

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 302
3103792

BETWEEN DONNA ISAACSON
Applicant

AND SONOVA AUDIOLOGICAL
CARE NEW ZEALAND
LIMITED (TRADING AS
TRITON HEARING)
Respondent

Member of Authority: Michele Ryan

Representatives: Nikkii Flint, counsel for the Applicant
Sarah Riceman, counsel for the Respondent

Submissions Received: 28 May 2021 from the Applicant
11 June 2021 from the Respondent
17 June 2021 “In reply” from the Applicant

Date of Determination: 15 July 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 10 May 2021 Donna Isaacson’s claims of unjustified dismissal, unjustified disadvantages and breaches of good faith against Triton Hearing (Triton) were upheld.¹

[2] In respect of the dismissal, Ms Isaacson was awarded \$19,964.19 comprising \$12,000 in compensation and \$7,964.19 for lost wages and loss of a monetary benefit. The disadvantage and good faith claims concerned the same conduct for

¹ *Isaacson v Sonova Audiological Care New Zealand Limited (trading as Triton Hearing)* [2021] NZERA 195

which I found the dismissal to be unjustified, and separate remedies for those matters were not awarded.²

[3] The parties have been unable to agree as to costs.

[4] Counsel for Ms Isaacson applies for \$5,500 in costs. Triton says costs should lie where they fall.

Analysis

[5] Ms Isaacson's claim was successful, and she is entitled to a contribution to costs unless there is a good reason not to.

[6] An assessment as to costs in the Authority typically begins by applying the daily tariff of \$4,500 for a first full day investigation. Consideration must then to a range of matters, including, in this case, the conduct of the parties and any settlement offers that have been made. Each of these factors, as well as the length of the investigation, may lead to an adjustment (up or down) to the tariff. Costs in the Authority are generally modest.

[7] This matter was not complex. The investigation into Ms Isaacson's claims lasted half a day inclusive of an early lunch break and a short adjournment while the parties undertook settlement negotiations.³ The starting point for costs is therefore \$2,250.

[8] As reason to uplift an award, submissions on Ms Isaacson's behalf first refer to Triton's failure to pay Ms Isaacson's full entitlement to notice and that the omission caused her to incur unnecessary costs. However, that issue did not ultimately require resolution by the Authority, and in any event, costs are not a vehicle by which substantive matters can be revisited. Ms Isaacson's application is not advanced by this submission.

² *Isaacson v Sonova Audiological Care New Zealand Limited (trading as Triton Hearing)* [2021] NZERA 195

³ The meeting began at 9.30.a.m. and concluded in full at 1.10 p.m.

[9] The primary ground of conflict between the parties concerns the effect of their respective calderbank offers. Both refer to several calderbank offers made over the course of a week ending 12 May 2020 and a further offer made 7 months later. Two of these do not impact on my assessment as it was reasonable for each to reject the others offer.

[10] The focus of the submissions from each party lie with Ms Isaacson's 12 May 2020 offer (the May offer) and Triton's 15 December 2020 offer (the December offer).

[11] Both parties allege it was unreasonable of the other to decline its offer.

[12] The purpose of a calderbank offer made from one party to another aims to resolve their differences so that legal proceedings (in progress or contemplated) come to a halt. If the party receiving the calderbank offer does not accept a reasonable offer, the party making the offer is entitled to place evidence of the offer with the Authority or Court as a factor to be considered after the substantive case has been decided and costs are at issue between them.

[13] Whether a calderbank offer may be regarded as reasonable will broadly depend on the receiving party's position at the time of the offer, and the outcome of the litigation between them. If the party bringing the claim has made a prior calderbank offer to settle for an amount lower than ultimately ordered by the Authority or Court, this may be factor warranting an increase to a cost award for the party bringing the claim. In contrast, if the party defending the claim has made a calderbank offer that matches or is above the amount ordered by the Authority or Court then this too may influence an increase in a cost award to the defending party's favour.

[14] Ms Isaacson's May offer was sent to Triton within days of lodging her statement of problem with the Authority. Her May offer to settle equated to \$16,000 plus GST and was open for acceptance until 19 May 2020. Triton did not accept the May offer.

[15] No further interaction between the parties appears to have occurred until 10 December 2020 when the Authority held a case management conference call for the

purpose of setting a timetable for exchange of evidence in preparation for an investigation meeting which was scheduled by agreement for mid-February 2021. Several days later Triton's December offer was delivered to Ms Isaacson. It offered \$16,000 to settle the claims and further advised it would further pay GST on the sum Ms Isaacson apportioned towards costs. Ms Isaacson did not accept the December offer.

[16] On behalf of Triton it is suggested that Ms Isaacson's failure to accept its December offer was unreasonable. It says the December offer essentially replicated the May offer Ms Isaacson had made, and on which she had previously advised she was willing to settle her claims for.

[17] Submissions on behalf of Ms Isaacson say the December offer did not account for the non-financial elements of a successful determination in the Authority including public affirmation and recognition of the unfair treatment to which she had been subjected. But if it was Ms Isaacson's wish to have public attention given to her claims, it is unclear why she sought a confidential settlement with Triton earlier in May 2020. However, I accept the December offer was made 7 months' after the May offer and Ms Isaacson had, in the intervening period, accrued some additional costs. While these had not increased dramatically, they had increased. The December offer did not reflect that alteration and it was reasonable of Ms Isaacson to reject it.

[18] Next, Triton points to the sum of 19,964.19 ordered by the Authority. It says taking into account the deduction of \$2,411.06 as PAYE Ms Isaacson was left with \$17,552.53. It submits its offer of \$16,000 in December 2020 is therefore close to the sum Ms Isaacson has obtained in real terms (within \$1,500 or thereabouts), and even closer where Triton's offer included payment of GST on the costs component (\$1,000 or thereabouts). I am not persuaded by either aspect of this submission.

[19] While there is not a tremendous difference between \$17,552.53 and \$16,000, nor is it insignificant. Even taking into account Triton's offer to pay GST on Ms Isaacson's costs - \$573 at the time of the offer - and therefore a difference of

approximately \$1,000 if applying the suggested methodology, –I remain of the view that the gap between this amount cannot be regarded as negligible.

[20] I am not persuaded Triton can fairly characterise its offer to Ms Isaacson's as matching that made by the Authority. I find therefore it was not unreasonable of Ms Isaacson to reject it.

[21] Finally, and despite Triton's offer being lower than that ordered in the Authority, Triton says Ms Isaacson would have been in a better financial position (by \$12,180 or thereabouts)⁴ if she had accepted its December 2020 offer compared to additional expenditure she incurred (\$13,317 inclusive of GST) to obtain the Authority's remedy of \$19,964.19. A similar submission was made to the Authority in *Fagotti v Acme*.⁵ In that case, the respondent had made a calderbank offer that was ultimately below that ordered by the Authority however the costs expended by the applicant to obtain the Authority's remedies left him in a financial deficit. That matter was addressed by the full Employment Court in the following way:⁶

... even if a significant part of the Authority's compensatory awards to Mr Fagotti will be consumed by the costs of his legal representation, recovery of a portion of these must still be in reasonable proportion to the nature of the plaintiff's success before the Authority and the awards made to him.

[22] I accept Triton's offer to settle was close to both that initially offered by Ms Isaacson to settle, and that ordered by the Authority. But I am not persuaded it was sufficient to reverse the presumption that costs follow the event.

[23] The effect (if any) of calderbank offers on costs remains within the discretion of the Authority. In *Fagotti v ACME & Co* the Court ordered a \$1,000 uplift to a full daily tariff costs award in circumstances similar to the parties in this case. A similar pro-rated uplift to Ms Isaacson's starting point of \$2,250 should be applied in this case.

⁴ Triton's offer of \$16,000 plus GST of \$573 on Ms Isaacson's costs (of \$3,820 as at 15 December 2020) means the total amount offered was \$16,573. After payment of legal fees accrued by that time Ms Isaacson's would have received \$12,180 if the offer had been accepted.

⁵ *Fagotti v ACME & Co* [2014] NZERA Wellington 131

⁶ *Fagotti v Acme & Co* [2015] NZEmpC 135 at [114]

Order

[24] Sonova Audiological Care New Zealand Limited (trading as Triton Hearing) is ordered to pay Ms Isaacson a contribution of \$3,000 towards costs plus \$71.56 for the Authority's filing fee.⁷

Michele Ryan
Member of the Employment Relations Authority

⁷ Employment Relations Act 2000, Schedule 2, Clause 15.