

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 588
3140781

BETWEEN

PATRICIA HUGHES
Applicant

AND

PHILIP BAYLY AND
JUSTINE ROWE AS
TRUSTEES OF PHILIP
BAYLY FAMILY TRUST
Respondents

Member of Authority: Sarah Blick

Representatives: David Watson, advocate for the applicant
Christopher Eggleston, counsel for the respondents

Investigation meeting: On the papers

Submissions or information received: 29 August 2022 from the applicant
7 September 2022 from the respondents

Determination: 10 November 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 15 August 2022 which found the applicant Ms Hughes was unjustifiably dismissed. It awarded \$3,000 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).¹ Ms Hughes' claim for arrears of holiday pay of \$2,865.42 was dismissed.

Amendment to respondent party

[2] Subsequent to the issuing of that determination, the Authority raised an issue with the parties as to whether the correct respondent party or parties had been identified. In the earlier determination, the respondent was identified as the Philip Bayly Family

¹ [2022] NZERA 390.

Trust (the Trust). Mr Philip Bayly and Ms Justine Rowe are the correct respondent parties and have now consented to being named as the respondent parties instead of Philip Bayly Family Trust. Ms Hughes has also consented to that amendment. An erratum to the earlier determination will be issued with a newly corrected intituling page and an amendment to paragraph [88], again with the parties' consent.

Costs application

[3] As the parties have been unable to resolve the issue of costs between themselves, Ms Hughes has sought an order for costs. She seeks an award of costs totalling \$7,500. This comprises of the Authority's usual daily tariff for a one-day investigation meeting and an uplift of \$3,000 on the grounds the respondents rejected a reasonable offer to settle all matters at a time when neither party had incurred substantial costs.

[4] The respondents say the parties shared comparable success in the Authority, and that costs should lie where they fall.

Costs principles

[5] The Authority's jurisdiction to order a party to contribute to costs incurred by another party is exercised by applying well-established "basic tenets" to the particular circumstances of the case.² Those tenets recognise that a successful party should receive a contribution to their reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of the case may allow for an order that costs lie where they fall; and the Authority may use a notional 'daily rate' or 'tariff' as a starting point to assess costs.

[6] The Authority considers undue rigidity in applying the tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the preparation required in particularly complex matters and whether the conduct of any party unnecessarily increased the costs incurred.

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

Costs submissions

[7] Ms Hughes' representative Mr Watson says she was the successful party and costs should follow the event. He has provided evidence that Ms Hughes has been invoiced costs totalling \$8,742.56 (GST inclusive). This amount includes the filing fee paid into the Authority.

[8] Mr Watson says a *Calderbank* offer made on her behalf on 12 October 2020 should be taken into account. He submits that offer was made early in the process and was an expedient settlement proposal – it comprised of an offer of full and final settlement on payment of \$16,500 compensation for hurt and humiliation under s 123(1)(c)(i) of the Act and a contribution of \$2,500 (plus GST) towards Ms Hughes' costs. Mr Watson says the offer was genuine and was made on the basis of avoidance of costs to both parties to settle all matters. Mr Watson says the respondents did not provide a response or any explanation as to why the offer was not accepted before it lapsed on 21 October 2020.

[9] For the respondents, Mr Eggleston observes Ms Hughes' statement of problem alleged she was unjustifiably dismissed on the basis she was offered and accepted permanent employment and that the Trust had agreed to accept liability for holiday pay accrued with Ms Hughes' previous employer. Counsel notes Ms Hughes sought to add an additional claim for lost remuneration at the investigation meeting, which was declined by the Authority.

[10] Mr Eggleston submits Ms Hughes succeeded in only one of her three claims, and the successful claim was not determined on the basis she had asserted – that she was permanently employed. The respondents submit on balance they accordingly enjoyed a greater degree of success than Ms Hughes.

[11] Mr Eggleston further submits the *Calderbank* offer made on Ms Hughes' behalf was 550% greater than what she was awarded. Rather than confirming that Ms Hughes' offer was reasonable and deserving of an uplift on the daily tariff, Mr Eggleston submits the letter reveals Ms Hughes' expectations were unreasonable from the outset. The respondents submit in those circumstances they had no option but to proceed to the investigation meeting.

[12] Additionally, Mr Eggleston says while the respondents' position is that costs should lie where they fall, they offered Ms Hughes the sum of \$1,500 in costs, in order to avoid both sides the cost of drafting and exchanging written costs submissions. Evidence of that offer has been received. Mr Watson rejected that offer on Ms Hughes' behalf, stating Ms Hughes would be prepared to accept the daily tariff amount of a one-day investigation meeting, being \$4,500.

Assessment

[13] At the investigation meeting, Mr Watson made a belated and unsupported claim on Ms Hughes' behalf for lost remuneration for a period of time during which she was still employed by her previous employer. This claim was not pursued with any force and minimal time was spent on this claim at the investigation meeting as it was unsupported by any evidence.

[14] Ms Hughes' claim that the respondents had accepted responsibility for holiday and leave entitlements accrued with her previous employer was not accepted by the Authority. However, that claim was arguable on the evidence and not without merit in light of discussions the respondents and Ms Hughes' previous employer had about entitlements of employees transferring to the Trust or the respondents' employ.

[15] I observe the parties' core focus in preparation was clearly on the unjustified dismissal claim. Evidence relevant to Ms Hughes' claim of unjustified dismissal also occupied the substantial bulk of time at the investigation meeting, which included oral evidence and closing submissions. I note Ms Hughes' evidence relating to a key discussion between the parties was not accepted by the Authority, which ultimately informed the Authority's finding that the respondents did not offer Ms Hughes permanent employment. However, the respondents unsuccessfully argued that Ms Hughes was offered and had accepted casual employment. The Authority found instead Ms Hughes was employed on a fixed-term basis which did not meet the requirements of s 66 of the Act, and that she was unjustifiably dismissed in the circumstances.

[16] I find Ms Hughes was substantially successful in establishing her main claim that the respondents acted unjustifiably in dismissing her. It is that 'event' of success which gives rise to an entitlement to an award of costs. She could not have achieved that success without lodging her claim in the Authority.

[17] This finding is consistent with the Employment Court's decision in *Coomer v JA McCallum & Son Limited* that made it clear that mixed success is nevertheless success for the purposes of awarding costs.³

[18] I consider the notional daily tariff is the starting point, and the applicable daily tariff is \$4,500.

[19] I have taken into account Ms Hughes' letter of offer to settle the matter on 12 October 2020. The Authority's findings show the level of compensation Ms Hughes sought was ultimately unrealistic, but the letter provided reasoned arguments and cited relevant case law in relation to Ms Hughes' employment status and her dismissal. It provided an opening for further discussion and negotiation, and I accept Mr Watson's unchallenged submission that the respondents provided no response or counter or any explanation as to why the offer was not accepted before it expired. Given the overall result, however, I am not satisfied this warrants an uplift to the starting point of \$4,500.

[20] Taking all of these matters into account, I make no further adjustment to the starting point.

Conclusion

[21] Philip Bayly and Justine Rowe as trustees of the Philip Bayly Family Trust are ordered to pay \$4,500 in costs and \$71.56 (being the Authority filing fee) to Patricia Hughes as a contribution to her costs within 21 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority

³ *Coomer v JA McCallum & Son Limited* [2017] NZEmpC 156.