IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 330
3073073

	BETWEEN	LINARA GAFIATULLINA Applicant
	AND	PROPELLERHEAD LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Mark Donovan, counsel for the Applicant Paul Robertson and Corbin Child, counsel for the Respondent
Submissions received:	From the Respondent on 3 and 20 July 2020 and from the Applicant on 16 July 2020
Determination:	21 August 2020

COSTS DETERMINATION OF THE AUTHORITY

A. Linara Gafiatullina must pay costs of $11,200 to Propellerhead Limited by no later than 28 days from the date of this determination.

[1] Propellerhead Limited (PL) sought an order requiring Linara Gafiatullina to contribute $20,000 towards costs of representation it incurred in successfully responding to her personal grievance application. The Authority found PL had not acted unjustifiably in dismissing Ms Gafiatullina on the grounds of redundancy.[1]

[2] A two-day investigation meeting was held in this matter. If the Authority's usual daily tariff for costs applied without adjustment, costs would be $8,000. PL gave three reasons for seeking a substantial increase on that amount.

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[1] *Gafiatullina v Propellerhead Limited* [2020] NZERA 227.

[3] Firstly, Ms Gafiatullina had not accepted two offers PL made to settle her grievance before the investigation meeting. If she had accepted either offer, Ms Gafiatullina would have achieved a better outcome than what resulted from the Authority determining her claim.

[4] Secondly, PL said the technical and factual complexities involved in preparing its case needed work by two lawyers so Ms Gafiatullina should be required to contribute to extra costs incurred for the work of second counsel.

[5] Thirdly, PL said Ms Gaifiatullina should contribute to its costs in preparing a formal application for costs.

[6] In a reply memorandum Ms Gafiatullina opposed an award at the level of $20,000, which would amount to an uplift of 150 per cent on the Authority's usual daily tariff. She accepted some uplift was required as a result of her not accepting the settlement offer but submitted this should be no more than a 50 per cent increase on the tariff, that is up to $12,000. She also submitted the increase sought for the costs of second counsel was not consistent with the nature of the Authority's proceedings and the general principle that costs in the Authority should be modest. She requested any award of costs be payable in monthly instalments of $500.

Costs principles

[7] The Authority's exercise of its discretion to award costs is guided by well-established "basic tenets" applied to the particular circumstances of each case.[2] Those tenets include exercising the discretion in a principled and not arbitrary way, considering equity and good conscience on a case-by-case basis, increasing or reducing an award to take account of party conduct that unnecessarily added to costs, considering whether any of the costs sought by the successful party were unnecessary or unreasonable, taking account of settlement offers that (if accepted) would have spared costs for both parties and the general rule that costs follow the event. Each case must be considered on its own merits. Undue rigidity in the Authority's practice of applying a daily tariff may be avoided by principled adjustments of the tariff rate, upwards or downwards, to account for particular characteristics or factors in each case. Such

[2] *PBO Limited v Da Cruz* [2005] ERNZ 808 at [44]-[46].

characteristics or factors may include a liable party's means to pay costs, preparation required in particularly complex matters and the conduct of the parties.

Assessment

[8] There was no reason apparent in this matter for departing from the usual approach of applying the daily tariff as the starting point for assessment of costs. Both parties also agreed Ms Gafiatullina was liable to pay costs as a result of the 'event' or outcome of the Authority's determination finding PL had not acted unjustifiably in dismissing her on the grounds of redundancy.

[9] The following aspects have been considered in this particular matter to determine whether application of the relevant tenets required an upward or downward adjustment of the daily tariff:

(i) the effect of settlement offers made by PL but not accepted by Ms Gafiatullina;
(ii) costs incurred by PL for involvement of second counsel;
(iii) Ms Gafiatullina's financial situation;
(iv) her request for permission to pay any costs awarded by instalment; and
(v) costs claimed for seeking costs.

Uplift for failure to accept reasonable settlement offer

[10] Case law on the weight to be given to settlement offers indicates the Authority should take a "steely" approach to setting costs where a party had turned down a reasonably made offer to settle the matter on terms better than that party ultimately achieved by carrying on with the proceedings.[3] This fortitude in assessing costs does not mean the party that made that better settlement offer can expect any eventual award of costs will account for all fees incurred after such an offer was rejected.[4] Rather, the uplift should make a difference sufficient to support the broader public interest in parties being encouraged to resolve matters themselves, where they reasonably can, rather than going on to use the limited resources deployed by the state for dispute resolution in the Authority and the courts beyond it. The effect of any uplift made to

[3] *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385 at [20] and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [109].
[4] *Stevens v Hapag-Lloyd (NZ) Limited* [2015] NZEmpC 28 at [97].

give weight to the settlement offer may, of course, also be offset by downward adjustments applied to give effect to other relevant factors in setting costs.

[11] In this case PL's first offer to settle Ms Gafiatullina's claim was made around two months before the Authority investigation meeting. It proposed settlement by paying her $20,000. A second offer, made one month before the meeting, proposed a larger amount of $25,000. She accepted neither offer. Both were formally made to her, through her counsel, on a 'without prejudice save as to costs' basis. PL submitted both offers were reasonable and presented fairly, with the effect explained and with an adequate opportunity for Ms Gafiatullina to take advice and evaluate the risks of not accepting either offer. She was properly on notice that, if unsuccessful in the Authority's investigation, PL would rely on its correspondence in making those offers as evidence that she had unnecessarily pursued her complaint.

[12] Ms Gafiatullina's reply noted she had made an earlier offer of her own, not accepted by PL, but did not challenge PL's submissions about the nature of the offers it had subsequently made to her.

[13] Neither party advanced any detailed rationale for the level of uplift on the daily tariff each proposed was appropriate for the purpose of taking account of the settlement offer. PL suggested a 150 per cent uplift. Ms Gafiatullina submitted any uplift "should be reasonably limited to a maximum" of 50 per cent of the tariff rate.

[14] Review of a sample of Authority costs determinations in which account has been taken of settlement offers showed no increase as high as PL sought. Typically the uplift made to give weight to such offers ranges between one quarter and one half of the tariff, with the final outcome also subject to other potential adjustments for factors such as party conduct, unnecessarily incurred costs and the financial means of the party ordered to pay costs.[5]

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[5] See, for example, *McKeown v Universal Communications Group NZ Limited* [2018] NZERA Auckland 80 (uplift of $4,000 on tariff for a two day investigation meeting, after applying a downward adjustment for financial circumstances); *Pender v Lyttleton Port Company Limited* [2018] NZERA Christchurch 161 (uplift of $3,500 on tariff for one day investigation meeting); *Maheta v Airbus Express Limited* [2020] NZERA 52 (uplift of $3,250 on tariff for one-and-a-half day investigation meeting); *Mokaraka v Department of Corrections* [2019] NZERA 636 (uplift of $3,000 on tariff for two-and-a-half day investigation meeting); *Cuttriss v Pact Group* [2019] NZERA 706 (uplift of $2,000 on tariff for one day investigation meeting) and *Dunn v Air New Zealand* [2020] NZERA 265 (uplift of $1,500 for one day investigation meeting).

[15] In this case lifting the applicable tariff by 40 per cent (that is $3,200) was within that broad range. It was an adjustment sufficient to give weight to Ms Gafiatullina's decision not to accept PL's reasonably-made settlement offers and was what I thought reasonable in exercise of the discretion to award costs.

No costs for second counsel

[16] There was nothing about the general or particular nature of this case, or the evidence given in it, that warranted requiring Ms Gafiatullina to contribute to the costs PL chose to incur by having second counsel involved in preparing its case.

[17] As PL submitted, the evidence was sometimes technical and intensely fact-specific. Ms Gafiatullina lodged six witness statements. PL lodged five. A common bundle of documents ran to more than 420 pages. However the level of specialised detail involved, including about a particular organisational model PL used in managing its employees, and the number of witnesses, 10 of whom attended the investigation meeting either in person or by audio visual link, was not significantly different from many other Authority investigation meetings that routinely delve into the work and practices of various industries.

[18] In such cases the following principle, expressed in the Authority's typical use of a daily tariff, applies:[6]

> Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues particularly (although not exclusively) for employees. …

No reduction of costs on financial grounds

[19] At the time of the Authority's investigation meeting Ms Gafiatullina had recently resigned from a job she had gained after she was dismissed by PL. Her husband had obtained new employment in Canada and they both planned to move there. Travel restrictions due to the Covid-19 pandemic delayed her departure.

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[6] *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at 15.

[20] In her reply memorandum on costs Ms Gafiatullina said she had been unable to find work in Auckland meanwhile and asked that any costs award be limited to an uplift of no more than 50 per cent "due to her financial circumstances".

[21] While PL objected that no proper account of Ms Gafiatullina's assets, liabilities, income and expenditure was provided in support of that submission, the determination already made has limited the uplift to below the ceiling Ms Gafiatullina sought in any event. And there was some evidence from Ms Gafiatullina's own written and oral evidence given earlier in the Authority investigation that she was not without access to resources, even if currently not in paid employment. She had referred to owning an apartment in Melbourne and a section in West Auckland. On what could properly be considered in this determination of costs, Ms Gafiatullina's means were not established to be insufficient to meet an award of costs at the level of the uplifted tariff.

No order for payment by instalments

[22] An order for payment of costs by instalment may be available through exercise of the Authority's discretion to award costs it thinks reasonable and its obligation to act as it thinks fit in equity and good conscience.

[23] No reliable grounds for an order for payment of costs by instalment were established in this case.

No costs on costs

[24] It is not the Authority's usual practice to award costs for preparing an application for costs. There were no grounds in this case to depart from that practice.

Robin Arthur
Member of the Employment Relations Authority