

**Attention is drawn to an order
prohibiting publication of parties'
identification**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 263
3111872

BETWEEN CC
 Applicant

A N D RQ LIMITED
 Respondent

Member of Authority: David G Beck

Representatives: Amy De-La Cruz, advocate for the Applicant
 Kenneth Morrison, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 21 May 2021 from the Applicant
 4 June 2021 from the Respondent

Date of Determination: 18 June 2021

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] On 7 May 2021 the Authority issued a determination finding that:

- a. CC was unjustifiably dismissed from her employment with RQ Limited.**

b. RQ Limited must pay CC the sums below within 28 days of this determination being issued:

i. \$14,880 gross lost wages;

ii. \$18,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;

[2] The parties were asked to explore resolving costs by agreement but failed to do so.

Submission for CC

[3] Ms De-La Cruz submitted that having successfully obtained an unjustified dismissal ruling her client sought a contribution to costs of \$10,455 claiming such was two-thirds of actual costs and a timesheet was provided to evidence such. The suggested 'uplift' was made on the basis that RQ Limited unreasonably turned down a timely Calderbank offer made on 16 November 2020 that did not exceed the amount CC obtained following an investigation meeting of 24 March 2021 and that RQ Limited conducted negotiations and litigation in a manner that caused CC additional distress.

Submission for RQ Limited

[4] Mr Morrison submitted that there was no justification for above scale costs and sought to question the legitimacy of Ms De-La Cruz's experience, qualifications and time expended on CC's claim and rates charged. I record I will not address these issues in any detail as I consider them to be unhelpful to my task of assessing what costs should be incurred and I have no criticism of the manner by which Ms De-La Cruz presented her case.

[5] I do make the point that Ms De-La Cruz's claim is objectively not excessive but it did include time spent attending to mediation that is not normally assessed by Authority unless extraordinary circumstances exist. I have discounted this portion of the costs for my consideration below.

Costs principles

[6] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ including: that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.²

The settlement offer

[7] The making of a settlement offer in the form of a 'Calderbank' is a relevant factor when considering costs where such does not better the award made by the Authority. Here the settlement amount was offered in a timely fashion although not a modest offer, it did significantly differ from the Authority award and would have saved CC from incurring additional costs given that RQ Limited chose to not seek external legal representation.

[8] I also have considered that no counter offer was made when objectively a sensible estimate of RQ Limited's likely exposure does not appear to have been undertaken and an overly confrontational approach is exhibited in correspondence. A counter offer may well have resolved matters.

Assessment

[9] A general principle for a successful party is that costs should 'follow the event' and here CC was wholly successful in her unjustified dismissal claim and I found an aggravating factor was that this involved a redundancy enacted in unusual circumstances for an ulterior motive.

[10] However, I found that the respondent company had an otherwise good reputation and strong support from remaining employees and the events occurred during the height of the Covid lockdown.

¹ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

² Section 160(2) Employment Relations Act 2000.

[11] In all these circumstances, including taking the Calderbank into account, I consider an increased daily tariff, that is normally \$4,500, is warranted but not to the extent sought as no particularly complex legal factors arose in this case. I fix that sum at \$7,000.

Award

[12] **I order RQ Limited to pay CC the sum of \$7,000 as a contribution to CC's legal costs.**

David Beck
Member of the Employment Relations Authority