grievance in return for payment of compensation and lost wages totalling $17,646.40, along with a contribution to her legal costs of $4,500. Having achieved more in the remedies awarded in the Authority’s determination, totalling $18,257 and with an award of costs yet to be made, Ms Fan sought an uplift of the tariff.

[8] Case law indicates the Authority should take a “steely” approach to setting costs in such situations, providing the offer to settle was reasonably made and could

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[2] Employment Relations Act 2000, Schedule 2 clause 15(1).
[3] *PBO Limited v Da Cruz* [2005] ERNZ 808 at [44]-[46].

reasonably have been accepted.[4] This approach reflects the public interest in encouraging parties to legal disputes to resolve matters themselves, where they reasonably can, rather than going on to use the limited resources deployed by the state for dispute resolution in the Authority and the courts beyond it.

[9] Although I carefully considered each party's submissions on the costs issue, including their various allegations about why Ms Fan's grievance had not been settled before the Authority's investigation meeting, neither ultimately added to or changed what needed to be considered in assessing this factor.

[10] In light of the outcome achieved in the Authority's substantive determination on her grievance, Ms Fan's earlier settlement offer was clearly reasonable and there was no suggestion VTL had not had adequate time to consider it.

[11] Taking account of the obligation to give sufficient weight to such offers in setting costs, an uplift on the Authority's daily tariff was appropriate.

[12] Review of a sample of costs determinations in similar matters showed the uplift made to give weight to reasonable settlement offers has typically ranged between one quarter and one half of the tariff. The final costs outcome may, of course, also subject to other potential adjustments for factors such as party conduct, unnecessarily incurred costs and the financial means of the party ordered to pay costs.[5]

[13] In this particular case lifting the applicable tariff by 40 per cent (that is $1,800) was within that broad range. It was an adjustment sufficient to give weight to VTL's decision not to accept Ms Fan's reasonably-made settlement offer and was what I thought reasonable in exercise of the discretion to award costs.

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[4] *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385 at [20] and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [109].

[5] See, for example, *McKeown v Universal Communications Group NZ Limited* [2018] NZERA Auckland 80 (uplift of $4,000 on tariff for a two day investigation meeting, after applying a downward adjustment for financial circumstances); *Pender v Lyttleton Port Company Limited* [2018] NZERA Christchurch 161 (uplift of $3,500 on tariff for one day investigation meeting); *Maheta v Airbus Express Limited* [2020] NZERA 52 (uplift of $3,250 on tariff for one-and-a-half day investigation meeting); *Mokaraka v Department of Corrections* [2019] NZERA 636 (uplift of $3,000 on tariff for two-and-a-half day investigation meeting); *Cuttriss v Pact Group* [2019] NZERA 706 (uplift of $2,000 on tariff for one day investigation meeting) and *Dunn v Air New Zealand* [2020] NZERA 265 (uplift of $1,500 for one day investigation meeting).

Order for costs

[14] Accordingly the order for costs in this matter is that VTL must pay $6,300 to Ms Fan within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority