

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 138
5436670

BETWEEN ROWENA ASHWORTH
 Applicant

AND SPOTLESS FACILITY SERVICES
 (NZ) LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: William Ashworth, for the Applicant
 Guido Ballara, counsel for the Respondent

Submissions received: 5 and 21 November 2014 from the Respondent
 19 November 2014 for the Applicant

Determination: 22 December 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In my decision of 24 September 2014 I found that Rowena Ashworth had not been disadvantaged in her employment by actions she alleged her employer had taken. I dismissed her claim to have a personal grievance and reserved the matter of costs.

[2] The respondent, Spotless Facility Services (NZ) Ltd (Spotless), now seeks costs. It submits that the existence of a *Calderbank* offer made on 25 June 2014 justifies an award of indemnity costs for all costs incurred after that date.

[3] Through its counsel, Mr Ballara, Spotless notes that of the four claims set out in the statement of problem one was withdrawn 14 days before, and one was withdrawn during, the investigation meeting. Mr Ballara says the respondent incurred costs preparing to defend each of those withdrawn claims and seeks recognition of that in the award of costs that is made. He further submits that Ms Ashworth's claims

could reasonably be considered unmeritorious claims which ought not to have been brought.

[4] Spotless seeks \$6,233.72 plus an additional \$600 as a contribution towards the costs it incurred in applying for costs. The latter claim appears to rely on Ms Ashworth's "failure/refusal to engage on the issue" of costs as well as on its "timely and relevant" *Calderbank* offer.

[5] Mr Ballara says the respondent's total costs exceeded \$7,000 plus GST, and that these had been reduced from recorded costs of \$13,556.556 plus GST. He provided a printout of time incurred, cost, and fees charged to support the respondent's application.

[6] Mr Ashworth, who made submissions on behalf of Ms Ashworth, does not deny that costs are appropriate but asks the Authority to take into account Ms Ashworth's limited means to pay. He provided details of her hours of work and her hourly pay rate. He also requested the Authority to reduce the respondent's claim for costs significantly.

[7] Mr Ashworth denied any failure or refusal to engage with the respondent over the issue of costs. He submitted that he had notified Mr Ballara of his belief that Ms Ashworth's challenge to the Authority's determination of Ms Ashworth's claims would result in costs being determined by the Employment Court. He had taken Mr Ballara's lack of a response to indicate agreement with that position.

[8] He invited the Authority to ignore the *Calderbank* offer and not to consider costs incurred by the respondent until after the second mediation in July 2014. Mr Ashworth says the offer was made two weeks before the parties attended that second mediation. In his view the timing of the offer and its low monetary value indicated Spotless was not making a serious attempt to resolve Ms Ashworth's employment relationship problems.

[9] In his submissions Mr Ashworth claimed Spotless had no intention of mediating in good faith with Ms Ashworth, and that Mr Ballara had misrepresented the matter of the withdrawal of one of Ms Ashworth's claims. He also claimed the respondent had included in its costs application fees incurred in relation to another person, also represented by Mr Ashworth, whose claims had been resolved at the July mediation.

[10] Mr Ballara denied those allegations and noted he had been instructed to represent Spotless only in relation to Ms Ashworth's claims. An email he sent to the Authority on 25 June 2014 to the Authority supports this. I find Mr Ashworth's claims to be speculative without evidence to support them and I disregard them for the purposes of this determination.

[11] The Authority's discretion to award costs arises from clause 15 of Schedule 2 to the Employment Relations Act 2000. The principles relevant to costs awards are well-settled and are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹. I shall not reiterate the principles here but note that I have applied them when determining costs after considering the parties' submissions.

[12] Costs are modest. They normally follow the event and there is no reason to deviate from that practice in this instance. Ms Ashworth chose to pursue claims in the Authority which failed and it is only fair that she contribute to the costs incurred by her employer. She has regular, but not full-time, employment with the respondent through which she earns approximately \$22,000 per year.

[13] The investigation meeting was completed in one day and the starting point for an award of costs is the Authority's current notional daily tariff of \$3,500. That amount may be adjusted depending on the circumstances.

[14] In this instance it is reasonable to take account of the *Calderbank* offer of \$500 made to Ms Ashworth on 25 June 2014. While the offer was modest, it reflected the respondent's accurate prediction that the Authority would find an absence of merit to Ms Ashworth's claims. The offer was open for seven days, which I find to be a reasonable timeframe, and was rejected in writing within that period.

[15] I do not agree with Mr Ballara that it would be reasonable to award indemnity costs after the *Calderbank* offer of 25 June 2014. Such costs are "exceptional and require exceptionally bad behaviour" in litigation according to the Court of Appeal in *Bradbury v. Westpac Banking Corp*². I do not find such behaviour was exhibited by Ms or Mr Ashworth although a more experienced representative may have handled the matter more efficiently.

¹ [2005] 1 ERNZ 808

² [2009] NZCA 234

[16] Nor do I agree that a higher award should be made because of the withdrawal of one claim before, and another in the course of, the investigation meeting. The wages claim that was withdrawn 14 days before the meeting was not a complex matter and would have required minimal preparation by the respondent.

[17] The claim that was withdrawn during the investigation meeting would have required some preparation. However, I consider it would have been no more than that provided for within the daily tariff. I also decline to award costs in respect of the respondent's application for costs. It is clear that Mr Ashworth's response to Mr Ballara's invitation to resolve the issue of costs was based on his mistaken belief of the effect of the applicant's challenge to the Employment Court of my determination of Ms Ashworth's claims. A quick email to Mr Ashworth alerting him to his mistake and suggesting he verify his belief may have averted the need for the Authority to become involved in the matter.

[18] Taking all factors into account, including the Calderbank offer made one month before the investigation meeting, with a seven day period for acceptance, I find an uplift of \$750 on the Authority's notional daily tariff to be appropriate.

[19] I order Ms Ashworth to pay Spotless Facility Services (NZ) Limited the sum of \$4,250.00 as a contribution to its costs.

Trish MacKinnon
Member of the Employment Relations Authority