

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 55
3078716

BETWEEN RACHEL DIMOLINE
Applicant

AND THERMO FISHER
SCIENTIFIC NEW
ZEALAND LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Rhys Walters, counsel for the Applicant
Jim Roberts, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 17 December 2020, from Applicant
23 December 2020, from Respondent

Determination: 15 February 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 4 December 2020 which found Ms Dimoline was unjustifiably dismissed by Thermo Fisher Scientific New Zealand Limited (Thermo Fisher) and awarded remedies in her favour reimbursing lost wages and compensation for non-economic loss.¹ The issue of costs was reserved and a timetable set for filing memoranda if the parties were unable to resolve costs themselves. Ms Dimoline now applies for a costs award in her favour.

¹ *Rachel Dimoline v Thermo Fisher Scientific New Zealand Limited* [2020] NZERA 504.

Ms Dimoline's claim for costs

[2] Ms Dimoline seeks reimbursement of actual costs incurred of \$18,521.80 (incl GST) plus reimbursement of filing fee and courier costs totalling \$87.06. A schedule of costs and invoices has been provided. She submits an uplift in the applicable notional daily rate for a two-day investigation meeting, \$8,000, is warranted given a without prejudice save as to costs settlement offer of \$127,159.16 was made on 3 October 2019, before the parties incurred any litigation costs. The Authority awarded more than that amount to Ms Dimoline being a total of \$150,659.16. The offer was not responded to and a substantial uplift is justified.

[3] Ms Dimoline says in this case mediation costs of \$2,840.50 (incl GST) should be included in any award because of unusual features of this matter including that Thermo Fisher was directed to mediation².

Thermo Fisher's response

[4] Thermo Fisher submits the starting point for the Authority's consideration of costs is the notional daily rate and that it is rare for the Authority to depart from such an approach. This is not a case where indemnity costs would be warranted and a 'steely' approach to settlement offers, as suggested in Ms Dimoline submissions, has been considered not generally consistent with the statutory imperatives of the Authority³. Though operative, the settlement offer is only one factor to consider regarding costs.

[5] Thermo Fisher submits there is no precedent for awarding mediation costs as either compensation or costs. It says in this matter Ms Dimoline unnecessarily created costs and refers to her position towards the deployment role expressed at the investigation meeting which prevented Thermo Fisher resolving her true employment relationship problem and demonstrates she has not put any effort into resolving the matter. Given this there should be no uplift for the settlement offer and costs should be limited to the ordinary daily rate totalling \$8,000.

² *Fagotti v ACME & Co Limited* [2015] NZEmpC 135 at [113].

³ *Stevens v Hapag-Lloyd* [2015] NZEmpC 28 at [95].

Costs principles

[6] 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

Costs analysis

[7] Ms Dimoline was the successful party and 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 Dimoline has incurred actual costs in respect of this matter. She should receive a contribution to costs incurred.

[8] The notional daily tariff is a starting point. The applicable daily tariff is \$4,500 with subsequent days \$3,500. It is accepted the starting point for costs for this matter, which involved two hearing days, is \$8,000. Factors to consider next are matters which would lead to an increase or decrease from that starting point.

[9] Thermo Fisher's submission is accepted that mediation costs should not be included in any costs award; to include mediation costs would be outside the usual.

[10] The settlement offer was sufficiently clear on its face including that it may be considered a relevant factor in a costs setting. If Thermo Fisher had accepted Ms

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

Dimoline's settlement offer it would be in a better position than it finds itself now. Thermo Fisher did not directly respond to Ms Dimoline's settlement offer. The consequence of this is there is no contemporaneous record of the reasons for its rejection. It is not accepted Ms Dimoline cloaked the true nature of her employment relationship problem causing unnecessary hearing time to be incurred. An uplift in costs is justified.

Conclusion

[11] Thermo Fisher New Zealand Limited is ordered to pay Rachel Dimoline \$10,000.00 as a contribution to her costs within 21 days of the date of this determination.

[12] In addition Thermo Fisher New Zealand Limited is ordered to pay Rachel Dimoline the sum of \$87.06 within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority