

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2021] NZERA 94  
3066513

BETWEEN            LILLIAN WAITERE  
                                 Applicant

AND                    CCS DISABILITY ACTION  
                                 WAIKATO INCORPORATED  
                                 Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Allan Halse, advocate for the Applicant  
                                 Ruvin Pattiaratchi, counsel for the Respondent

Investigation Meeting:    On the papers

Submissions Received:    7 December 2020 and 27 January 2021 from the  
                                 Applicant  
                                 18 December 2020 from the Respondent

Date of Determination:    9 March 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In my determination of 13 November 2020 I found Lillian Waitere had been unjustifiably disadvantaged in her employment as a Community Support Worker with CCS Disability Action Waikato Incorporated (CCS).<sup>1</sup> Her other claims against CCS did not succeed. These were that she had been constructively dismissed and that CCS had breached its obligations of good faith under the Employment Relations Act 2000 (the Act) and the Health and Safety at Work Act 2015 by failing to protect her once she had raised concerns.

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<sup>1</sup> [2020] NZERA 469.

[2] I found Ms Waitere did not contribute to the situation that led to her personal grievance. I ordered CCS to pay her \$7,500 under s 123(1)(c)(i) of the Act as compensation for her grievance and I reserved the issue of costs.

[3] Ms Waitere and CCS have been unable to agree on costs and I am now asked to determine that issue.

### **Costs in the Authority**

[4] The Authority has the power to order any party to a matter to pay to any other party such costs and expenses as it thinks reasonable.<sup>2</sup> Underpinning the award of costs are principles which have been developed and applied over time. The principles, which were referred to with approval by the Full Court of the Employment Court in *Da Cruz*<sup>3</sup> and reconsidered and reconfirmed ten years on by the Full Court in *Fagotti*<sup>4</sup>, are well known and it is unnecessary to repeat them all here.

[5] Among the principles are that the discretion to award costs is to be exercised in accordance with principle rather than arbitrarily. Costs will normally follow the event which usually results in the successful party being entitled to a contribution to its actual costs from the unsuccessful party. Costs should be modest and they are to be considered in the light of the particular circumstances.

[6] Costs are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. Where a party's conduct has unnecessarily increased costs, that may be taken into account in the award that is made, but costs are not to be used as a punishment or as an expression of disapproval of a party's conduct.

### **Submissions of the parties**

[7] Ms Waitere submits she should be awarded \$6,250, being one and a half days calculated on the Authority's daily tariff. She acknowledges she did not succeed with all her claims. She

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<sup>2</sup> Clause 15 of Schedule 2 to the Act.

<sup>3</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC).

<sup>4</sup> *Fagotti v Acme & Co Ltd* [2015] EmpC 135.

submits, however, that she suffered severe adverse health effects from the unjustified disadvantage claim which she prosecuted successfully, and had been significantly financially disadvantaged as a result.

[8] CCS submits that, as Ms Waitere succeeded on only one of her claims, it should not have to contribute to her costs. In its view, costs should lie where they fall. CCS also submits the Authority should consider attempts it made to resolve matters with Ms Waitere, including a *without prejudice save as to costs* offer, made on 19 February 2019. This was 12 months before the Authority heard Ms Waitere's claims and shortly after the parties had attended mediation with a mediator employed by the Ministry of Business, Innovation & Employment.

[9] The financial components of the offer, which CCS made on the basis of expediency and a denial of liability, consisted of \$2,000 in compensation under s 123(1)(c)(i) of the Act and \$1,000 plus GST as a contribution to Ms Waitere's costs. The offer was open for three days and was roundly rejected by Ms Waitere's advocate on the day it was made. The response made on Ms Waitere's behalf made it clear that any Calderbank offer under \$10,000 would not be acceptable.

[10] In CCS's submission, while the amount offered by CCS was below the amount ultimately awarded by the Authority, the emphatic nature of Ms Waitere's rejection of its offer shut down any further reasonable attempts at settlement. CCS characterised this as a refusal to engage in negotiations.

[11] In reply submissions, Ms Waitere rejects that characterisation and says there was engagement by way of counteroffers that were made, which were refused by CCS.

## **Discussion**

[12] While Ms Waitere succeeded in only one of her claims, I consider it appropriate that she receive a contribution to her costs from her former employer, CCS. The disadvantage grievance was significant and her success with that grievance merits recognition in costs. It is reasonable, however, to take into account the partial nature of the success she achieved with her claims in setting the amount of the award of costs.

[13] The starting point will be the Authority's notional daily costs tariff, which is currently \$4,500 for the first day and \$3,500 for subsequent days. The Authority's investigation meeting took place over two days but was completed shortly before noon on the second day. I regard that as a one and a half day hearing for the purposes of costs. That equates to a potential costs award of \$6,250.

[14] The amount awarded to Ms Waitere as compensation for her grievance was more than three times the compensation amount offered to her in the Calderbank offer made to her by CCS in February 2019. It was reasonable for Ms Waitere to decline that offer and I do not accept CCS's submission that the manner of Ms Waitere's doing so closed the door on any further attempt to resolve the matter. Accordingly, the existence of the Calderbank offer will not affect the quantum of costs in this instance.

[15] Equally, the costs award will not be influenced by Ms Waitere's submission regarding the financial effects on her as a result of adverse health resulting from the unjustified disadvantage she suffered. Costs awards are not for the purpose of providing further compensation for a grievance: they are a contribution to the legal and representation costs incurred in pursuing the grievance.

[16] After considering the applicable principles, the submissions of the parties, and the partial success Ms Waitere achieved, I find it appropriate to discount the potential \$6,250 costs award by 40 percent.

### **Orders**

[17] CCS Disability Action Waikato Incorporated is ordered to pay costs in the sum of \$3,750.00 to Ms Waitere.

Trish MacKinnon  
Member of the Employment Relations Authority