

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 356
3171842

BETWEEN

VICKY LEE DEVINE
Applicant

AND

HEART KIDS NEW ZEALAND
INCORPORATED
Respondent

Member of Authority: Natasha Szeto

Representatives: Liz Lambert, representative for the Applicant
Anthony Drake and Rosie Judd, counsel for the Respondent

Submissions received: 13 and 27 March 2024 from the Respondent
27 March 2024 from the Applicant

Date: 17 June 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 1 March 2024, I issued a determination¹ in which I found Vicky Lee Devine failed to raise a personal grievance with her former employer Heart Kids New Zealand Incorporated (Heart Kids) within 90 days.

[2] I was not satisfied the delay in raising a personal grievance was occasioned by exceptional circumstances and I did not grant leave for Ms Devine to raise a personal grievance out of time. I found Ms Devine's claims of discrimination and breach of contract

¹ *Vicky Lee Devine v Heart Kids New Zealand Incorporated* [2024] NZERA 122.

unsuccessful, and found she was not owed any arrears including holiday pay or accrued annual leave payments.

[3] In the determination, I referred to the Authority's usual practice of applying the daily tariff to determine costs and the parties were encouraged to resolve any issue of costs between them. They have been unable to do so.

[4] Heart Kids lodged and served a Memorandum of Counsel as to Costs on 13 March 2024. Heart Kids says the totality of Ms Devine's case was devoid of merit and each cause of action was bound to fail.

[5] Heart Kids submit the following factors justify a modest uplift to the daily tariff:

- (a) Ms Devine's conduct in bringing the claim in light of PSA advice.
- (b) The additional application made under s 114 of the Act.
- (c) Ms Devine's rejection of a reasonable *Calderbank* offer.²

[6] Heart Kids asks the Authority to order Ms Devine pay a contribution to its legal costs of \$6,750.00 plus GST, and disbursements of \$1,361.65 being the cost of its lawyers' accommodation. Heart Kids' costs claim totals \$8,111.65.

[7] Ms Devine filed a Costs submission in reply on 27 March 2024. She asks the Authority to allow costs to lie where they fall. Ms Devine submits the Authority should apply the principle that costs are only justified at the court of first hearing if the matter is not appealed³, which is not the case here. Ms Devine says her substantive case was not unmeritorious, and in fact was a matter of both public and judicial interest and novelty. Additionally, Ms Devine says she is unable to pay costs. If she is successful in her challenge to the Employment Court, her circumstances would change, but it would be unfair to impose costs on her now when she does not have the resources to meet them.

² *Calderbank v Calderbank* [1976] Fam 93 (CA).

³ *Manukau Golf Club Inc v Shoye Venture* [2012] NZSC 109.

Analysis

[8] The Authority has clear statutory power to order such costs and expenses to be paid as the Authority thinks reasonable.⁴ Costs are awarded at the Authority's discretion.⁵ The principle that costs follow the event is well-recognised by the Authority and courts.⁶ I do not accept the submission that the starting point for a matter taken on challenge to the Employment Court is costs lie where they fall. Further, a challenge to the Employment Court does not operate as a stay on matters before the Authority. Hearts Kids has requested the Authority make a costs order and it is appropriate that I do so.

[9] The Authority has adopted a daily tariff approach as the starting point for considering costs, which is well known. The parties were advised of the costs approach at the Case Management Conference. The current daily tariff is \$4,500.00 for the first day of hearing, and \$3,500.00 for subsequent hearing days.⁷ The parties can expect the Authority to adhere to the approach of applying the daily tariff, unless there is good reason to depart from it.

[10] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁸ as confirmed in *Fagotti v Acme and Co Limited*⁹. It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[11] A robust approach is to be adopted in relation to *Calderbank* offers. The Employment Court has noted that such an approach is "consistent with the public interest in encouraging the acceptance of reasonable settlement offers and avoiding unnecessary litigation".¹⁰

⁴ Employment Relations Act 2000, Schedule 2, clause 15.

⁵ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

⁶ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

⁷ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi (February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>

⁸ [2005] 1 ERNZ 808.

⁹ [2015] NZEmpC 135 at 114.

¹⁰ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4.

[12] As the successful party, Heart Kids is entitled to a contribution to its costs actually and reasonably incurred. My records show the investigation meeting took a full day. The appropriate starting point for assessing costs is \$4,500.00.

[13] Heart Kids has set out the factors it says justify an uplift. Core amongst them is the way Ms Devine's case progressed, including that there were differing explanations offered for why the personal grievance was raised out of time, and a late application was made for leave to raise a personal grievance out of time on the basis of exceptional circumstances.

[14] Of the factors Ms Devine submits are relevant to the exercise of my discretion to award costs, the only factor that impacts on costs in this case is her financial circumstances – a point to which I will return.

[15] It is a well-settled principle that costs are not intended to punish or express disapproval at an unsuccessful party's conduct. But where the unsuccessful party has acted unreasonably, thereby also unnecessarily increasing costs, an uplift can be considered. Ms Devine made an oral application for leave under s 114(3) at the investigation meeting, and further information was filed in support subsequently. Had the issue been raised earlier, it is likely the investigation meeting would have taken a further quarter to half day.

[16] In addition, I have seen the *Calderbank* offer given to Ms Devine, and I am satisfied it was a reasonable offer made in sufficient time before the investigation meeting to provide a reasonable time for response. The submission for Ms Devine appears to be that she had a right to pursue a personal grievance against Heart Kids. While that is correct, it must also be acknowledged Ms Devine was wholly unsuccessful in her claims and acceptance of the offer would have put her in a significantly better position. An uplift to the tariff is appropriate to recognise the unexplained rejection of a reasonable *Calderbank* offer.

[17] For the reasons set out above including the conduct of the matter and the *Calderbank* offer, and taking into account parity with other costs awards in the Authority, I consider it is appropriate to order an uplift in costs. The uplift I apply is \$1,750.00, being half a day's tariff costs for a second or subsequent day of investigation meeting time. That results in a nominal costs award of \$6,250.00 before considering Ms Devine's financial situation.

[18] Through submissions, Ms Devine says she currently does not have the resources to meet a costs award. She has not filed any information to support her claim. There is no basis for me to take financial circumstances into account to reduce an otherwise appropriate award of costs and I therefore decline to do so.

[19] In relation to disbursements, Heart Kids makes a claim for its lawyers' accommodation. Heart Kids chose to be represented by two counsel based out of Christchurch, and I do not consider it is reasonable for Ms Devine to bear the cost of their travel expenses. I decline to award costs in respect of accommodation.

[20] Stepping back to look at matters overall and considering parity with other cases, an award of \$6,250.00 which includes an uplift to the daily tariff, represents a modest and appropriate costs award in the circumstances.

Orders

[21] For the reasons set out above, I order Vicky Lee Devine to pay Heart Kids New Zealand Incorporated within 28 days of the date of this determination:

- (a) The sum of \$6,250.00 as a contribution to its costs.

Natasha Szeto
Member of the Employment Relations Authority