

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2021] NZERA 459
3084636

BETWEEN

LEILA MCLEOD
Applicant

AND

TOKAANU-TURANGI &
DISTRICTS MEMORIAL
RSA INCORPORATED
Respondent

Member of Authority: Marija Urlich

Representatives: Adam Mapu, for the Applicant
David McLeod, for the Respondent

Investigation Meeting: On the papers

Submissions and further information received: 22 September 2021, from the Applicant
4 October 2021, from the Respondent

Determination: 18 October 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 25 August 2021 which upheld Ms McLeod's claim she had been unjustifiably dismissed and most of her wage arrears claim and declined the counterclaim brought by Tokaanu-Turangi & Districts Memorial RSA Incorporated (the Club).¹ Ms McLeod was awarded remedies totalling \$27,639.65. The issue of costs was reserved and a timetable set for filing memoranda if the parties were unable to resolve costs themselves.² Ms McLeod now applies for a costs award in her favour.

¹ *Leila McLeod v Tokaanu-Turangi & Districts Memorial RSA Incorporated* [2021] NZERA 374.

² Above [93].

Ms McLeod's claim for costs

[2] Attached to Ms McLeod's costs memorandum is a time record document detailing total costs incurred by her in respect of this matter of \$34,195.50 and disbursements of \$1,835.11.³ Also attached is a without prejudice settlement offer she made to the Club following mediation in November 2019. Ms McLeod seeks an award of full costs. She submits that her offer to the Club to settle was considerably less than the total awards made by the Authority in her favour and had her offer been accepted further costs would have been avoided.

The Club's response

[3] The Club says costs should lie where they fall because the without prejudice offer made to Ms McLeod on 16 January 2020 was very close to what Ms McLeod had indicated she would settle for, at that stage. In Club also points to the settlement offer it made to Ms McLeod in November 2019 of \$15,120.90 with some adjustment for tax.

Costs principles

[4] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.⁴

³ Of these total costs approximately \$3000 applies to Ms McLeod's unsuccessful interim reinstatement application and approximately \$5000 was costs incurred prior to and including mediation.

⁴ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.

Costs analysis

[5] Ms McLeod was the successful party. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted Ms McLeod has incurred actual costs in respect of this matter. She should receive a contribution to costs incurred. It is not accepted this is a case where an award of indemnity costs is warranted – the nature of conduct to justify such an award is not present.⁵ Nor is it accepted this is a case where costs should lie where they fall.

[6] In assessing an appropriate costs award the notional daily tariff is a starting point. The applicable daily tariff is \$4,500.00 for the first day and \$3,500.00 for every day thereafter. This matter required two hearing days.

[7] The parties say their respective settlement offers should factor in the assessment of whether an increase or decrease in the tariff is warranted. The Authority should take a “steely” approach to costs awards where an unsuccessful party has not accepted a settlement offer that would have resulted in that party getting a better outcome than it achieved in the Authority's determination.⁶ As the successful party no decrease in the daily tariff is warranted because Ms McLeod has not declined a settlement offer greater than the award made in her favour by the Authority.

[8] The Club did fail to accept an earlier settlement offer made by Ms McLeod which was less than the Authority awarded. If the Club had accepted the settlement offer both parties would have been spared the subsequent costs of preparing for and participating in the investigation meeting. As a result the Club is liable to pay more than the daily tariff towards costs Ms McLeod incurred.

[9] What may be an appropriate increase in the tariff involves considering a reasonable contribution to costs reasonably incurred. On the information received by the Authority the total costs incurred by Ms McLeod after the settlement offer was made and less costs incurred in her unsuccessful interim reinstatement application appears to be approximately \$26,000. Weighing all the relevant factors in assessing an appropriate

⁵ *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438, at [21].

⁶ See *Fagotti*, above n 4, at [109] confirming the Court of Appeal's remarks at [20] in *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385 also applied to assessing costs in the Authority.

uplift in the daily tariff including that Ms McLeod was not wholly successful in her claim a reasonable contribute to costs reasonably incurred is \$9,000.00.

[10] A contribution to total disbursements incurred after the settlement offer was made is reasonable but should not include the costs of out of town representation and accommodation.⁷

Outcome

[11] Tokaanu-Turangi & Districts Memorial RSA Incorporated is ordered to pay Ms McLeod \$9,000.00 towards the costs of representation and reimburse her disbursements of \$250.00 within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority

⁷ *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].