

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 130  
3024112

BETWEEN                      LEEANNE FOOTE  
   Applicant  
  
AND                                PROGRESSIVE REALTY  
   LIMITED  
   Respondent

Member of Authority:        David Appleton  
  
Representatives:              Applicant in person  
   Dean Kilpatrick, Advocate for respondent  
  
Submissions received:        25 February and 4 March 2019 from Respondent and  
   Applicant  
  
Date of Determination:        7 March 2019

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1] Following the determination of the Authority on 3 May 2018<sup>1</sup> that Ms Foote was an employee of the respondent from 23 November 2013, Ms Foote claimed payment of various sums that she said were due to her from the respondent, and arising out of her employment. The Authority determined those outstanding matters by way of a second determination dated 24 January 2019<sup>2</sup>. On 4 March 2019 the respondent accepted Ms Foote's calculation of the employer's KiwiSaver contribution she was due. The only outstanding issue to be resolved remains that of costs.

[2] Costs had been reserved in both previous determinations. Ms Foote represented herself throughout the Authority's proceedings, whilst the respondent was represented by Mr Kilpatrick throughout. The respondent now seeks a contribution

---

<sup>1</sup> [2018] NZERA Christchurch 60.

<sup>2</sup> [2019] NZERA 34.

towards its costs on the basis of the Authority's daily tariff. As the two investigation meetings lasted around half a day each, I assume that the respondent is therefore seeking a contribution of \$4,000, being half of the first day's tariff of \$4,500, and half of the subsequent day's tariff of \$3,500.

[3] The respondent's application is based on two grounds:

- (a) That Ms Foote withdrew parts of her claim on short notice; and
- (b) She rejected a Calderbank offer<sup>3</sup> sent to her by the respondent.

### **Discussion**

[4] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

#### **15 Power to award costs**

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[5] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*<sup>4</sup> when setting costs awards. These include:

- (a) There is discretion as to whether costs would be awarded and in what amount.
- (b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- (c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- (d) Equity and good conscience are to be considered on a case by case basis.
- (e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct

---

<sup>3</sup> A letter marked "Without Prejudice – Save as to Costs".

<sup>4</sup> [2005] 1 ERNZ 808

which increased costs unnecessarily can be taken into account in inflating or reducing an award.

- (f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- (g) That costs generally follow the event.
- (h) That without prejudice offers can be taken into account.
- (i) That awards will be modest.
- (j) That frequently costs are judged against a notional daily rate.
- (k) 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.

#### *The withdrawal of claims*

[6] Ms Foote had originally claimed for eleven separate awards of arrears and other reimbursements. The respondent conceded four of them prior to the second investigation meeting. Ms Foote later withdrew five further claims. One of these five claims (for a commission payment) was withdrawn after evidence was presented to Ms Foote showing she was not entitled to the commission claimed. The other four claims were, it is fair to say, weak legally.

[7] The remaining two claims of the eleven were investigated by the Authority, and Ms Foote was successful. The respondent's counter claim was unsuccessful.

[8] Mr Kilpatrick submits that Ms Foote did not withdraw the five claims until the morning of the second investigation in January 2019, whereas Ms Foote says she did so during a telephone conference in August 2016 (I believe she means 2018). However, the notice of direction for that telephone conference records that Ms Foote said she would consider two of her claims further and I directed that the Authority would not determine a further claim. Therefore, the picture is not quite as either party suggests.

[9] However, I believe that Mr Kilpatrick is right in the sense that Ms Foote did not definitively communicate her decision not to pursue four of her claims (excluding the one the Authority said it would not determine) until the day of the investigation

meeting in January 2019. However, Mr Kilpatrick has not set out exactly how much costs were unnecessarily incurred by his client as a result of that late withdrawal. Furthermore, three of the four claims were really just legal issues, and would not have required any detailed evidence.

[10] As far as these late withdrawn claims are concerned, I do not accept that it is appropriate to award any costs to the respondent, as I am not prepared to guess what extra costs were incurred.

*The Calderbank offer*

[11] Turning to the Calderbank offer, this was sent to Ms Foote in a letter dated 17 October 2018. It offered Ms Foote \$12,500 in full and final settlement. This sum presumably excluded the sum of \$5,579.60 which the respondent had conceded was due in an open letter sent to Ms Foote on the same day, although that is not expressly stated.

[12] However, even excluding the sums which were conceded in the open letter to Ms Foote, Ms Foote recovered \$4,395.57 more than was offered in the Calderbank offer. This sum takes into account an additional \$1,000 which should have been conceded in the open letter, but which was excluded due to a miscalculation by the respondent. It also includes the KiwiSaver amount because, if Ms Foote had accepted the Calderbank offer, she would not have had a finding from the Authority that she was owed KiwiSaver contributions. Finally, it excludes \$2,937.48 commission for July 2016, referred to in paragraph [34] of the second determination, which the respondent has since proven to the Authority's satisfaction was paid to Ms Foote in September 2016.

[13] In other words, Ms Foote beat the Calderbank offer soundly, and it was entirely reasonable for her to have rejected the offer.

[14] In conclusion, I decline to award costs to the respondent.

[15] For the avoidance of doubt, Ms Foote was not represented during the proceedings and so did not incur any costs of representation that she can claim.

**David Appleton**  
**Member of the Employment Relations Authority**