IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 94
3060775

	BETWEEN	JOHN AND CYNTHIA CHAMBERLAIN T/A MISS FEAVER FLORIST Applicant
	AND	SHIRLEY BRUNNING Respondent

Member of Authority:	Helen Doyle
Representatives:	Jeremy Daley, counsel for the Applicant Paul Mathews, advocate for the Respondent
Submissions Received:	9 December 2019 from the Respondent 27 January 2020 from the Applicant
Date of Determination:	28 February 2020

COSTS DETERMINATION OF THE AUTHORITY

A I order John and Cynthia Chamberlain to pay to Shirley Brunning the sum of $3,700 being costs.

Substantive determination

[1] The Authority in its determination dated 18 November 2019[1] found the applicant was unsuccessful in claims that the respondent had breached the record of settlement under s 149 of the Employment Relations Act 2000 (the Act).

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[1] [2019] NZERA 663

[2] Costs were reserved and the Authority has received submissions on costs from both parties.

The respondent's submissions

[3] Mr Mathews on behalf of the respondent says that the actual costs incurred by her were $5,018.75 exclusive of GST. He submits that an offer to settle costs was not accepted and the daily tariff is sought for the one day investigation meeting which currently is $4,500. An invoice was attached to the costs submission.

The applicant's costs

[4] Mr Daley submits that whilst the respondent was successful there are circumstances that support costs should lie where they fall or alternatively the tariff should not apply.

[5] Mr Daley refers to the leading judgment of the Employment Court about costs in the Authority in *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2] and the principles in that judgment reflecting that the Authority has held to some basic tenets when considering costs.

[6] These include that the discretion regarding costs is to be exercised in accordance with principle and not arbitrarily and that costs are not to be used as a punishment or an expression of disapproval. Awards are usually modest and frequently judged against a daily tariff.

[7] Mr Daley refers to the ability the Authority has to uplift or reduce an award of costs based on circumstances particular to the case it is assessing.

[8] He refers to a counter-claim commenced by the respondent and withdrawn after the investigation meeting.

[9] Mr Daley places emphasis in his submissions on letters being written to the respondent on three occasions on 26 November 2018, 12 December 2018 and 19 December 2018 to which there was no response. Mr Daley submits that the failure or refusal of the respondent to engage left the applicant with no option but to commence proceedings as there were no alternative explanations advanced to the information provided.

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[2] *PBO Limited v Da Cruz* [2005] ERNZ at[44]

[10] Mr Daley refers to what he calls an unusual aspect to the case being the posting of information on Mr Mathews' website as a continuing breach.

[11] He submits that the Authority determined that a disclosure was made by the respondent prior to the date the mediator signed off the record of settlement. Mr Daley refers to these as special circumstances. He submits that had the respondent engaged with an alternative explanation to the three letters written then a different approach may have been taken to lodging proceedings. Mr Daley submits that increased costs were in part a consequence of the respondent's failure to engage.

[12] He submits that costs should lie where they fall but if any costs were to be ordered the starting point would be 66 percent of actual costs being $3,351.48 with reductions for the matters referred to in the submission.

Analysis and conclusions

[13] It is a fundamental principle that costs usually follow the event. The respondent was the successful party and is entitled to consideration by the Authority whether she is entitled to a contribution towards her costs incurred in defending the claim against her.

[14] The matter occupied almost a full day from 9.30am to 3.45pm. That was longer than usual for this sort of case however there were 7 witnesses in total. It was not a legally complex matter but there were elements of factual complexity about whether disclosures were made by the respondent in breach of the record of settlement and if so when they were made. There was no conduct by with Mr Mathews or Mr Daley that increased costs during the investigation meeting.

Costs to lie where they fall or 66% of actual costs

[15] Mr Daley submits that costs should lie where they fall because of unusual aspects of this case including that there was some disclosure made about the settlement but it could not be concluded after the settlement agreement had been signed by the mediator.

[16] Mr Daley further submits that 66% of Mr Mathews' actual costs should be the starting point of $3,351.48. The Authority assesses awards in most cases on the basis of a daily tariff with adjustments as required and not on the basis of 66% of actual costs.

[17] I do not accept that costs should lie where they fall and consider it appropriate to start with the usual daily tariff of $4,500 and from that point consider whether there should be any increase or decrease to the tariff.

Withdrawal of counterclaim

[18] The respondent did withdraw a counterclaim against the applicant after the investigation meeting. The applicant also withdrew a claim. Looking at this in the round I find that the costs associated with the late withdrawal of the counterclaim are effectively negated by the costs of the late withdrawal of the applicant's claim.

Failure to respond to three letters written to respondent prior to proceedings

[19] The final of three letters dated 19 December 2018 to the respondent noted the lack of a response and stated that proceedings would be lodged seeking a penalty and given the failure to engage costs would be sought on a solicitor/client basis.

[20] Whilst I cannot be satisfied to a high degree of certainty that a response from the respondent would have resulted in a different approach to proceedings there is a real possibility that it could have and that the failure to respond increased costs. A response would have focussed the concerns for the applicant on when the disclosures had occurred in relation to s 149(1) and (4) of the Act. A response could have opened up lines of communication about a complex factual situation about who said what and when. Once proceedings are lodged there is often a much more fixed view to a need for formal resolution. Objectively assessed the respondent appeared to take a sit and see approach to the proceeding and any evidence. The object of the Employment Relations Act 2000 (the Act) is met in part by reducing the need for judicial intervention.[3] This involves early communication.

[21] I conclude there should be a reduction to the daily tariff for the failure by the respondent to respond at all to three letters sent to the respondent before proceedings were lodged. I do weigh in assessing this that it is ultimately for the applicant to establish a breach to the required standard of proof. A reduction of $800 is appropriate in all the circumstances.

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[3] s 3(a)(vi) Employment Relations Act 2000

The fact of a disclosure

[22] Mr Daley submits that had the applicant not disclosed anything about the settlement at any time then the applicant would not have had to issue proceedings. The difficulty with that argument in relation to costs is that the cause of action for the applicant arises under s 149 of the Act and costs must be assessed in relation to that. I make no further reduction to tariff on that basis.

The advocates website

[23] It is unclear what if any link there is to what is on the advocates website and an increase in costs to the applicant. The submission in part is that an award of costs:

> ..tacitly approves those actions and that costs which will in effect be paid to the Advocate should at a minimum be reduced given his actions.

[24] One of the principles in the exercise of costs is that they are not designed to punish. This submission comes precariously close to a suggestion of punishment. No adjustment is made on the basis of the website.

Conclusion

[25] An award of costs of $3,700 is fair and reasonable in all the circumstances being the tariff reduced by $800.

Order made

[26] I order John and Cynthia Chamberlain t/a Miss Feaver Florist to pay costs to Shirley Brunning in the sum of $3,700.

Helen Doyle
Member of the Employment Relations Authority