

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 182A/10
5276476

BETWEEN LEANNE COLLIER-WILSON
Applicant

AND AUCKLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: K J Anderson

Representatives: E Hartdegen, Counsel for Applicant
A Drake, Counsel for Respondent

Submissions Received: 7 May and 26 May 2010 for Respondent
21 May and 2 June 2010 for Applicant

Determination: 13 July 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] A determination issued by the Authority on 21st April 2010 (AA182/09), found that the claims pursued by Ms Collier- Wilson could not be upheld. The parties were invited to resolve the matter of costs but have been unable to do so. They have now provided comprehensive submissions pertaining to their respective positions regarding the matter of an appropriate award of costs to the Auckland District Health Board (“the ADHB”), as the successful party.

The submissions for the ADHB

[2] The submissions for the ADHB inform that its costs “*on a time and attendance basis*,” come to \$68,500, plus GST and disbursements. Invoices have been provided displaying costs incurred being \$73,125 (GST exclusive) plus disbursements of \$1,723.41.

[3] The Authority has been referred to *Gates v Air New Zealand Limited* ARC40/04, 24 March 2010, Couch J; in the context of what constitutes a reasonable hourly rate, and the view of the Employment Court that a “*useful starting point*” is two thirds of the costs actually and reasonably incurred by the party, adjusted up or down according to the circumstances of the case, and the manner in which it was conducted. The submission is that the Authority should take a starting point of two thirds of the costs incurred by the ADHB and adjust that upwards taking into account a number of relevant factors. These factors being:

(a) *The failure of Ms Collier-Wilson to properly articulate her allegations*

I accept that the allegations of Ms Collier-Wilson against the ADHB were difficult to interpret and they lacked certainty. Indeed, some time was spent in conference calls, and at the investigation meeting, exploring the precise nature of breaches of contract and good faith alleged against the ADHB, in addition to counsel for them seeking to clarify the background to the various allegations a number of times prior to the hearing date.

(b) *Settlement attempts*

Evidence has been produced of attempts to settle matters with Ms Collier- Wilson on a “without prejudice” basis, albeit not in the context of a *Calderbank* offer. Nonetheless, I will return to this issue in due course.

(c) *The resignation of Ms Collier-Wilson*

Having exposed the ADHB to intensive litigation pertaining to a disadvantage grievance for which she sought, as a remedy, to have the ADHB resume her employment within the Te Puaruruhau unit, Ms Collier-Wilson resigned from her employment approximately one and a half weeks after the investigation meeting, (and before the decision of the Authority had been issued) hence even if the Authority had upheld her claims and granted the remedies sought, the purpose of the litigation would have been pointless.

[4] In summary, the ADHB says that the Authority should adjust the two thirds starting point upwards and award costs in the sum of \$51,375 (plus GST).

The submissions for Ms Collier-Wilson

[5] The submissions for Ms Collier-Watson include:

(a) Reference to the discretion of the Authority as set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.

(b) The level of costs awarded by the Employment Court are not available in the Authority and by implication, *Gates* (ibid) is not applicable to costs awards from the Authority.

(c) There was not a *Calderbank* situation as a “without prejudice save as to costs” offer was never made.

(d) That the legal costs incurred by the ADHB are “*excessive in the extreme*” and it was unnecessary for two counsel to be involved in the preparation of the ADHB case.

(e) That any award made by the Authority should be on the basis of a daily tariff somewhere between \$500 and \$1,500 per day, given that Ms Collier-Wilson is currently unemployed.

(f) The resignation of Ms Collier-Wilson was unforeseen as she was required to relocate to the United Kingdom to care for her partner’s elderly and ill parents and grandparent.

(g) Ms Collier-Wilson is in “*an impoverished financial position*” and that an equitable outcome from the Authority may be that costs should lie where they fall. Ms Collier-Wilson has provided a statement of her assets and financial liabilities.

Analysis and Conclusions

[6] The investigation meeting for this matter took the better part of two days. While the costs incurred by Ms Collier-Wilson have not been totally revealed,¹ the costs for the ADHB amount to the extraordinary sum of nearly \$75,000, plus GST.

¹ According to the summary of her financial position, it seems that Ms Collier-Wilson borrowed \$20,000 on a revolving credit mortgage to pay her legal fees.

While it is not for the Authority to comment on how such a sum could be accumulated, it is appropriate to find that such sum cannot be seen as reasonable in the context of the contribution sought from Ms Collier-Wilson. Equally, it has to be said that given the uncertain manner in which the claims of Ms Collier-Wilson were presented, this left the ADHB with little choice but to prepare their response on the basis that all possible aspects were covered, with some reasonable expenses having to be incurred.

[7] It also has to be said that on the basis of the overwhelming evidence presented to the Authority, it became clear that the overall the claims of Ms Collier-Wilson had little chance of success, particularly her claim for an order that she be allowed to return to work within the Te Puaruruhau unit. It was obvious to any observer, that this simply was not possible for the various reasons set out in the substantive determination. Furthermore, in relation to this claim, I do not accept that the resignation of Ms Collier-Wilson was unforeseeable, as it was indicated at the investigation meeting, that a resignation was being contemplated and that a claim of constructive dismissal may result. It may well be that the requirement to relocate to the United Kingdom subsequently arose, but a considerable amount of preparation and hearing time was taken up on a matter (the return of Ms Collier-Wilson to the Te Puaruruhau unit), that in addition to not being a realistic possibility, by the date of the investigation meeting, it appeared that Ms Collier-Wilson was having second thoughts about remaining in the employment of the ADHB at all.

[8] I also accept that the ADHB attempted to achieve a settlement with Ms Collier-Wilson, albeit not in the sense that a *Calderbank* offer was made. Nonetheless, given the lack of substance regarding Ms Collier-Wilson's overall claims, some reasonable prudence on her part, should have prevented this matter going the distance it did. As was succinctly espoused by the Employment Court in *Da Cruz* (ibid):

Finally, in accord with the Court of Appeal in *Binnie*² and this Court in *Harwood*³ we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

² *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438

³ *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433

To this I would add, that applicant parties should not only be aware of the accumulation of their own costs as a matter proceeds, but also the likely accumulation of the costs of the other party, in the event that an award of costs to them may eventuate, if the case being pursued by the applicant is unsuccessful.

[9] I accept the submission for Ms Collier-Wilson that *Gates* (and other Employment Court cases) does not have general application to cost determinations of the Authority. As was held in *Da Cruz*:

In contrast, there is no binding authority on the Employment Relations Authority which impels it to apply the 66 percent guideline. We find that any such authority would run counter to the imperative that it should act without technicality. There is sufficient difference between the two institutions to warrant the Authority taking a different approach to the question of costs particularly because it, rather than the parties, conducts the investigation of the employment relationship problem brought to it.

And further:

[... we are in agreement with Judge Travis in *Harwood v Next Homes Ltd* that the legislative intent is that such considerations that are relevant to proceedings before the Court are not relevant to proceedings before the Authority. The unique nature of the Authority and its proceedings mean that parties to investigation meetings should not have the same expectations about procedure and costs as they have of the Court.

[10] Finally, the Court in *Da Cruz* found that there was nothing wrong in principle with the tariff based approach adopted by the Authority, so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. The Court also expressed the view that the tariff based approach provides a degree of certainty which can be of assistance to the parties, especially those about to commence mediation.

[11] A reasonable tariff for each day of an investigation is generally \$2,500 to \$3,000. Then, exercising its discretion, taking into account the particular characteristics of a case, the Authority may adjust the tariff up or down depending on the circumstances, taking into account such matters as; overall outcome of its investigation, the conduct of the parties, the preparation required and the means of a liable party to pay.

[12] I am bound to say that if it was not for the current (1st June 2010) personal circumstances of Ms Collier-Wilson, i.e. that she is unemployed and has substantial liabilities, I would have raised the daily tariff quite substantially. This is because, on the clear evidence available, prior to the investigation meeting, this is a case that

should have been settled by Ms Collier-Wilson accepting that the outcomes she was seeking were not realistically available or even reasonably arguable. Furthermore, the claims were not clearly articulated and required the respondent to prepare their case to ensure that all possibilities were canvassed. Then finally, while Ms Collier-Wilson was seeking an order allowing her to return to work in the Te Puaruruhau unit, and considerable time was spent on this issue, it became clear that Ms Collier-Wilson had second thoughts about remaining in the employment of the ADHB at all, apart from the circumstances that, apparently, led to her relocating to the United Kingdom.

[13] However, the Authority should not impose undue hardship on an unsuccessful party hence I conclude that a daily tariff of \$3,000 is appropriate in this case.

Determination

[14] Pursuant to Clause 15 of Schedule 2 to the Employment Relations Act 2000, Ms Collier-Wilson is ordered to pay the Auckland District Health Board the sum of \$6,000.00, plus a contribution to disbursements of \$500; a total of \$6,500.00.

K J Anderson
Member of the Employment Relations Authority