

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 5
3015312

BETWEEN SIAN LUCAS
 Applicant

A N D TE RITO DAYCARE
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: A Kersjes for Applicant
 S Max for Respondent

Investigation Meeting: On the papers

Submissions Received: 26 September 2017 from Applicant
 12 October 2017 from Respondent

Date of Determination: 5 January 2018

DETERMINATION OF THE AUTHORITY

A. Te Rito Daycare Limited is directed to pay Sian Lucas the sum of \$2,250 as a contribution towards her costs.

Employment relationship problem

[1] Sian Lucas was found to have been unjustifiably dismissed by Te Rito Daycare Limited (Te Rito Daycare). Te Rito Daycare Limited was ordered to pay her compensation of \$5,000 including a reduction of 50% for Ms Lucas' contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.¹

[2] Ms Lucas now seeks legal costs. Her actual costs were \$7,048.39 GST inclusive. She seeks an award of the Authority's daily notional tariff of \$4,500.

¹ *Sian Lucas v Te Rito Daycare Limited* [2017] NZERA Auckland 282.

What is the starting point for assessing costs?

[3] The Authority applies a tariff based approach to costs.² Matters lodged in the Authority from 1 August 2016 are subject a daily costs tariff of \$4,500 for the first hearing day and \$3,500 for each day thereafter.³ The meeting was concluded in one hearing day. Therefore the starting point for assessing costs shall be \$4,500.

Are there any factors that warrant adjusting the notional daily tariff?

- [4] The applicant submits an award at the rate of \$4,500 is justified because:
- a) Her representative sought to engage the respondent in settling costs but was unsuccessful;
 - b) She has been invoiced for \$7,048.39;
 - c) She seeks recovery of disbursements of \$384.14 for her ERA filing fee, transport and general office expenses;
 - d) She seeks a further \$267.50 for preparation of the costs memorandum;
 - e) She should not be further disadvantaged by having to pay her costs;
 - f) For “clarity” she now seeks \$5,171.64 including disbursements.

Non-legally Qualified Representatives

[5] The applicant’s representative is not subject to the same regulation imposed upon qualified lawyers. Lawyers conduct and fee arrangements are strictly regulated by the Lawyers and Conveyancers Act 2006 (LCA) and the Lawyers and Conveyancers (Lawyers Conduct and Client Care) Rules 2008 (Rules).

[6] The purpose of this amount of regulation is set out in the LCA. The purposes include “to maintain public confidence in the provision of legal services” and to “protect the consumers of legal services”.⁴ While the Authority is not a disciplinary tribunal or empowered to enforce the LCA or Rules against representatives, they do provide guidelines for assessing the reasonableness of all representatives’ conduct and fees in the Authority.

² *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [16].

³ Practice Note 2 Costs in the Employment Relations Authority para.4.

⁴ Section 3 Lawyers and Conveyances Act 2006.

Conditional fee arrangement

[7] The applicant's representative was directed to provide a copy of its invoice and terms of engagement. From the costs submissions it appears the applicant has not as yet paid the invoice.

[8] The terms of engagement state the applicant's representative "mostly work[s] on a contingency basis ... which means we only charge if we are successful or if you withdraw". This is a conditional fee agreement.

[9] Lawyers may only enter into conditional fee agreements in the circumstances below:

9.9 Where a lawyer enters into a conditional fee agreement with a client, the lawyer must ensure that,—

- (a) before entering into the conditional fee agreement, the lawyer has informed the client of any other appropriate arrangements that may be available, including, where relevant, the possibility of legal aid; and
- (b) the total fee charged at the conclusion of the matter is fair and reasonable in accordance with rule 9.

[10] A lawyers conditional fee arrangement must also be in writing and provide:⁵

- (a) the method by which the fee is to be determined; and
- (b) the condition or conditions that will amount to success and upon the occurrence of which the fees or any part of them will become payable; and
- (c) whether there are any fees or expenses for which the client will be liable whether or not the client succeeds; and
- (d) the basis upon which either party may terminate the agreement and what the liability for fees on termination will be; and
- (e) the method by which the fee is to be determined in the event that an offer of settlement or compromise is made in respect of the matter, which the client declines to accept against the advice of the lawyer; and
- (f) the circumstances in which the client may be liable to pay the costs of any other party to the proceedings; and
- (g) that the client may give notice cancelling the conditional fee agreement within 5 working days after it has been entered into by the client on the basis that the lawyer may charge a normal fee for any work done during that period.

[11] No similar conditional fee agreement or arrangement has been evidenced for this applicant. There is no estimated fee payable or a set method for calculating that final fee. For costs purposes, it means there is no way to ascertain the true fee this client has agreed to be charged whether successful or not. Given the invoice remains unpaid and the applicant is seeking a lesser costs award, it may also indicate the invoice does not reflect the final fee to be paid. This does not provide any public confidence in the fees to be charged or protection for clients.

⁵ Rule 9.10 Lawyers and Conveyances Act (Lawyers Conduct and Client Care) Rules 2008.

Hourly rate

[12] The terms of engagement refers to an hourly rate that “fluctuate[s] from \$150 to \$350 plus [GST] per hour”. The Authority has previously noted in an assessment of an employment advocates costs:⁶

In the case of an unregulated advocate, without the expenses and obligations carried by qualified and registered professionals, a rate of \$350 was not reasonable for the purposes of the Authority’s assessment of costs.

[13] These “fluctuating” hourly rates are substantially higher than the applicable legal aid rates for employment advocates of \$82 per hour.⁷ The invoice is also 278% more than the set fees payable under legal aid for this type of employment matter. The legal aid payable for this matter would have amounted to \$2,531 for an employment advocate.⁸

Proportionality

[14] The Authority’s daily notional tariff is based upon an expectation that all parties manage the legal costs of their cases proportionate to the expected awards. The proportionality of legal costs has been referred to by the Employment Court:⁹

There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

[15] Proportionality is a factor lawyers must take into account when determining the reasonableness of their fees charged.¹⁰ Other jurisdictions such as the High Court may also reduce or refuse costs where “the property or interests at stake in the proceeding were of exceptionally low value”.¹¹

[16] There is concern that cases of this nature are being conducted in ways that are not proportionate to the likely compensatory award. Where the property or interests at stake are of exceptionally low value, reduced or refusal of costs may be appropriate. Increased costs should not be expected.

⁶ *MacDonald v TKR Properties Ltd* [2017] NZERA Auckland 240 at [13].

⁷ Lawyers and Service Providers: Family and Civil legal aid rates <https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/provider-rates-and-special-rates/family-or-civil-fee-rates/>.

⁸ Legal Aid Civil (Employment) Fixed Fees Schedule <https://www.justice.govt.nz/assets/Documents/Publications/LA-Employment-Fixed-Fees-Schedules.pdf>

⁹ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [47].

¹⁰ Rule 9.1(e) Lawyers and Conveyances Act (Lawyers Conduct and Client Care) Rules 2008.

¹¹ HCR 14.7(b) High Court Rules 2016.

[17] The facts of this case were never going to result in an award of more than \$5,000. There was no basis for any lost wages because Ms Lucas failed to mitigate her losses. This should have been apparent to her representative when she was briefed. This remedy should not have been pursued at hearing. It required additional time and effort by the respondent in cross examining Ms Lucas about her efforts to find work.

[18] The applicant's representative was warned at an earlier telephone conference about the evidential requirements necessary to prove a compensation award of \$20,000 which were not met at hearing. An award of this amount should not have been pursued at hearing. It required more hearing time seeking evidence about this level of remedy.

[19] It was also evident from the submissions there was a lack of specialist knowledge about the law relating to contributory conduct and how it may apply to the applicant. If properly advised the applicant should have expected a reduction of any award for contributory behaviour. The invoice of \$7,048.39 was therefore out of proportion to any reasonably expected award.

Reasonableness of fees charged

[20] The invoice charges one amount for a range of activities – it does not itemise out the time spent on each activity or the date the work occurred. Some of the activities do not warrant such a high charge out rate. For example there is a charge of \$120 per hour for 3.50 hours for services including “research, filing and general administration”. There is no skill or specialist knowledge required for filing and general administration to justify a charge out rate of \$120 per hour.

[21] The necessity for the amount of research charged was not evident in the statement of problem or at hearing or during submissions. This was not a complex or novel issue. It was a straightforward unjustified dismissal. Despite this the invoice charges for research three times at two different rates (\$120 and \$250 per hour). The total charged for research and other activities was 12.6 hours (3.5 hours at \$120 per hour and 9.1 hours at \$250 per hour). This is excessive.

[22] Some charges also appear to be for the same activity. For example 11.40 hours at \$250 per hour was charged for attending the investigation meeting and “consultation” “meeting attendance” “advice” and “post-consultations”. Given the

investigation meeting attendance was less than 6 hours, an additional 5.40 hours meeting with the client to advise and prepare appears excessive. This is especially when it was in addition to the 5.90 hours charged for preparation and “meeting attendance” noted earlier in the invoice.

[23] The disbursements are also inadequately itemised. Other than the \$71.56 filing fee the remainder of costs are unknown. The “transport” disbursement is not a reasonable cost to be charged and shall not be reimbursed.

[24] The “general office expenses” disbursement may also have been charged earlier in the invoice under “general administration” above. I am uncertain what it relates to at all. It may relate to photocopying of the applicants bundle of documents. I did not direct the filing of any bundle of documents. The bundle was unhelpful. This is because it omitted two critical documents namely the applicant’s employment agreement and the letter raising the personal grievance and was not used at hearing as a consequence.

Conduct at hearing

[25] This investigation meeting took a full day but should have been completed within half a day. The conduct of the applicant’s case extended the meeting time because the majority of the applicant’s relevant evidence was revealed through the Authority and the respondent’s examination at hearing. This evidence should have been contained in the applicant’s briefs or the statement of problem. Although I gained some assistance from her written brief and documents, most of the hearing time was used by the Authority and respondent clarifying the applicant’s evidence.

Outcome

[26] Taking the above into account an appropriate costs award is half the applicable daily notional tariff or \$2,250.

[27] Te Rito Daycare Limited is directed to pay Sian Lucas the sum of \$2,250 as a contribution towards her costs.

T G Tetitaha
Member of the Employment Relations Authority