IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 228
3055252

	BETWEEN	WATER MART WAIRARAPA (2017) LIMITED (IN LIQUIDATION) Applicant
	AND	TRACEY OAKLY Respondent

Member of Authority:	Sarah Blick
Representatives:	Richard McNaughton for the Applicant Jills Angus-Burney, counsel for the Respondent
Submissions received:	4 September 2019 and 22 May 2020 from Respondent 15 May 2020 from Applicant
Determination:	31 May 2022

COSTS DETERMINATION OF THE AUTHORITY

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[1] The applicant Water Mart Wairarapa (2017) Limited employed the respondent, Tracey Oakly, between January 2018 and 2019. On 3 March 2019, it lodged a statement of problem with the Authority stating the respondent had been overpaid wages, due to her recording of incorrect hours on the applicant's timekeeping software. The applicant sought an order from the Authority requiring the respondent to repay an overpayment of $6,792, legal costs and reimbursement of the Authority's filing fee.

[2] Prior to the filing of her statement in reply, the parties attended mediation but the matters between them remained unresolved. In her statement in reply, the respondent denied she was overpaid except for in relation to 48 hours (totalling net wages of $692) and denied knowingly recording incorrect hours on the applicant's

software. Further, she raised a counterclaim for underpayment of her wages and asked that the overpayment be offset against that underpayment, so that the respondent could receive the difference owed to her.

[3] An investigation meeting was set down on 22 August 2019, following a case management conference held by the previous Member dealing with this matter. On 20 August 2019, the applicant wrote to the Authority advising that the parties had reached full and final settlement and that it wished to withdraw its claim against the respondent. In response, the Authority advised the parties that it will close the file and the investigation meeting date was vacated.

Respondent's costs submissions

[4] On 4 September 2019, counsel for the respondent filed a memorandum and submissions seeking an award of costs. The respondent stated she had made an open offer to settle the matter on 17 July 2019 excluding any allowance for costs, which was not accepted by the applicant and accordingly expired. On 16 August 2019, through counsel the respondent made a further offer to settle on a without prejudice save as to costs basis. The letter indicated the respondent would settle on the basis the applicant paid $3,500 in costs, and noted a presumption that on discontinuance of a proceeding, an applicant is liable for the costs of the proceeding. A further email from counsel on 20 August 2019 (also sent on a without prejudice save as to costs basis) offered settlement on the basis the applicant paid $6,000 to the respondent, taking into account preparation time for the investigation meeting.

[5] The respondent says she offered a draft settlement on 16 August 2019 with an error in the costs amount of $2,500 which was withdrawn soon after it was sent to the applicant, and was amended to $3,000. The respondent stated that when offered two versions of a draft settlement on 16 August 2019, the applicant indicated its willingness to agree to terms in one, but the following day refused to accept the clause drafted requiring the applicant to address costs. The respondent says between 17 August and Tuesday 20 August 2019, the applicant refused to agree to the mediation certification signoff process. In the face of such prevarication, the respondent was left with no choice but to continue to prepare for the investigation meeting on 22 August 2019. The respondent filed four briefs of evidence prior to the investigation meeting date.

[6] The respondent submitted there was never a good and proper basis to bring the claim, given the applicant could have made an authorised deduction from the respondent's final wages with her consent pursuant to the Wages Protection Act 1983.

[7] The respondent submitted that had the terms of the respondent's open letter of 17 July 2019 been accepted at the time, the matter would have been resolved at less time and expense and in the applicant's favour.

[8] Costs of representation at mediation was included in the costs submission on the grounds that the applicant failed to follow its own terms in the employment agreement and to first seek to resolve matters at mediation prior to lodging its statement of problem.

[9] The respondent also noted she had sought personnel data and time records from the applicant which were not provided in a timely fashion, and that she had summonsed the applicant's former Operations Manager to attend and give evidence at the investigation meeting.

[10] The respondent sought to have the standard daily tariff uplifted. She sought indemnity costs based on the merit of the claim, and for the unhelpful, obstructive and abusive conduct of the applicant's director, Mr Richard McNaughton.

Applicant's response

[11] In response to the application for costs, on 5 September 2019 Mr McNaughton emailed the Authority stating, among other things, that it had no jurisdiction to consider the application for costs, as an agreement had been reached between the parties. He said the applicant had signed a record of settlement and returned it to the respondent, and then the respondent sought to change terms in the settlement. Mr McNaughton stated the application for costs was vexatious and must be struck out, and that while the applicant's position was that matters had been fully and finally settled, it was willing to consider having the substantive matter heard.

Further steps in investigation

[12] The Authority administratively re-activated the matter in order to deal with the respondent's application for costs.

[13] On 5 September 2019, counsel for the respondent advised that the respondent strongly opposed any application to reopen the investigation, and believed the applicant would be unable to meet the costs of the respondent if the applicant was unsuccessful in the matter. Counsel indicated that the respondent would also seek security as to costs if the matter was reopened.

[14] On 9 March 2020, the Authority held a further case management conference with the parties. Timetabling directions were issued requiring the applicant to file an application to reopen the investigation along with submissions. The issue of costs was put on hold pending any reopening application. The applicant did not comply with those timetabling directions.

Applicant's costs submissions

[15] On 15 May 2020 the applicant filed costs submissions, asserting:

a. The respondent was provided with her personnel file and payroll data and was placed in no material disadvantage as a result;
b. Had the applicant's former Operations Manager been presented as a witness earlier, matters most likely would not have progressed as they did, and the parties' costs burdens would have been substantially less;
c. The applicant's case was not hopeless and it did not act badly or in bad faith;
d. The applicant signed a record of settlement whereby $2,000 was payable and sent it to the respondent's counsel, and requested an invoice to be sent so that it could make payment that day. It said counsel then demanded an amount exceeding the daily tariff.

[16] The applicant indicated it was making its own application for costs of $4,000 plus GST for legal advice received in relation to the respondent's costs application. The applicant advised it was seeking a copy of the relevant invoice but it appears it was never provided to the Authority.

Respondent's costs submissions in reply

[17] On 22 May 2020 counsel for the respondent filed costs submissions in reply. The submissions noted the applicant had not filed an application or submissions to reopen the matter as timetabled, the applicant's legal fees appeared unrelated to costs

submissions and were somewhat disingenuous as counsel for the applicant had not lodged any submissions to justify these costs. The respondent submitted that the applicant's withdrawal of the matter and its failed efforts to reopen the matter did not entitle it to an award of costs from the respondent. To the contrary, the reopening was a "fruitless exercise" which had only delayed justice for the respondent.

[18] The respondent wished to uplift the total costs sought taking into account additional work undertaken since filing her original costs application. The respondent sought total costs of $15,174.25 (including GST) in defending the matter and related delays, and provided tax invoices in support. The respondent acknowledged she is liable for the net overpayment of $962, to be deducted from any costs award.

[19] The respondent further noted the applicant had been represented by Mr McNaughton, the applicant's director, throughout the proceedings. She stated that as a former lawyer, Mr McNaughton was fully aware of the impact of how unfair the applicant's strategy to reopen this matter was on the respondent, given his capacity to "self-represent".

Applicant's liquidation

[20] On 30 October 2020, counsel for the respondent advised the Authority that the applicant had been placed into liquidation. Counsel advised she had approached the liquidators to add the respondent to the applicant's list of creditors. Counsel relayed the liquidators' advice that the respondent could lodge the claim to its full costs value pending the Authority's costs determination.

[21] The matter was then held in abeyance, with neither party taking any steps in relation to it.

[22] On 24 May 2022, the Authority contacted the applicant's liquidators who advised they still saw no issue with the Authority issuing a costs determination to the respondent. The liquidator further advised, however, that there was no meaningful prospect of any distributions being made to unsecured creditors in the liquidation.

[23] The liquidators' response is taken by the Authority to be consent to continue the proceedings, such that a determination in relation to costs is not prevented by s 248 of the Companies Act 1993.

Costs Principles

[24] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*.[1]

[25] Costs are not to be used as a punishment, are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction. Of relevance in this matter is the principle that costs will be modest. The Employment Court observed at para [47]:

> … we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.[2]

[26] The Authority normally adopts a notional daily tariff based approach to costs. The current notional daily tariff is $4,500 for the first day of an investigation meeting and $3,500 for each subsequent day. The notional daily tariff is then adjusted to reflect the particular circumstances of each case.

Costs Assessment

[27] It is common ground that no record of settlement was signed by the respondent, nor was it signed by a mediator pursuant to s 149 of the Act. It therefore did not become binding or enforceable by either party. The applicant therefore acted hastily in withdrawing its substantive application prior to the resolution of costs with the respondent.

[28] The respondent has incurred costs after having put the applicant on notice that should it proceed with its claims, she would be seeking costs from it. It is appropriate in these circumstances for a costs award to be made despite the liquidation status of the respondent. However, it is not appropriate to award the respondent the level of costs she is seeking.

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[1] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.
[2] Ibid at [47].

[29] The offers made by the respondent were reasonable and were made before the withdrawal of the Authority application, and acceptance would have negated the need for an investigation meeting. I consider that the offers may be taken into consideration in the matter of costs on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted.

[30] The Authority notes that the applicant's withdrawal of the application came at a very late stage, at 5.19pm on 20 August 2019, with the investigation meeting due to be held on 22 August 2019.

[31] It is necessary to consider whether the respondent's total costs are reasonable. Counsel states that the respondent was invoiced a total of $15,174.25 (being $13,194.99 excluding GST). I am not confident that these costs are reasonable or that this matter was approached as economically as possible by the respondent. Further, I am not satisfied full indemnity costs should be awarded. However, I am satisfied that the way in which the applicant's claim was pursued has likely incurred unnecessary costs to the respondent as a result.

[32] The Authority finds no basis for making a costs award in relation to mediation attendance, and further notes the relevant invoices do not particularise the amount invoiced in relation to mediation as opposed to other attendances.

[33] Taking all these considerations into account, I consider that a costs award slightly above the level of the daily tariff for a first day of investigation meeting in favour of the respondent is appropriate. I therefore award $5,500 in costs to the respondent, Tracey Oakly.

Sarah Blick
Member of the Employment Relations Authority