

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 507
3151882

BETWEEN

ROBYN MORTIMER
First Applicant

AND

SUN KISSED TAN LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Robert Thompson, advocate for the Applicant
Mathew Docherty for the Respondent

Submissions received: 16 September 2022 for the Applicant
30 September 2022 for the Respondent

Date of Determination: 05 October 2022

COSTS DETERMINATION OF THE AUTHORITY

Costs

[1] The applicant, Ms Mortimer has applied for a contribution to her costs (plus the Authority filing fee) from the respondent (SKT) after determination of her application for unjustified action and unjustified dismissal. Ms Mortimer was successful except for a reduction to the remedies for contribution. In my determination dated 9 September 2022 (my determination) I made the following orders:

- a. \$7,921.41 gross being \$8,801.57 gross for lost earnings under s 128(2) of the Act less 10% for contribution under s 124 of the Act.
- b. \$14,400.00 being \$16,000.00 compensation under s 123(1)(c) of the Act less 10% for contribution under s 124 of the Act.

[2] The issue of costs was reserved for the parties to resolve themselves. They have not been able to do this.

[3] Ms Mortimer lodged submissions for costs and SKT replied.

Costs principles

[4] Clause 15 of Schedule 2 of the Act empowers the Authority to order costs to any party as the Authority thinks reasonable. A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall. ¹

[5] The Authority uses a notional daily tariff ² as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter and takes into account the preparation for the same. This tariff may then be adjusted upwards or downwards according to the circumstances of each case considering things like a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs. ³

¹ Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

² The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 for the first day and \$3,500.00 for each additional day.

³ As above at 1.

Ms Mortimer's submission

[6] Ms Mortimer submits that the tariff for the one-day investigation meeting should be increased by \$1,000.00 because she offered a 'Calderbank' letter (the letter) to settle for \$5,500.00 plus GST to cover her "actual costs" at a point before any substantive steps were taken in the Authority investigation. She offered this on the basis that it would alleviate both parties from the stress of continuing with the Authority process. She proposed that continuing with that stress would not be "beneficial for either party." The figure offered to effectively withdraw her claim was considerably less than what was eventually ordered against SKT in my determination.

SKT's submission

[7] SKT submits that it should pay some costs but that the daily tariff be reduced by the 10% contribution found in my determination.

[8] SKT opposes an uplift to the daily tariff. It says it believed that Ms Mortimer's actions amounted to serious misconduct and as such did not accept the offer to settle. SKT further submits that "a respondent to a claim of any nature is entitled to a fair and reasonable process and should not be penalised for exercising that right."

Assessment

[9] I agree that Ms Mortimer should have an order for a contribution to her costs. The matter was heard across almost a full day. The starting point should be the daily first day tariff of \$4,500.00.

[10] I do not find, as submitted by SKT, that I should reduce the tariff by 10%. Costs are not a mechanism to punish a party and the reduction has already been made in my determination.

[11] I do not find there should be the uplift of \$1,000.00 as submitted for Ms Mortimer for the following reasons.

[12] The Employment Court⁴ has observed that while ‘Calderbank’ offers are “front and centre” for the Court when considering costs, the Authority’s discretion is broader and sits within the context of a jurisdiction “intended to be low level, costs effective, readily accessible and non-technical”.

[13] While it is submitted for Ms Mortimer that the Employment Court⁵ has also referred to “the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice letter without costs being impacted”, I do not find this situation fits neatly into that category. There will be an order for costs in this matter and the case referred to was in the Employment Court. That jurisdiction has a specific regulatory obligation to consider offers made to settle when exercising its discretion to make orders for costs⁶. The Authority’s equivalent provision does not contain that specific⁷ and has broader discretion for the reasons outlined above.

[14] The offer to settle in this matter was from the person who initiated the claim on the basis of avoiding the stress of continuing in the Authority. This was just after the mediation event was unsuccessful. The offer was for payment of “actual costs” at that time rather than any concession to compensation or lost earnings claimed. Presumably by this time Ms Mortimer had received advice on and assistance with the commencement of the grievance process as well as representation and support at mediation. The claim Ms Mortimer brought was not straight forward and my consideration of it and the weighing of the evidence should be apparent in my determination. I accept SKT’s submission that it wanted to test its right to

⁴ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

⁵ *Lancom Technology Limited v Forman* [2018] NZEmpC 30 at [38].

⁶ Employment Court Regulations 2000, Regulation 68.

⁷ Employment Relations Act 2000, Schedule 2, clause 15.

defend the claims that had been brought. There was also Ms Mortimer's contribution which means she was not wholly successful in her claim.

[15] Considering the above I do not find this is a situation that warrants an uplift to the daily tariff.

Order

[16] Sun Kissed Tan Limited is ordered to pay Robyn Mortimer \$4,500.00 plus the filing fee of \$71.56 as a contribution to her costs.

Antoinette Baker
Member of the Employment Relations Authority