

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 67/08
AEA 1291/05

BETWEEN Wendy Clear
Applicant

AND Waikato District Health Board
Respondent

Member of Authority: Janet Scott

Representatives: Mark Hammond Counsel for Applicant
Geoff Bevan Counsel for Respondent

Submissions received: 24 October 2007 from Applicant
2 October from Respondent

Determination: 29 February 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicant lodged a number of disadvantage claims in the Authority and also lodged a claim that she had been unjustifiably dismissed. The majority of the applicant's claims were declined by the Authority. However, Ms Clear was successful in that she was found to have a disadvantage grievance because the Board failed to investigate her fourth complaint about her team leader (Mrs Parata) and failed to treat her fairly in the management of that complaint. (AA 33/07).

[2] In a separate determination (AA 275/07), a remedy for the disadvantage grievance was set pursuant to s.123 (1)(c)(i). The respondent was directed to pay to Miss Clear the sum of \$15,000 to remedy the grievance in question.

[3] Costs now remain to be set and this determination addresses that matter.

Principles and Discussion

[4] In arriving at this determination on costs I have had regard to the features of the matter to which the costs award relates, to the submissions of the parties and to relevant case law.

[5] The respondent points to two Calderbank offers made to the applicant. The first was made on 10 April 2006 some 16 days before the first hearing day. That offer was in the sum of \$7000 (taxable) with a contribution of \$5000 towards costs. The second offer was made after the investigation had been adjourned part heard and is dated 9 June 2006. This offer was made 13 days prior to the reconvening of the investigation meeting on 22 June 2006. This second Calderbank offer was in the sum of \$20,000 and counsel for the applicant was invited to discuss with counsel for the respondent how this amount would be allocated between a taxable payment and a contribution to the applicant's costs. This offer included a statement that the respondent was prepared to offer an appropriately worded apology relating to the way the 2003 investigation into the applicant's complaints was handled.

[6] Given the existence of these Calderbank offers the respondent requests the Authority to direct that costs lie where they fall.

[7] For the applicant it is submitted that the Authority should not have regard to the Calderbank offers. It is submitted that the first offer was made only a few days prior the first hearing day in the matter; that the respondent took the applicant to the brink before the settlement offer was made and the amount offered is less than that awarded by the Authority.

[8] The Authority is asked to ignore the second Calderbank offer made because by the time it was made the parties had already been through three days of hearing.

[9] It was also submitted that a Calderbank offer that is conditional on other terms being fulfilled is not a true Calderbank offer. (*Rapana v McBride Street Cars* [2007] DCR 551). The Calderbank offer made to the applicant was conditional on the specific condition that the terms be kept confidential.

[10] Lastly counsel for the applicant submitted that the apportionment of costs to the aspect of the claim on which Ms Clear was successful is somewhat arbitrary but it is in the range of \$30,000 - \$35,000. It was noted that the contextual evidence had relevance to the claim on which Ms Clear did succeed.

[11] In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, the Court considered that the costs principles applied by the Authority were not necessarily as comprehensive or as prescriptive as those set out in *Okeby*¹ and similar earlier judgments (judgment at para 44). The Court went on to refer to some “basic tenets” that had been held to by the Authority when considering costs. These were said to include:

- There is discretion as to whether costs would be awarded and what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party’s conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties’ costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice except as to costs offers can be taken into account.
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

¹ *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613.

[12] The Court held, at para 45, that these principles are appropriate to the Authority and consistent with its powers, and said:

“They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the Binnie² principles which extend the range of costs which the Court may award beyond what could reasonably be labelled ‘modest’.”

[13] The Court considered that there was nothing wrong in principle with the Authority’s tariff-based approach so long as it was not applied in a rigid manner without regard to the particular characteristics of the case.

[14] Bearing the above in mind, I consider the following matters are relevant in a costs setting.

- The applicant brought a number of claims but was successful in respect of only one claim and was awarded the sum of \$15,000 pursuant s.123 (1) (c) (i).
- The case was enormously important to the applicant who sought vindication of her position.
- While the applicant was unsuccessful in respect of a number of her claims the allegations of bullying at the core of her claim were never comprehensively examined until the matter came to be considered by the Authority and the scope of the Authority’s investigation was necessarily wide. To the extent the applicant was successful, her success was comprehensive on the point that the respondent did not investigate the totality of her complaints after it had promised her that it would do so and it did not treat her fairly in the process.
- The first of the two Calderbank offers made was less than the sum awarded to the applicant by the Authority. It must be disregarded. The second Calderbank offer was in a sum equal to that which the applicant will recover from the Authority in total (compensation plus costs) and it included the offer of an apology on the point in respect of which the applicant was successful. I cannot see on the face of that offer that it was conditional on confidentiality. However, that offer was made after three days of hearing when both parties had already expended the bulk of the costs incurred.

² Binnie v Pacific Health Ltd [2002] 1 ERNZ,438 (CA)

[15] Weighing everything - the fact that the evidence, of necessity, had to be comprehensive because there had never been a careful inquiry into the applicant's claims; the fact that the inquiry itself was important to the applicant and the fact that the second Calderbank offer was made so very late in the piece, I decline to take the second Calderbank offer into account albeit it was for a sum equal to the total amount to be awarded to the applicant and that it included an apology.

Determination

[16] In reliance of the above reasoning I direct the respondent to pay to the applicant the sum of \$5,000 as a contribution towards the costs she incurred in having her claims investigated in the Authority.

Note: I apologise to the parties for the delay in issuing this determination. I have been kept from it by other pressing matters.

Janet Scott

Member of the Employment Relations Authority