IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 155
3146601

BETWEEN	OCEAN KEREAMA First Applicant
AND	ASHLEY KEREAMA Second Applicant
AND	BERRY TASTY (2008) LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Ira White, advocate for the Applicants Lance Peterson, advocate for the Respondent
Submissions Received:	30 March 2022 from the Applicant 13 April 2022 from the Respondent
Date of Determination:	22 April 2022

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 16 March 2022 I issued a determination in which I concluded Berry Tasty should be penalised for breaching the terms of a s149 settlement.[1] An application the penalty be paid to the applicants as opposed to the Crown was declined, as was an application there be a prohibition on the publication of anything that might identify the applicants.[2]

[2] Costs were reserved and the Kereama's now seek a contribution toward those they incurred in making the claim.

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[1] *Kereama and Kereama v Berry Tasty (2008) Ltd* [2022] NZERA 89
[2] Above n1 at [33] and [45]

[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.[3] From there adjustment may occur depending on the circumstances though in this situation an issue arises in that the tariff cannot be applied per-se as the matter was, by agreement of the parties, determined on the papers.

[4] A further issue arises in that the applicants do not identify the amount they seek as a contribution toward costs. Instead, there is what Ms White characterises as a "proforma" invoice for 14 hours work along with various disbursements. There are three issues with this. The first is the invoice actually specifies 15 hours work and not 14. The second is the label "proforma" and the lack of any evidence it was an actual invoice the applicants were required to pay. The third is, to be blunt, it appears to be exactly what the label suggests – a proforma designed to produce an outcome close to the notional daily tariff though that is not ultimately an issue. A contribution toward costs is exactly that – a contribution and not indemnity.

[5] Ms White's submission does, however, contain advice of two pertinent issues. The first is an exchange of calderbank offers. The first offer, from Berry Tasty, was dated 10 November 2021. While not expressly stated it reflected some confusion in the statement of problem regarding remedies and about which I had made comment during a telephone conference on 8 November.

[6] In section 3, the remedies section of the statement of problem, the Kereama's sought penalties, albeit payable to them, and costs of $500 plus GST with the caveat this might increase in the event further costs were incurred. In the facts section, section 2, of the statement of problem the applicants' sought costs of $500 plus GST and compensation pursuant to s 123(1)(c)(i) of the Act. The issue is the claim was that there had been a breach of a s 149 settlement and compensation is not an available remedy. Having discussed this and other perceived problems faced by the claim Berry Tasty offered $550.

[7] The reply came on 14 November 2021. It rejected Berry Tasty's offer, asserted the remedies were clearly stated in section 3 of the statement of problem (no compensation) but then contradicted that by asking for $2,500 as compensation

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

pursuant to s 123(1)(c)(i) of the Act. The offer also sought the same again as a contribution toward costs along with reimbursement of the Authority's filing fee. Interestingly the offer was made on behalf of the second applicant, Ashley Kereama, and there is no mention of her sister, the first applicant.

[8] The second pertinent issue was an attempt to settle costs with the Kereama's seeking $1,500 plus GST along with the filing fee. This was rejected with Berry Tasty suggesting costs lie where they fall.

[9] Berry Tasty's position is now that it, and not the Kereama's, should be entitled to a contribution toward costs. Indeed, it seeks *a substantial contribution of not all* of its costs which now amount to $3,835 ex GST..

[10] In support its submission canvasses the background already described above along with further reflections about the filing of subsequent documents. It then turns to the outcome noting Ocean Kereama was unsuccessful, while Ashley Kereama was only partially successful having failed with her attempts at obtaining some form of personal compensation and a non-publication order.

[11] The argument Berry Tasty should get costs is based on a submission:

a. Costs applications should be *factual and reasonable*;

b. Time was effectively wasted addressing an approach that was never going to succeed – namely continuing attempts to obtain compensation;

c. That there should never have been an assumption penalties would pass to the applicants; and

d. That reasonable calderbanks should be accepted.

[12] I reject Berry Tasty's approach. I do so as the key principle is costs follow the event. The key event was a claim Berry Tasty had breached a s 149 settlement by making disparaging comments and I found it had, at least with respect to Ashley Kereama. The issues upon which Ashley Kereama was unsuccessful were subsequent ancillary ones and I see little of substance in Ocean's failure. Neither party differentiated the two to any great extend in their submissions.

[13] As to the issues raised by Berry Tasty in support of its claim it be awarded costs I make the following observations. I agree a costs application should be factual and reasonable but for reasons already discussed in [4] above I have no intention of taking the proforma invoice at face value. Instead, I accept costs have been incurred and will apply the normal tariff approach.

[14] The second point I disregard if only because neither party actually addressed this in submission. Both primarily concentrated on the factual background with Berry Tasty arguing its actions did not constitute a breach as there was no dissemination of its comments. The same applies to the point about to whom the penalties would be paid as once again neither party actually addressed this in submissions. That said, and while the question of whether compensation could be obtained was addressed in the calderbanks, that was reasonably fleeting and once again the issue was not canvassed in any depth by either party in submission. In other words it is difficult to conclude Berry Tasty incurred unreasonable costs by reason of addressing these issues.

[15] Finally there are the calderbanks both of which I also disregard. That is because neither can be deemed reasonable with neither coming close to predicting the final outcome or, on behalf of the party proffering it, putting a position that would have seen the rejecting party better off.

[16] Returning to the fact the key event was the Keream's, or more properly Ashley Kereama's, successful pursuit of a claim Berry Tasty had breached a s 149 agreement. It is that which entitles them, or at last Ashley Kereama, to a contribution towards her costs.

[17] As already said I have qualms about the proforma invoice, instead noting matters determined on the papers often attract a contribution in the order of half a days tariff or less. It is here I note the Kereama's willingness to accept $1,500 plus GST and reimbursement of the filing fee. Given the issues canvassed above I conclude that was a fair and reasonable position and will make an order accordingly.

Conclusion and Orders

[18] For the above reasons I order Berry Tasty (2008) Limited pay Ashley Kereama the sum of $1,796.56 (one thousand, seven hundred and ninety six dollars and fifty six cents) toward the costs Ms Kereama incurred in pursuing her claim.

[19] Payment is to be made within 14 days of this determination.

Michael Loftus
Member of the Employment Relations Authority