

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 38
5409395

BETWEEN

JENNY GEORGE
Applicant

A N D

NURSE MAUDE DISTRICT
NURSING SERVICE
Respondent

Member of Authority: Helen Doyle

Representatives: Jeff Goldstein, Counsel for Applicant
Peter Macdonald, Advocate for Respondent

Submissions Received: 18 February 2014 from Applicant
19 February 2014 from Respondent

Date of Determination: 28 February 2014

COSTS DETERMINATION OF THE AUTHORITY

A Costs are to lie where they fall.

B Nurse Maude District Nursing Service is to reimburse Jenny George for her filing fee of \$71.56 and hearing fees in the sum of \$613.32.

[1] In my determination dated 17 December 2013 I found that the applicant was not actually or constructively unjustifiably dismissed from her employment but was unjustifiably disadvantaged in her employment. A compensatory award was made in the sum of \$3,000.

[2] Costs were not able to be agreed and both Mr Goldstein and Mr Macdonald on behalf of their respective clients say that any cost award should be made in their client's favour.

The applicant's submissions

[3] Mr Goldstein refers the Authority to the leading Employment Court judgment about costs in the Authority, *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808, and the basic tenets that are appropriate to the Authority when considering costs.

[4] The investigation meeting was held over three full hearing days. Mr Goldstein submitted that the third day was really required by the Authority so that it could question an additional witness.

[5] Mr Goldstein submits that the applicant's actual costs were \$25,800 together with GST. This is at a charge-out of \$350 per hour. Disbursements incurred were the filing fee of \$71.56 and hearing fees of \$613.32. Reimbursement is sought of those disbursements.

[6] Mr Goldstein also made submissions about a letter marked *without prejudice save as to costs* sent to him by Mr Macdonald. Mr Goldstein said that regardless of that settlement offer in the nature of a *Calderbank* offer, the Authority should apply the principle that costs follow the event. He submits it would be manifestly unfair to award the respondent the costs it seeks.

[7] In all the circumstances he submits that the respondent should be ordered to pay the applicant costs in the sum of \$10,500 plus disbursements, or if that is not accepted, each party should bear their own costs with the respondent paying disbursements of the filing fee and hearing fees.

The respondent's submissions

[8] Mr Macdonald acknowledges the success that the applicant achieved, although refers to it as a *minor success*. He submits that the respondent has been subjected to significant costs in defending the claim and attempted to avoid ongoing costs by making an offer *without prejudice save as to costs* to which there was no response from the applicant.

[9] Mr Macdonald submits that the respondent's actual costs were \$23,850 and he has attached invoices to support those costs.

[10] The letter dated 8 August containing the offer provided as follows:

Dear Jeff

Without Prejudice Save as to Costs

Re: Jenny George and Nurse Maude – File Number 5409395

My client and I have met to review the respective positions of both parties in relation to the above matter. While my client remains confident of its ability to defend fully your client's claim, it is acknowledged that there is clearly a degree of risk to both parties.

It is in this context that it is suggested that there be some serious attempt at negotiating a settlement of this dispute and, in my client's view, such an outcome may be achieved provided any settlement negotiations are realistically based. This would need to include acceptance of the fact that both parties have already accrued significant costs in terms of both time and expenditure.

My client is, taking account of relevant factors referred to, prepared to offer a sum of \$10,000.00 as a full and final settlement of all outstanding matters. If accepted this offer would be subject to negotiating additional terms that were acceptable to both parties. The offer will remain open until 5.00 pm Wednesday 14 August 2013 after which it will automatically lapse.

Thank you for your consideration.

*Yours sincerely
Peter Macdonald
Principal*

[11] Mr Macdonald submits that there was no response to that letter. The first two days of the investigation meeting were 27 and 28 August 2013.

[12] He submits that the respondent should be indemnified for its full costs to the amount of \$23,000 and that the Authority should exercise its discretion against granting the applicant any costs.

Determination

[13] The usual principle is that costs follow the event. The applicant had limited success. That is the starting point.

[14] The discretion as to whether costs are awarded and, if so in what amount is to be exercised in accordance with principle and not arbitrarily. In *PBO*, amongst the principles that are appropriate to the Authority are that costs are not to be used as a

punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in increasing or decreasing an award. Without prejudice [save as to costs] offers can be taken into account. Awards in the Authority are generally modest and the nature of the case can influence costs. The Authority can consider whether all or any of the parties costs are unnecessary or unreasonable. Costs are usually awarded on the basis of a daily tariff now recognised as \$3,500.

[15] With respect I do not agree entirely with Mr Goldstein's submission that the third day of the investigation meeting was *really required by the Authority to question an additional witness*. The Authority did want to question an additional witness but having reconsidered my minute book, the main reason for the third day was to hear evidence from the Chief Executive Officer of Nurse Maude, James Magee, as there had been insufficient time to deal with his evidence during the earlier two days. It was agreed it would be sensible to hear any additional evidence and submissions on that day as well.

[16] I have then considered whether in the exercise of my discretion as to costs I should have regard to the letter dated 8 August 2013 that Mr Macdonald says was an offer in the nature of a Calderbank offer.

[17] The reason for Calderbank offers is well known. They are made to encourage consideration by the party who receives such an offer of the chances of success in proceeding and a possibility of settlement before significant costs of preparing and having a matter investigated by the Authority are incurred. The purpose of the offer is to shift the risk of costs incurred after it is made from the respondent to the applicant. If the applicant succeeds but for a lesser amount than was offered he or she will be at a risk of an award of costs in favour of the respondent.

[18] For an offer in the nature of a *Calderbank* offer to be a relevant consideration to the issue of costs it must be both clear and transparent and with sufficient time for consideration – *Shanks v Agar (t/a Rod Agar & Co)* [1996] 2 ERNZ 578.

[19] There was sufficient time for consideration of the purported offer in the letter but I do not find that it was clear and transparent. That is because after offering the sum of \$10,000 in full and final settlement there is the following sentence; *If accepted this offer would be subject to negotiating additional terms that were acceptable to*

both parties. It was not known from the letter what those additional terms may be and what effect they would have on the amount of \$10,000. I do not find that in those circumstances the offer in the letter was clear enough to have been accepted. Further negotiation was required.

[20] I do not find therefore I can place weight on the letter as a Calderbank offer.

[21] Notwithstanding that conclusion the respondent did make a reasonable offer as an attempt to negotiate a settlement. The applicant did not respond to it. The applicant had quite limited success. Her main claim that she was unjustifiably dismissed was unsuccessful. In those circumstances I intend to exercise my discretion and order that costs but not disbursements lie where they fall.

[22] Costs are to lie where they fall. Nurse Maude District Nursing Service is to reimburse Jenny George for her filing fee of \$71.56 and hearing fees in the sum of \$613.32.

Helen Doyle
Member of the Employment Relations Authority