

NOTE: This matter is subject to an order prohibiting publication of some information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 639
3139881

BETWEEN	JOLENE HUMPHREY Applicant
AND	WHANARUA EDMONDS T/A EXTREME BEAUTY SALON Respondent

Member of Authority:	Peter Fuiava
Representatives:	Fiona Dalziel and Michelle Urquhart, counsel for the Applicant Marsella Edmonds for the Respondent
Submissions and information received:	19 May and 8,11 September 2023 from the Applicant 2 June, 14 August and 11 September 2023 from the Respondent
Determination:	31 October 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination dated 28 April 2023 I found that Whanarua Edmonds had withheld Jolene Humphrey's final pay for annual leave and public holiday pay and awarded her wage arrears, interest, and reimbursement of the Authority's filing fee.¹

[2] The determination reserved costs and set a timetable for the filing of memoranda in the event the parties could not resolve costs between themselves. This determination resolves the issue of costs. Both parties have lodged with the Authority written

¹ *Jolene Humphrey v Whanarua Edmonds* [2023] NZERA 212.

submissions concerning costs which includes from Mr Edmonds a six-month cashflow summary to July 2023 regarding his business Extreme Beauty Salon (EBS).

Non-publication order is granted

[3] Under cl 10 sch 2 of the Employment Relations Act 2000 (the Act), the Authority may order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published. The discretion must be exercised on a principled basis acknowledging that open justice is fundamental to our common law system of civil and criminal justice.²

[4] On 14 August 2023, I was advised by Mr Edmonds' mother, Marsella, that they have been trying to sell EBS for over a year and that disclosure of the financial information provided could disadvantage those efforts. While I find that the cashflow information would need to be disclosed to a potential buyer as part of due diligence in any event, publication of this information to the world at large could prejudice Mr Edmonds efforts to sell EBS which may then prejudice his ability to pay costs to Ms Humphrey. Cumulatively considered, I find that there is a sound and sufficient reason to grant a non-publication order around the cashflow information which contains commercially sensitive information. However, this order does not prevent Mr Edmonds from disclosing this information to any interested third-party buyer of his business as part of their due diligence.

Costs principles

[5] Costs are a matter of discretion. The discretion is to be exercised in accordance with principle and not arbitrarily. It is usual for costs to follow the event namely that the losing party pay a contribution towards the successful party's costs. Other principles include that cost awards will be modest, that Calderbank offers may be taken into account, and that costs are not used as a punishment or as an expression of disapproval of an unsuccessful party's conduct.

[6] The starting point for costs based on the Authority's daily tariff is \$4,500 for the first day and \$3,500 for every subsequent day. The daily tariff is usually taken as a starting point, although not used in a rigid manner, with principled adjustments made

² *Erceg v Erceg* [2016] NZSC 135 at [2].

having regard to the particular characteristics of a case. From that starting point, the Authority can consider whether there are factors justifying an increase or decrease in costs.³

Costs submissions

[7] Ms Humphrey submitted that the investigation meeting took one full day on 29 September 2022 in Rotorua. I note that the investigation meeting was originally scheduled for two days but was completed in one which benefitted both parties. However, further information from Mr Edmonds was requested and was provided. It was agreed that the parties would then lodge closing written submissions but it appears that Mr Edmonds did not understand what was required of him and consequently an oral closing submissions hearing by audio-visual link was arranged for 31 January 2023 which started at 11.30 am and ended at approximately 12.33 pm.

[8] At a minimum, Ms Humphrey submitted that she is entitled to \$4,500 for the one-day investigation meeting and a further \$1,750 for the closing submissions hearing for the combined sum of \$6,250. However, Ms Humphrey seeks her actual costs in pursuing her matter in the Authority which amount to \$19,260.37. Four invoices totalling \$23,803.53 were provided (28 June, 31 March 2021, 31 August 2022, and 19 May 2023).

[9] Ms Humphrey says that she is entitled to an uplift in costs because:

- (a) Mr Edmonds rejected a reasonable settlement offer put forward on 12 July 2021;
- (b) Mr Edmonds rejected a further reasonable settlement offer put to him on 8 October 2021;
- (c) the first investigation meeting scheduled for 9-10 August 2022 was adjourned on 8 August 2022 at Mr Edmonds' request which increased Ms Humphrey's costs because preparation was already completed for a hearing that did not proceed as planned; and
- (d) written submissions which were due to be filed on 30 November 2022 were suddenly and at the last minute changed to oral submissions at Mr Edmonds' request. Ms Humphrey's written

³ Employment Relations Authority Practice Direction, August 2023;
<https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

submissions were fully prepared by the time Mr Edmonds requested oral submissions hearing which has resulted in Ms Humphrey incurring further unnecessary costs.

[10] In response, Mr Edmonds submitted that while Ms Humphrey was the successful party, she was not successful with all her claims. By this I take Mr Edmonds to be referring to my finding at [36] and [37] of the determination that Ms Humphrey was unsuccessful with her claim for a penalty for a breach of s 65 the Act and s 5A of the Wages Protection Act 1983. I had also found that there was merit in Mr Edmonds' counterclaim against Ms Humphrey who I considered had not acted in good faith when she was asked by Marsella whether she was planning to establish her own business or continue to work for EBS.⁴

[11] However, despite these favourable findings to Mr Edmonds, I was not satisfied on the facts that there was a causal link between his loss of clients and Ms Humphrey's departure and setting up of her own business to award damages.⁵ In addition, I found that Mr Edmonds had not sufficiently mitigated his loss which I attributed to his relative lack of experience as the new business owner of EBS. Mr Edmonds could have had Ms Humphrey undertake a longer notice period or observe a period of garden leave which would have given his business the time it needed to meet the competition.⁶

[12] Mr Edmonds' cost submissions record that, through his former legal representative, he attempted to negotiate a settlement with Ms Humphrey and that he has incurred legal costs totalling \$5,476.34. Copies of five invoices from 18 January to 24 November 2021 were provided. As for the adjournment of proceedings, Mr Edmonds calls for honesty submitting that he had accommodated an earlier request from Ms Humphrey for an adjournment which I note related to an extension request for the filing of a written witness statement as opposed to requesting an adjournment of the investigation meeting as he had done.

[13] Mr Edmonds submitted that he should not have to pay Ms Humphrey's legal costs when there was never a guarantee that she would be compensated in full. The

⁴ n 1, at [2] and [30].

⁵ At [31].

⁶ At [31] and [32].

most he should have to pay is the daily tariff for a one-day investigation meeting of \$4,500. Mr Edmonds further submitted that since the second-wave of COVID-19 in 2021, EBS has not fully recovered and that neither he nor anyone in his family is receiving a wage from the business. If the Authority were to rule in favour of Ms Humphrey, this would create extreme financial hardship for himself and his family.

Costs analysis

[14] The starting point is that costs should follow the event. The investigation meeting was originally scheduled for two days but was completed in one. While the parties were spared the added expense of a second day of meeting, further costs were incurred as a result of Mr Edmonds' request to have an oral closing submissions hearing by audio-visual link after written closing submissions had originally been directed by the Authority.

[15] Ms Humphrey invites the Authority to adopt a starting point of \$6,250 based on \$4,500 for the one-day investigation meeting on 29 September 2022 and a further \$1,750 for the half-day oral submissions hearing. However, standing back, I prefer \$1,500 for the hearing of closing oral submissions which takes into account the actual time of hearing as well as some recognition for time spent on drafting written closing submissions and preparation time for the hearing.

[16] For the costs-setting exercise, I adopt as my starting point \$6,000 (\$4,500 + \$1,500). While Ms Humphrey may not have succeeded with all her claims, she was successful with her wage arrears claim and is the successful party by any realistic appraisal. In *William Coomer v JA McCallum and Son Limited*, the Employment Court acknowledged that determining which party was successful can be problematic but success on more limited terms is still success.⁷

[17] The court further found that Mr Coomer could not have achieved the success he had without lodging a claim in the Authority and that there was no evidence that he had behaved in some inappropriate way or engaged in practices which unreasonably prolonged the investigation.⁸ The same can be said here with Ms Humphrey who

⁷ *William Coomer v JA McCallum and Sons Limited* [2017] NZEmpC 156 at [37]

⁸ At [43].

needed to approach the Authority to progress her wage arrears claim against Mr Edmonds. Mixed success is still success and it does not matter that she may have lost a significantly larger or more complex claim if she was successful with any claim.⁹

Indemnity costs

[18] Ms Humphrey applies for actual or indemnity costs against Mr Edmonds. In *Bradbury v Westpac Banking Corporation*, the Court of Appeal identified that such costs may be ordered where a party behaved badly or very unreasonably.¹⁰ In my determination, I found merit in Mr Edmonds' counterclaim that Ms Humphrey had not acted in good faith. Because of that finding which has not been challenged, I find that Mr Edmonds does not meet the high threshold in *Bradbury* of exceptionally bad behaviour to justify the award of indemnity costs.

Conduct of the proceedings

[19] I can still take into account whether the conduct of the proceedings was such that an uplift to the daily tariff is justified.

[20] Both parties have referred to past offers to settle the matter. While Mr Edmonds' cost submissions refer to negotiations made on his behalf by his former legal representative, no evidence of a Calderbank offer was provided by him.

[21] On the other hand, Ms Humphrey made two offers on a Calderbank basis to Mr Edmonds by letters dated 12 July and 8 October 2021 both of which predate the investigation meeting on 29 September 2022. The first Calderbank offer gave Mr Edmonds the opportunity to settle if he paid Ms Humphrey her annual leave balance of \$3,211.02 and her counsel's legal costs of \$5,500 plus GST. He had four days to contemplate that offer before it expired on 16 July. The second Calderbank offer was Ms Humphrey's best offer of a negotiated settlement; payment of her annual leave balance above and a contribution of \$4,500 plus GST towards legal costs. That offer was open for one week and expired on 15 October 2021.

⁹ See *Sharlene Edwards v JS Ewers Limited* [2023] NZERA 345 at [8]-[9].

¹⁰ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [26]-[27].

[22] I find both of Ms Humphrey's offers of settlement to be reasonable and Mr Edmonds had sufficient time to contemplate each offer before they expired. Had he accepted either he would have been considerably better off. His rejection of two reasonable offers of settlement made on a Calderbank basis warrant an uplift in costs. However, any uplift should be modest. An uplift of \$2,000 is appropriate in the circumstances.

[23] Ms Humphrey seeks a further uplift in costs because the original dates of the investigation meeting of 9-10 August 2022 had to adjourn on 8 August at Mr Edmonds request because of the death of a close member of his *whanau*. Mr Edmonds opposes any uplift having previously accommodated Ms Humphrey when she sought the benefit of an adjournment. However, the adjournments are not the same. To adjourn an investigation meeting the day before its commencement incurs duplication of work and wasted costs. Here, Ms Humphrey's counsel would have spent time preparing for the investigation meeting which did not proceed as planned. A further uplift is warranted but this too must be modest. I consider a further \$1,000 appropriate in the circumstances.

Ability to pay costs

[24] Mr Edmonds and his mother Marsella have stated that they have been trying to sell EBS for over a year. While I have been provided with financial information regarding EBS's financial performance from February to July 2023, the respondent here is Mr Edmonds in his personal capacity rather than his business. If he is experiencing financial hardship, it has not been shown that he is impecunious and neither has it been shown that the sale of EBS would not change his financial position for the better.

Conclusion and Orders

[25] Costs are not intended to punish or express disapproval at an unsuccessful party's conduct. However, the conduct of the proceedings by Mr Edmonds has had the effect of considerably increasing Ms Humphrey's legal costs which requires an upwards but principled adjustment to the daily tariff.

[26] The Authority orders Whanarua Edmonds to pay Jolene Humphrey \$9,000 as a reasonable contribution to her legal costs no later than 4 pm Tuesday 28 November 2023.

Peter Fuiava
Member of the Employment Relations Authority