

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 13
5531837

BETWEEN EMMA GRAHAM
 Applicant

A N D KMA GROUP LIMITED t/a
 KNOCKOUT SPORTSWEAR
 Respondent

Member of Authority: James Crichton

Representatives: Mark Beech with Jessica Dickson, Counsel for
 Applicant
 Ani Bennett, Counsel for Respondent

Submissions Received: 4 November and 25 November 2015 from Applicant
 20 November 2015 from Respondent

Date of Determination: 12 January 2016

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the Authority's substantive determination issued as [2015] NZERA Auckland 248 and dated 17 August 2015, I decided that the applicant (Ms Graham) had a personal grievance through having suffered a series of unjustified actions of the respondent employer (Knockout Sportswear), and I awarded her remedies as a consequence.

[2] Costs were reserved.

The claim for costs from the applicant

[3] Ms Graham seeks costs totalling \$11,000 together with \$120.06 for costs and disbursements. The claim for \$11,000 in legal costs is justified first by reference to

the daily tariff rate which the Authority typically uses to fix costs, which for the two day hearing would have provided a figure of \$7,000, but additionally there is a request for an uplift of \$2,000 per day of hearing bringing the total sought to \$11,000.

[4] Much of the justification for the uplift sought is occasioned by Ms Graham's contention that there were both operative *Calderbank* offers in play and that the behaviour of Knockout Sportswear in the pre-hearing settlement negotiations the parties undertook were such as to cause her additional unnecessary legal cost.

The claim for costs from the respondent

[5] Knockout Sportswear seeks an award of costs in its favour in the sum of \$21,000 having incurred total legal costs exclusive of GST and disbursements in the sum of \$33,748.25.

[6] The essence of the justification for Knockout Sportswear's application for a costs award in its favour is its contention that, notwithstanding the award made against it in the substantive determination, it says it was substantially successful in defending Ms Graham's claims.

[7] In particular, it observes (correctly) that the basis on which Ms Graham filed her personal grievance (an allegation of unjustified dismissal) was not made out to the Authority's satisfaction.

[8] Moreover, Knockout Sportswear maintains that Ms Graham's other claims were also not established and that allegation is, with respect, only partially true. The claim for lost wages had to fall away once the Authority satisfied itself that there was no personal grievance for unjustified dismissal so the wages claim is inextricably linked to the unjustified dismissal allegation.

[9] In fact, the only element of Ms Graham's claim that in my opinion cannot be bound up with her claim to have been unjustifiably dismissed is the contention that penalties should be awarded for breach of good faith. While it is true that I made no orders of the sought requested, I was certainly roundly critical of the behaviour of both parties, both of whom I considered had not behaved in good faith, the one to the other: see for instance paragraph [64] and paragraph [73] of the substantive determination.

Issues

[10] The first question I must determine is what impact the usual principle of the costs following the event, ought to have in respect of the present matter. This is because, in effect, both parties are claiming a victory and therefore both parties say that they are entitled to an award of costs in their favour.

[11] Next, I need to consider whether the various attempts that the parties made to settle matters prior to the Authority's investigation can assist me in any material way in determining the quantum of costs to be awarded.

Who was the successful party here?

[12] I have not been persuaded by Knockout Sportswear's claim that it is in effect the successful party and therefore is entitled to have Ms Graham contribute to its costs. It is true that Ms Graham's claim to have been unjustifiably dismissed was not accepted by me, but that is not the complete picture because as Knockout Sportswear acknowledges, I identified another personal grievance for disadvantage as a consequence of the unjustified actions of Knockout Sportswear and I awarded Ms Graham compensation to remedy that personal grievance.

[13] In making the decision I did, again as Knockout Sportswear acknowledges, I relied on s.122 of the Employment Relations Act 2000 (the Act) which gives the Authority a very broad power indeed to identify that a personal grievance raised by an employee was not of the type identified by the employee but was of another type.

[14] The short point is that however the matter was argued by Ms Graham, she satisfied the Authority that she had a personal grievance and was entitled to compensation in consequence.

[15] It seems to me to follow inexorably from that conclusion that Ms Graham is certainly the successful party; she made claims against her employer and while the particularity of those claims were not accepted, I analysed the matter in a different way but still reached the conclusion that she had suffered a personal grievance.

[16] In doing so, I was roundly critical of Knockout Sportswear for its behaviour which I was satisfied was not the behaviour of a good and fair employer. Of course,

Knockout Sportswear reminds me that I was also critical of Ms Graham whose description of her leave request to her employer was, in my judgment, deceitful.

[17] But the short point is that despite that finding, Ms Graham was still successful in having a personal grievance found in her favour and being awarded compensation and compensation at a level that was higher than average awards of compensation, thus reflecting the Authority's judgment about the bad behaviour of Knockout Sportswear.

[18] Moreover, while I was critical of Ms Graham's behaviour, I reflected that criticism in a reduction in the remedies that I thought she was entitled to, but I make the point that even with that reduction, she has still been awarded significantly more than the average for a personal grievance dealt with by the Employment Relations Authority.

[19] I conclude then that Ms Graham was the successful party and that she is entitled to have costs awarded in her favour and to have a contribution to the costs that she has incurred in the matter provided to her by Knockout Sportswear.

Is there an operative *Calderbank* in play here?

[20] Both parties agree that there were earnest attempts to settle the matter before the Authority's investigation commenced. That, however, is about all they agree about.

[21] Ms Graham maintains that she accepted a *Calderbank* offer on 2 April 2015 and that that was subsequently resiled from by Knockout Sportswear. Conversely, Knockout Sportswear's position is that there were no *Calderbank* offers accepted by Ms Graham which were subsequently resiled from by Knockout Sportswear.

[22] It is apparent to me that both parties made serious attempts to resolve matters by agreement; there were a succession of offers and counter-offers but I am satisfied on the material before me that notwithstanding Ms Graham's contention that there was a concluded bargain on 2 April 2015, there was not and I have not been persuaded that on any other date or dates the parties were of one mind about the terms of a *Calderbank* offer which had been accepted.

[23] If the parties were of one mind at the time, my expectation is that I would have been confronted with a simple proposition from the party seeking to rely on the *Calderbank* offer but rather than that I have been directed to an extensive exchange of offers and counter-offers over a significant period of time.

[24] Of course, the parties are to be commended for their efforts to try to resolve matters by agreement, but the point of the current analysis is that I am not persuaded that there is an operative *Calderbank* offer in play in the present proceeding and therefore the costs that Ms Graham is entitled to have fixed in her favour can be ascertained without reference to any *Calderbank* letter.

Determination

[25] This matter took two days to hear and so the starting point for any analysis is two days at the Authority's notional daily tariff rate which would give us a starting figure of \$7,000. Ms Graham seeks an uplift on that sum because she says that the behaviour of Knockout Sportswear has materially contributed to the increase in the costs that she would otherwise have incurred.

[26] I am advised that Ms Graham incurred total costs of approximately \$17,000 and in all the circumstances, I am satisfied that those costs are within the reasonable range. Obviously Members of the Authority are familiar with the impost of costs in these kinds of proceedings and given the seniority and skill of Ms Graham's counsel, I am satisfied the costs incurred are reasonable. Of course, the fundamental question I have to answer now is what proportion of those costs ought to be met by Knockout Sportswear.

[27] The starting point, as I have already identified, is \$7,000. Certainly, there is nothing before me which would encourage me to take away from the base starting figure of \$7,000. The issue is whether Ms Graham has made out a claim for any uplift.

[28] There are two bases on which an uplift might be claimed; the first is Ms Graham's contention that, put shortly, the parties spent a great deal of time prior to hearing trying to negotiate a settlement and were ultimately unsuccessful. The second aspect allegedly justifying an uplift is the contention that Knockout Sportswear produced irrelevant evidence which of necessity Ms Graham's counsel had to deal with.

[29] I think it is difficult to rely on either of those aspects as a basis for any significant uplift because arguably both impact the parties equally. Certainly it is true that the parties spent a great deal of time trying to resolve matters by agreement, but I have not been persuaded that that time that was spent did not impact equally on the parties and therefore while it increased the overall costs, it did not materially increase Ms Graham's costs more than Knockout Sportswear's costs.

[30] The same argument I think can be made in relation to the claim that there was irrelevant evidence put in and which Ms Graham had to deal with. The observation I made at hearing was that I thought that there was irrelevant evidence from both sides and that all that I was interested in was whether Ms Graham had a personal grievance or not and if the evidence helped me to reach that conclusion, it had probative value and if it did not then I would not consider it.

[31] In all the circumstances then, I order Knockout Sportswear to pay to Ms Graham the sum of \$7,000 as a contribution to the costs that she reasonably incurred in successfully prosecuting a personal grievance claim against her former employer. I have not been persuaded that any uplift in the notional daily tariff rate is appropriate in the particular circumstances of this case.

James Crichton
Chief of the Employment Relations Authority