**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

[2014] NZERA Wellington 88
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| | BETWEEN | FIONA HUNTER<br>Applicant |
| | AND | TE AO MARAMA KOHANGA REO<br>Respondent |

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| Member of Authority: | Trish MacKinnon |
| Representatives: | Jenny Murphy for the Applicant<br>Kelly Coley and Ruth Oakley for the Respondent |
| Submissions Received: | 25 June 2014 from the Applicant<br>10 July 2014 from the Respondent |
| Investigation Meeting: | On the papers |
| Determination: | 9 September 2014 |

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## COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination of 23 June 2014 I found Fiona Hunter had been unjustifiably constructively dismissed from her employment with Te Ao Marama Kohanga Reo (TAMKR). I also found she had been unjustifiably disadvantaged by her suspension and by the unilateral reduction of her pay during her suspension. Her claim to have been discriminated against by virtue of her recent health issues was upheld. I dismissed one of Ms Hunter's claims to have been unjustifiably disadvantaged by her employer, and found no substance to any of the six instances she claimed represented breaches of good faith towards her by her employer.

[2] Ms Hunter now seeks an award of costs in light of the success of a number of her claims before the Authority. Her representative, Ms Murphy, submits that full indemnity costs are warranted or, alternatively, a significant uplift to the notional daily tariff.

[3] Ms Murphy's justification for such an award includes timely, reasonable and repeated offers to settle made by the applicant on a *without prejudice except as to costs* basis; participation in a second mediation directed by the Authority; and the conduct of the respondent relating to a witness for Ms Hunter.

[4] Additionally Ms Murphy cites the non-attendance, without prior notification, of three witnesses for the respondent for whom briefs of evidence had been provided. The applicant had been put to the expense of preparing evidence relating to that of those witnesses.

[5] Ms Murphy cites the length of the hearing as a further factor warranting indemnity costs. In her view the matter could have been heard in one day if the respondent had made the admissions and acknowledgements before the investigation meeting that it made over two days. This entailed the cost of an additional day's representation as well as Authority charges. Ms Murphy also submits that "*false and unsubstantiated allegations*" made by the respondent in its statement in reply and its witness briefs added to the costs incurred by Ms Hunter.

[6] Ms Hunter's costs and disbursements, for which a series of invoices was provided, totalled $11,705.72 inclusive of GST. These covered the period from Ms Murphy's initial consultation with Ms Hunter in June 2013 to after the investigation meeting which took place on 26 and 27 March 2014.

[7] In support of her submission that this is a case warranting full indemnity costs Ms Murphy cites *Bradbury v Westpac*.[1] The Court of Appeal in that case referred to indemnity costs as being "*exceptional*" and requiring "*exceptionally bad behaviour*" and misconduct that was "*flagrant*".[2] In the alternative, Ms Murphy submits the daily tariff should be applied with an uplift to reflect the factors referred to in previous paragraphs. She submits this results in an amount of $10,649.22, again inclusive of GST.

[8] Ms Coley submits TAMKR's view that costs should lie where they fall. If the Authority found in favour of an award, then the notional daily tariff should apply. In that event, the starting point should be $5,250 to reflect the reality of the investigation

[1] [2009] 3 NZLR 400 (CA).
[2] Ibid at [28].

meeting taking one and a half days, with the first half of the second day being mainly taken up by *without prejudice* discussions between the parties.

[9] TAMKR questions the reasonableness of Ms Hunter's costs, contrasting its own invoiced costs of $5,718.42, evidence of which was provided to the Authority. Ms Coley disputes the appropriateness of full indemnity costs, stating there was nothing so exceptional about the case, and no evidence of exceptionally bad behaviour, that would warrant such an award or a departure from the *Da Cruz*[3] principles.

[10] Ms Coley submits it would not be appropriate to increase a costs award because of the second, Authority-directed, mediation. She cites *Quan Enterprises Ltd v Fair*[4] in which Judge Ford declined to award such costs on the basis that it "*could well result in an injustice in the sense that the Court could end up rewarding a party whose intransigence or unreasonableness had resulted in a failure to reach a mediated settlement.*"

[11] If the Authority does award costs against TAMKR Ms Coley suggests the notional daily tariff should be reduced to reflect a number of relevant factors. These include the respondent's attempts to resolve the matter, including Calderbank offers; the applicant's failure fully to disclose relevant Calderbank offers and *without prejudice* communications; the impecuniosity of TAMKR; and the applicant's lack of success in some of her claims.

[12] Ms Coley submits any costs award should be limited to the costs amount sought by Ms Hunter on 13 August 2013 in a *without prejudice except as to costs* offer initially left open until 16 August but, by agreement, extended to midday on 19 August 2013. The offer comprised the full monetary amounts sought by Ms Hunter and an open apology. I will return to this shortly.

[13] Ms Coley acknowledged at the investigation meeting she had not informed Ms Hunter's representative that some witnesses who had prepared written briefs of evidence would not be present at the hearing. This was the result of administrative oversight in failing to copy the applicant into an email to the Authority regarding those witnesses.

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[3] Both parties cited the well-known principles set out by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.
[4] [2012] NZEmpC 62 at [10].

[14] Regarding the treatment of a witness by TAMKR, Ms Coley submits the respondent acted in good faith and, while both parties could have better handled the matter, the applicant did not incur additional costs as a result.

**Discussion**

[15] Costs awards come within the Authority's equity and good conscience jurisdiction. They are discretionary, and that discretion is to be exercised in accordance with principles endorsed in the *Da Cruz* case previously referenced.

[16] I agree with Ms Coley that there was no exceptionally bad behaviour or flagrant misconduct on the part of the respondent that would warrant indemnity costs. TAMKR properly made concessions and acknowledgements in its statement in reply and I do not accept Ms Murphy's submission that it made unfounded and unsubstantiated allegations in its response to Ms Hunter's claims.

[17] Having rejected full indemnity costs, the appropriate starting point is the Authority's nominal daily tariff of $3,500 per day. Relevant factors are then considered to determine whether any upward or downward adjustment is appropriate.

[18] One such relevant factor is that TAMKR acknowledged more than six months before the investigation meeting that there were procedural flaws in the manner in which it had dealt with Ms Hunter in the latter stages of her employment. It is evident from the offers made by each party on a *without prejudice except as to costs* basis that efforts were made to resolve the matter informally, both before and after that acknowledgement.

[19] Those efforts continued, with my encouragement, during the investigation meeting, in the course of a thirty minute break on the first day, and before the meeting commenced on the morning of the second day. I cannot agree with Ms Coley's submission that the time taken by the parties to explore informal resolution should be deducted from the length of the investigation meeting for the purpose of costs. The informal talks took less than two hours in total and did not greatly impinge on the progress of the investigation. I decline to deduct that time from the overall length of the meeting.

[20] I am not persuaded by Ms Murphy's submission that the parties' lack of success in resolving the matter informally was due to any unreasonableness on the

part of TAMKR. It is not necessary for me to disclose all the offers and counteroffers that were made by each party. However, I am satisfied the failure of their attempts was, in part at least, due to Ms Hunter adopting an uncompromising approach to the full open apology she insisted upon as part of any agreement to resolve the matter.

[21] Ms Hunter's wish to be vindicated from blame for the termination of her employment was reasonable. However, her refusal to countenance wording proposed by TAMKR on 16 August 2013, and repeated on 19 August with an enhanced monetary offer which met the amounts she had been seeking at that time, impaired the prospect of the parties reaching a reasonable agreed resolution. The wording proposed by TAMKR was:

> *In June 2013, Fiona was wrongfully suspended from duties at the Kohanga, which resulted in an irreparable breakdown in the employment relationship between us. We sincerely apologise to Fiona for any distress this caused her. We wish Fiona the best for the future.*

[22] In Ms Murphy's rejection of the offer she noted the importance to Ms Hunter of a "*genuine*" apology letter, which implies the apology offered by TAMKR in the Certificate of Service was less than that. She sought higher compensation and costs as well as "*an open letter of apology*" from TAMKR's Executive which was to state that Ms Hunter had not contributed in any way to the employment relationship breakdown.

[23] Ms Murphy also cited an 1840 contract law case to support her view that Ms Hunter's offer to settle on the monetary terms now agreed by TAMKR was no longer open at the time the respondent had made its offer. She further noted the offer was made after the agreed 12.00 p.m. deadline.

[24] Ms Coley's offer had been made within two hours of that deadline on a day in which a flurry of emails had passed between herself and Ms Murphy. A real opportunity for settlement appears to have been lost by a reliance on the technicalities of contract law. This was at odds with the apparent wish by Ms Hunter to resolve the matter informally without recourse to litigation.

[25] Ms Hunter's next offer to resolve the matter for a greater amount of both compensation and costs was conveyed through Ms Murphy only hours later that same day. This did little to persuade TAMKR of her genuine wish for informal settlement. Although Ms Hunter was ultimately successful in a number of her claims I consider the history of *without prejudice except as to costs* offers between the parties, and the

failure of all Ms Hunter's claims regarding breaches of good faith by TAMKR, militates against an increase to the nominal daily tariff.

[26] I am not persuaded Ms Hunter incurred the level of additional preparation costs claimed by her representative as a result of TAMKR's failure to inform her that some witnesses would not be attending the investigation meeting. The original date of the meeting was moved by one month due to a bereavement unrelated to either party and beyond their control. This occurred within close to the date of the scheduled meeting. By then the briefs of evidence had all been filed and the parties' preparation would have been close to completion. I have no reason to doubt that, had it not been for the unexpected postponement for which TAMKR bore no responsibility, the three witnesses would have been present at the investigation meeting.

[27] Nor do I find merit in Ms Murphy's submissions regarding other factors supporting an increase to the daily tariff. While there are instances where it has been appropriate to make a modest award of costs for attendance at mediation because of the specific circumstances[5], it is not a common occurrence and this is not one of those cases.

[28] There are sound public policy reasons against such a practice occurring routinely which Judge Ford encapsulated in *Quan Enterprises*, cited earlier. In any event, the first mediation took place after Ms Hunter had raised a personal grievance over matters arising from her suspension from employment but before she raised a personal grievance for constructive dismissal. In that situation it was to be expected the Authority would require the parties to attend further mediation and to bear their own costs for doing so.

[29] I am not persuaded the applicant unreasonably incurred additional costs from having to summons one witness as a result of an inquiry to the witness' employer by a committee member of the respondent. The witness was giving evidence in a personal capacity following her professional involvement with Ms Hunter. It was foreseeable a witness summons would be required in that situation and appropriate one be issued.

[5] For example, *RHB Chartered Accountants Ltd v Rawcliffe* [2012] NZEmpC 31.

[30] Nor am I persuaded by Ms Murphy's submission that the daily tariff should be increased because of the length of the hearing. The starting point is based on a two-day hearing which obviates the need to consider the length as a separate factor.

[31] I have examined the invoice information submitted by Ms Murphy. It is not clear from the billing information for the period 5 August 2013 to 5 September 2013 which costs were attributable to post-mediation matters related to the initial grievance and which were related to the raising of the second grievance.

[32] In that situation I find it fair to apportion half of the invoice, $1,310, to post-mediation matters which are appropriate to a consideration of costs, and half to be related to the raising of the second personal grievance. I do not regard it reasonable to include that half of the invoice in this costs consideration.

[33] I have concluded the costs incurred by Ms Hunter, other than those up to and including the first mediation, and excluding costs related to raising of the second grievance and the subsequent mediation, amount to less than the nominal daily tariff. They amount to $6,220 exclusive of GST. It is not the normal practice of the Authority to award GST and I decline to do so.

[34] Ms Coley's submission regarding the impecuniosity of TAMKR is endorsed by accounting evidence I accepted during the investigation meeting. That is a relevant factor in any discussion of appropriate costs to be awarded to Ms Hunter as the predominantly successful party. It is apparent to me the Kohanga, with its limited assets, restricted sources of funding, and minimal cash flow will struggle to pay costs in addition to the awards made to Ms Hunter in my substantive determination.

**Determination**

[35] In all the circumstances I find an appropriate contribution for TAMKR to make to Ms Hunter's costs to be $5,200. In addition it should reimburse her the $71.56 cost of the Authority filing fee. Orders for such payment are made accordingly.

Trish MacKinnon
Member of the Employment Relations Authority