

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 214
3100653

BETWEEN KATHRYN DOUDS
Applicant

AND OASIS NETWORK
INCORPORATED
Respondent

Member of Authority: Michael Loftus

Representatives: Ashleigh Fechney, advocate for the Applicant
Recardo Bosch, for the Respondent

Submissions Received: 10 May and 19 May 2021 from the Applicant
17 May, 18 May and 19 May 2021 from the Respondent

Date of Determination: 20 May 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] On 27 April 2021 I issued a determination in which I concluded Ms Douds had a personal grievance having been unjustifiably dismissed.¹ She was, however, unsuccessful with two unjustified disadvantage claims.

[2] Costs were reserved and as the successful party Ms Douds now seeks a contribution toward those she incurred pursuing her claims. Oasis objects and while not expressly saying so, strongly suggests no award should be made.

¹ [2021] NZERA 167

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim, with the current starting point being \$4,500 for the first day and \$3,500 for each day thereafter.² From there adjustment may occur depending on the circumstances.

[4] The investigation took a full day which, applying the tariff, would see a contribution in the order of \$4,500. Ms Douds, however, seeks more.

[5] She starts with the premise she should receive the tariff arguing it should not be reduced as a result of her failure with respect to the disadvantage claims as that did not reduce the remedies she achieved and did not increase the length of the hearing as the subject matter would have been canvassed in any event. I agree with both propositions and conclude a reduction for this reason inappropriate especially as I should, when considering mixed success, stand back and look at things “in the round”.³ Having done so I conclude it is clear Ms Douds was, by virtue of the dismissal claim, the successful party.

[6] Having started with the tariff Ms Douds then seeks an uplift for the following reasons.

[7] An additional \$500 as a result of Oasis having rejected a reasonable offer to settle. That offer was in the form of a calderbank letter and while couched in a different way from the awards ultimately made it would have seen Ms Douds accept about a quarter less than she later achieved. The underlying principle of a Calderbank is the offer would have led to a more beneficial outcome for the party against whom costs are sought, thus putting the other party to costs that, albeit with the benefit of hindsight, could have been avoided. Here, the letter was sent well before the investigation and acceptance would have put Oasis in a better position. It is well established the rejection of reasonable offers should be reflected in later costs awards so this becomes a compelling argument for an uplift.

[8] An additional \$500 by reason of the way Oasis is alleged to have approached the matter and which it is asserted resulted in additional cost. In particular reference is made to an indication from Oasis it would consider a second mediation while, it is submitted, it had no intention of doing so with a genuine view to settling. Comment is also made that it failed to follow another member’s recommendation it get legal assistance and while not expressly said it is implied that failure meant it chose to pursue a hopeless case thus imposing unreasonable

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

³ *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156 at [43]

cost on Ms Douds. This fails to convince. First I have no knowledge of how mediation was approached and nor am I permitted to. Second, I know of nothing which suggests I should penalise a party for not seeking advice or representation and have to note the failure would appear to have resulted in the rejection of a reasonable calderbank with the repercussions of that having already been addressed.

[9] Ms Douds also seeks a further increase to address the fact she is not GST registered. While the Court takes this into account its approach to costs differs from the Authority which has generally considered the tariff to be all inclusive.

[10] Finally there is a request the Authority's filing fee be reimbursed. That is a disbursement which should be recompensed.

[11] Considering the above factors I would consider an award of \$5,000 plus the filing fee appropriate but opposing that is Oasis's submission.

[12] Oasis's first argument is it understood from the hearing that I would, in determining costs, take into consideration the extent to which Ms Douds contributed to the situation that arose. I have no idea how Oasis got that impression and would have to suggest it was confused by what was said. Contribution is taken into account when considering remedies for the substantive grievance.⁴ Costs awards reflect the way in which the litigation was conducted and cannot be used to punish substantive behaviour as Oasis now suggest I do, though I have to note there was no reduction of remedies by reason of contribution in any event.⁵

[13] It is also argued Oasis has already suffered enough unproductive expenditure as it paid a months notice. This argument fails to convince as that was taken into account when awarding lost wages.

[14] There is then a further attempt to revisit some of the substantive allegations Oasis levelled against Ms Douds with an argument they saw her receive money it is alleged she was not entitled to. Again, I must repeat costs are about the conduct of the litigation but in any event Oasis's failures meant the substantive allegations being referred to here were never made out.⁶

⁴ Section 124 of the Employment Relations Act 200

⁵ Above n 1 at [48]

⁶ Above n 4

[15] It is also argued a costs award would put Oasis at risk and impede its ability to provide the services it is funded to provide. This also fails to convince if only because there is no supporting evidence.

[16] Finally it is noted the substantive determination is being challenged and a stay has also been sought. Aside from the fact a stay is yet to be granted this is in itself a reason to determine the costs issue with precedent suggesting it appropriate I proceed so the Court is seized of all matters when it considers the challenge.⁷

[17] Given the discussion above it follows none of the arguments tendered by Oasis convince me there is reason to reduce the costs award.

Conclusion and Orders

[18] For the above reasons I order Oasis Network Incorporated pay Kathryn Douds the sum of \$5,071.56 (five thousand and seventy one dollars and fifty six cents) as a contribution toward the costs she incurred pursuing her claims.

Michael Loftus
Member of the Employment Relations Authority

⁷ *Swales v AFFCO New Zealand Ltd* EmpC Auckland AC19/01, 23 March 2001 and *Sandilands v Chief Executive of the Department of Corrections* ERA Wellington WA67A/09, 10 September 2009