

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 30
5588637

BETWEEN HARA YASMIN FIRMAN
 Applicant

A N D INSYN LIMITED trading as
 SYNERGY HAIR RICCARTON
 Respondent

Member of Authority: Helen Doyle

Representatives: Jeff Goldstein and Linda Ryder, Counsel for Applicant
 Andrew Riches, Counsel for Respondent

Submissions Received: 25 January 2017, from the Applicant
 10 February 2017, from the Respondent

Date of Determination: 27 February 2017

COSTS DETERMINATION OF THE AUTHORITY

A Insyn Limited trading as Synergy Hair Riccarton is to pay to Hara Yasmin Firman costs in the sum of \$10,700 and disbursements in the sum of \$684.88.

The Authority determination

[1] The Authority found in its determination dated 21 December 2016 that a warning for removal of product issued to the applicant was justified, an action of suspension was unjustified, and that the applicant had been unjustifiably constructively dismissed. It awarded remedies taking contribution into account for the grievances it found made out.

[2] The Authority imposed a penalty of \$3,000 for breach by the respondent of the requirement to provide wage and time records with half of the penalty payable to the applicant and half to the Crown. The other applications for a penalty by the

applicant were not made out. Awards were made for alternative holidays and holiday pay. The Authority did not find that it had jurisdiction to deal with a claim by the respondent for the value of the product removed and other counterclaims were dismissed.

[3] Costs were reserved and failing agreement a timetable was set for an exchange of submissions. Although the respondent was represented by its director Kelvyn Glading at the Authority investigation meeting, Mr Riches has now been instructed for the purpose of costs. Submissions have been received on behalf of the applicant and from Mr Riches on behalf of the respondent.

The applicant's submissions

[4] Mr Goldstein in his submissions refers to the judgment of the full Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹ and the basic tenets that need to be considered by the Authority when considering costs.

[5] Mr Goldstein submits that the investigation meeting was unnecessarily lengthened by the way in which the respondent conducted its case and that the respondent failed to provide the required documentation and to fully cooperate with the Authority and the applicant's representative. It is also submitted that the respondent brought a vexatious counterclaim which lengthened the time and put forward arguments lacking in substance.

[6] The actual time for the investigation, it was submitted, was three full days and there is reference to submissions not being presented within that time and a claim for a further half day costs based on tariff. In fact submissions from the applicant were provided within the three day timeframe and the respondent's submissions followed in writing. Mr Goldstein submits that the applicant would be entitled on a tariff basis to costs of \$12,250 based on 3.5 days.

[7] There is reference to a *Calderbank* offer to settle the matter in the sum of \$9,000 in a letter dated 6 April 2016. The *Calderbank* letter was headed "without prejudice save as to costs" and the offer was to settle for a global sum for lost remuneration and compensation of \$9,000 under s 123 (1)(c)(i) of the Act which

¹ [2005] 1 ERNZ 808

would be a net amount of \$9,000 together with legal costs of \$7,000 plus GST. It was an offer open until 15 April 2016.

[8] The applicant was awarded \$9,088.75 plus interest as wages and compensation. In addition there was a penalty ordered of \$1,500 which was to be paid directly to her. The applicant submits that this should be taken into account when setting the costs to be awarded to the applicant and that on a tariff basis, the applicant would be entitled to costs of \$12,250 but the effect of the *Calderbank* offer must be taken into account.

[9] The applicant submits that there should be uplift to the daily tariff by \$500 per day (3.5 days), resulting in a costs award of \$14,000. The applicant submits that her actual costs were \$36,375 plus GST and there are disbursements of \$71.56 for the lodgement fee and hearing fees of \$613.32. The applicant seeks the sum of \$14,000 costs together with disbursements and a further increase to that of \$600 for providing the costs submission.

The respondent's submissions

[10] The respondent also refers to *PBO Ltd* and the principles from that judgment.

[11] The respondent submits that the applicant broadly sought remedies for suspension, a written warning in respect of removal of property, and unjustifiable termination by way of constructive dismissal together with penalties.

[12] It was noted in submissions that the awards were reduced by 65% and that the starting point should be that the applicant would be awarded the daily tariff of \$3,500 per day, amounting to \$10,500. Mr Riches submits then that the Authority must take into account in adjusting that figure downward, that the applicant raised a number of matters on which she was unsuccessful, the failure to accept responsibility for the removal of product resulted in a prolonged hearing and that there was argument required as to whether the applicant's recordings were admissible.

[13] Mr Riches submits that this matter is distinguishable from the judgment in *White v. Auckland District Health Board*² because the contribution issues required substantial time which delayed and prolonged the hearing.

² [2008] NZCA 451

[14] Mr Riches submits that a full day of the hearing could be attributable to the warning aspect for removal of property as the parties, it appeared from the determination, went to lengths to present evidence to establish removal of product was not acceptable, nor the norm. He submits that had the applicant not disputed the validity of her warning, then a significant portion of the hearing time would not have been necessary. He submits that the focus could then have been on the actions of the respondent following the warning rather than the conduct which justified it.

[15] Mr Riches submits that the suspension issue could have been dealt with briefly and that the maximum sum awarded should be \$5,250 being three days divided by two.

[16] Mr Riches submits that the amount awarded the applicant of \$9,088.75 plus interest and the half of the penalty was grossly disproportionate to the amount that was sought of up to \$120,000 together with lost wages. He accepts that the Authority should take into account *Calderbank* offers and that the amount achieved by the applicant exceeded the amount in the *Calderbank* letter.

[17] Mr Riches submits that the \$7,000 plus GST for costs in the *Calderbank* offer however was at a time when, the comprehensive statement of problem aside, steps outside mediation were minimal. He submits that is the daily tariff for two days when it was several months before preparation and lodging statements of evidence was required. He submits that taking that into account the awards fell well short of the figures in the *Calderbank* offer.

[18] He further notes that the respondent was not represented and that there is no justification to step outside the usual tariff figure. Had, he submits, there been some acknowledgement of the contributory conduct by the applicant, it is likely the matter could have been heard within a day and a half. He submits there is no justification to step above the usual tariff rate which should be apportioned for the successful components of the applicant's case and then reduced for conduct increasing the hearing time.

Determination

[19] There is a discretion as to whether costs are awarded and in what amount. Costs are not to be used as a punishment or an expression of disapproval but conduct

that increases costs can be taken into account in inflating or reducing an award. Without prejudice save as to costs offers may be taken into account. The Authority often assesses costs against a notional daily rate. At the time when the proceedings were lodged that was \$3,500 per day.

[20] The applicant was successful and there is no good reason to depart from the fundamental principle that costs follow the event.

[21] This was a matter involving three full days of investigation with submissions delivered orally on behalf of the applicant on the third day, delivery commencing, my minute book shows, at 2.15pm and concluding at 4.30pm. Mr Glading who is the sole director of the respondent provided written submissions after the conclusion of the investigation meeting and there was only a brief reply comment on behalf of the applicant then received.

[22] The daily tariff for three days at that time is \$10,500.00. Mr Goldstein arrived at his figure of \$12,250 taking a further half day for preparation of written submissions into account but as set out submissions were in fact given on behalf of the applicant within that three day timeframe.

[23] The applicant was not entirely successful. Although criticism was levelled at the respondent for lengthening the investigation meeting I do not find that to have been the case. Mr Glading's questions by way of cross-examination were appropriate. He did not question extensively or unnecessarily.

[24] I accept Mr Riches submission that time was taken up with the warning about the removal of product found to be justified. This was an issue of particular importance to the respondent which would have been very apparent to the applicant and her representatives in preparation for and during the investigation meeting. Mr Glading played security camera footage at the investigation meeting and asked Ms Firman about aspects of it. Witnesses were called to give evidence about removal of product without paying for it. Some evidence about the events leading to the warning would have been required in any event to put the constructive dismissal matter in context so I do not find a deduction to the daily tariff to the extent that Mr Riches suggests is called for. I intend to reduce the tariff by the sum of \$1300.00.

[25] The recordings are a neutral issue with each party having a success. The awards did not come close to the remedies asked but that did not really increase the time to investigate in a measurable way.

[26] The counterclaims did not take up time so as to be reflected in uplift to the daily tariff.

[27] The award made for lost remuneration and compensation by the Authority did exceed the amount the applicant offered to settle for in the *Claderbank* offer. Mr Riches submits the costs sought were excessive at the time the offer was made.

[28] This is a matter that should have settled. If Mr Glading had returned to Mr Goldstein and advised that the cost component of the offer was excessive then I find he would have been on stronger grounds for the Authority to have no regard to it in assessing costs. There is no evidence that he did that and Ms Firman will achieve more than \$7000 in a costs award for this matter.

[29] I find that there should be an uplift of the daily tariff by \$500 per day because of the Calderbank offer. I make no uplift for the applicant's costs submission.

[30] Two disbursements claimed for a hearing fee of \$613.32 and a filing fee of \$71.56 are approved.

[31] Insyn Limited T/A Synergy Hair Riccarton is to pay to the Hara Yasmin Firman the sum of \$10,700 costs and disbursements in the sum of \$684.88.

Helen Doyle
Member of the Employment Relations Authority