

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 13
5518845

BETWEEN TUAHINE HANSEN
 Applicant

AND IDEA SERVICES LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Steve Emslie, for Applicant
 Paul McBride, for Respondent

Submissions Received: 11 November 2015 from the Applicant
 28 September and 13 November 2015 from the
 Respondent

Determination: 26 January 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 4 September 2015 I dismissed Mrs Hansen's claim to have been unjustifiably dismissed from her employment as a Community Support Worker in Whanganui.¹ The question of costs was reserved.

[2] The respondent, Idea Services Limited, now seeks a contribution to its costs in the vicinity of \$6,000 plus disbursements of \$330, being travel costs for counsel and witnesses for the respondent. It says, through counsel, its invoiced costs were \$9,950. Invoices in excess of that amount were provided to support the application.

[3] Mrs Hansen resists the application. Her first ground is the lack of evidence that the costs cited by Idea Services were incurred. Idea Services has subsequently provided invoices so this ground no longer applies. Her second ground is her inability to pay.

¹ [2015] NZERA Wellington 87.

[4] The principles regarding the Authority's discretion to award costs are well known² and it is unnecessary to repeat them all here. Those of particular note in this instance are that:

- the discretion is to be exercised in a principled manner rather than arbitrarily;
- costs generally follow the event;
- awards will be modest;
- the nature of the case can influence costs and are frequently judged against a notional daily tariff; and
- Calderbank offers can be taken into account.

[5] The investigation meeting, which was held in Whanganui, lasted a little over half a day. In the normal course of events the Authority's notional daily tariff, which is currently \$3,500, would apply. On that basis an award of costs would be in the vicinity of \$1,750 to \$2,500.

[6] However, in this instance evidence was provided of a Calderbank offer that was made to Mrs Hansen on 16 April 2015. Idea Services submits that, at the date this offer was made, less than 30% of the total expenditure on the matter had been incurred. It submits the Calderbank offer, and the timely manner in which it was made, justifies a significant uplift to the daily tariff.

[7] The offer included Idea Services' withdrawal of the dismissal and acceptance of her resignation; a certificate of service; and payment of \$1,500. The offer remained open for acceptance for ten days, which I consider to be an adequate time for deliberation. Idea Services seeks a contribution of \$1,000 up to the time the Calderbank offer was made and \$5,000 for the period thereafter.

[8] Counsel for Idea Services submits that any contentions made on Mrs Hansen's behalf regarding her limited means are properly considerations for enforcement rather than quantum. Mr McBride cites *Scarborough v Micron Security Products Ltd*³ in support of this submission.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC), confirmed in *Fagotti v Acme & Co Ltd* [2015] EmpC 135.

³ [2015] NZEmpC 105.

[9] In that case Judge Inglis' decision concerned a self-represented litigant who had been clearly put on notice by the Court in previous interlocutory applications that she should obtain professional assistance with the proceedings she had instigated. That is not a factor in the current matter. Mrs Hansen was represented in the investigation meeting by a lawyer and, although unsuccessful, she was exercising her statutory right to challenge her employer's decision to dismiss her.

[10] In doing so, she said her main motivation was to restore her reputation to put her in a better position to find alternative employment in the area of work in which she had been employed for almost 30 years. Rejecting the Calderbank offer was an unwise decision in hindsight, but one that Mrs Hansen made for reasons that were paramount to her. In the circumstances I find her refusal to accept the offer to be more unfortunate than unreasonable.

[11] The Employment Court has recently drawn attention to the original legislative intent that proceedings in the Authority be low level, cost effective, readily accessible and non-technical. Judge Inglis noted that it "*is plain (including from the Authority's informed assessment of an appropriate notional daily rate, currently set at \$3,500) that the Authority is not intended to be an overly legalistic or costly forum*".⁴

[12] Judge Inglis also noted, in relation to financial hardship, that it was "*well established that the Authority may have regard to a party's financial circumstances in determining costs, including whether they ought to be ordered at all*".⁵

[13] I have considered Mr Emslie's submission regarding Mrs Hansen's limited means to contribute to costs and the evidence he provided in support. This consisted of a recent bank statement of Mrs Hansen's which covered a 33 day period and did not entirely support his submission that, once living expenses have been paid, Mrs Hansen has only \$40 per week left over. On the basis of the weekly expenses he cited, and the deposits into Mrs Hansen's account over that 33 day period, I find she could provide a modest contribution to the respondent's costs.

[14] Taking \$2,200 as a suitable starting point, and balancing the relevant factors, I consider an uplift of \$500 to be appropriate recognition of Mrs Hansen's refusal of the Calderbank offer.

⁴ *Stevens v Hapag-Lloyd (NZ) Limited* [2015] NZEmpC 28 at [94].

⁵ n4 at[103].

[15] I decline to order the reimbursement of travel costs. Counsel for the respondent submits that he and witnesses for the respondent travelled from Wellington in one car. He calculated the cost on the basis of 390 kilometres for the return trip at the current IRD rate of \$0.77 per kilometre.

[16] Idea Services has the right to engage counsel from outside Whanganui. However, as competent counsel are available in Whanganui, it is not appropriate that Mrs Hansen be asked to subsidise its election to engage counsel from Wellington.

[17] Mr McBride did not specify which witnesses travelled with him from Wellington. It is my understanding that two of the three witnesses who gave evidence for the respondent were based in the Whanganui area. The attendance of any witnesses from outside Whanganui was at the election of the respondent and I do not find it reasonable that Mrs Hansen should pay for that attendance.

Determination

[18] Mrs Hansen is ordered to contribute \$2,700 to the costs of Idea Services Limited.

Trish MacKinnon
Member of the Employment Relations Authority