

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 114
5384012

BETWEEN SHEILA MAREE ROSE MILNE
 Applicant

AND NEW LEAF BEAUTY LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Barbara Buckett, Counsel for Applicant
 Respondent in person

Submissions received: 15 July and 13 August 2013 from the Applicant
 30 July 2013 from the Respondent

Determination: 24 September 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 25 March 2013¹ the Authority found that the applicant, Ms Milne, had been unjustifiably dismissed. The respondent was ordered to reimburse lost wages of \$4,312.50 (gross), \$6,000 as compensation and \$86.25 for KiwiSaver contributions.

[2] On 15 July 2013 the applicant via her representative applied for full indemnity costs of \$15,451 plus GST and disbursements including \$71.56 for the filing fee. She also requested a further \$1,500 for costs associated with making this application.

[3] By memorandum received 30 July 2013 Ms Natalie Shearer, one of the respondent's two directors, says costs should lie where they fall.

Issues

[4] The following issues are to be determined:

¹ *Milne v New Leaf Therapy Ltd* [2013] NZERA Wellington 32

- i. Should Ms Milne be awarded indemnity costs?
- ii. If indemnity costs are not appropriate, what matters should be considered relevant in an assessment for costs?
- iii. Are there factors which should allow an uplifting or scaling back of costs?

Principles

[5] The principles which guide the Authority's approach to assessing costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*². Those principles are now so well established that I do not consider it necessary to restate these in full in this determination. The Authority's usual approach is to assess costs using a notional daily tariff. The Authority has the discretion to raise or lower the tariff depending on the circumstances of the matter and the tariff should not be applied in a rigid manner.

Indemnity costs

[6] Ms Milne seeks full indemnification of her costs (and disbursements) in reliance on an offer of settlement made by her approximately one month prior to the investigation meeting. She says the offer was unreasonably refused by the respondent and as a consequence she has incurred unnecessary costs.

[7] The Court of Appeal in *Bradbury & Ors v Westpac Banking Corporation*³ held that orders for indemnity costs are exceptional and require exceptionally bad behaviour. While an offer to settle is a factor that the Authority can properly take into account in an assessment of costs I do not regard a rejection of a settlement offer can be characterised as unreasonable such that indemnity costs are appropriate. This matter does not meet the very high threshold required before indemnity costs may be imposed and I decline to make the order requested.

What matters should be considered relevant in an assessment for costs?

[8] This is an appropriate case where the Authority's tariff should act as the starting point for an assessment as to costs. The investigation meeting took a full day

² [2005] ERNZ 808

³ [2009] NZCA 234

with written submissions following. The starting point for assessing costs is therefore \$3,500.

1. Offers to settle

[9] Although a Calderbank offer is normally made by the party sought to be held liable, it can also be made by the claimant offering to settle for a sum⁴. A fundamental benefit of settlement prior to proceeding with litigation in circumstances where a Calderbank offer has been made is so both parties can reduce costs associated with the proceedings and reach an outcome similar to that that which may be ordered by the Authority or Court.

[10] The investigation meeting was held on 23 January 2013. On 7 December 2012 the respondent wrote to the applicant's representative and requested the parties attend further mediation. On 18 December 2012 the applicant responded to that correspondence 2012 stating that counsel would not be available to attend mediation before the investigation meeting scheduled for 23 January 2013. The applicant via her representative made a settlement offer for a sum approximately half that awarded by the Authority. The offer was held open until 16 January 2013. The letter proposed that if accepted, the Mediation Service could draft up an agreement, if not, full solicitor/client costs would be sort.

[11] The respondent says the offer to settle was made by the applicant after she had full advantage of viewing the respondent's briefs but prior to filing her own in circumstances where she was in breach of an agreed timetabling for exchange of documents and when these should have been supplied six weeks earlier⁵. The respondent says at the time the offer was made considerable costs had already incurred in preparation of a defence of claims and in the absence of the applicant's evidence.

[12] I consider the benefit of the Calderbank offer was largely lost for the respondent by the applicant's failure to provide evidence about her claim in accordance with the timetabling agreements and in these circumstances I am unwilling to exercise my discretion to order an increase in costs.

⁴ *Watson v New Zealand Electrical Trades Ltd t/a Bray Switchgear* (2006) 4 NZELR 59

⁵ In compliance with the timetabling agreement made during a conference call

2. Ability to pay

[13] I accept that the applicant incurred costs of \$15,451 plus GST and a filing fee.

[14] There is an established approach in this jurisdiction of taking into account a party's ability to pay if payment would place an undue hardship on that party⁶.

[15] The respondent attached to its memorandum a letter dated 18 July 2013 written by a chartered accountant from 'Norrie and Daughters', an accountancy firm specialising in insolvency and liquidation. The letter states that it has been approached by the respondent for advice as to solvency or otherwise. Enclosed with the letter are the respondent's financial statements for the period 1 April to 16 July 2013. The financial statements reflect the respondent as running at a net loss, with total liabilities outweighing its assets. The letter advised that the respondent had been assessed by Norrie and Daughters as failing both limbs of the solvency test⁷.

[16] The applicant states that Norrie and Daughters were solely reliant on information provided to it by the respondent. I accept that the information contained in the documentation from Norrie and Daughters has not been sworn or tested and therefore I can only give limited weight to it.

[17] I note also that the respondent is continuing to trade.

[18] The fundamental principle of an award of costs is to recompense the party who has been successful in litigation for the cost of being represented in that litigation by counsel. There is a need to do justice having regard to the interests of both parties. I do not consider that the information set out in the respondent's memorandum should lead to determination of no award of costs however the respondent's financial circumstances are cause against an increase to the notional tariff.

1. Payment of the award

[19] The applicant says that it is over five months since the Authority issued its determination ordering the respondent to pay remedies but that the respondent is yet to do so.

[20] The applicant attached to her affidavit an earlier letter dated 1 July 2013 sent by Norrie and Daughters. The letter contains a proposal to the applicant that she

⁶ *Gamble v AgResearch Ltd* Judge Couch CC 6/09

⁷ under the Companies Act

forgo payment of the orders made in the Authority's determination in exchange for an instalment payment plan whereby the directors of the respondent would together personally pay \$3,750 in total over 6 months.

[21] The offer purports amongst other things that an acceptance of the arrangement will allow the applicant to receive a portion of the remedies free of tax in contrast to the possibility that she receive nothing should the respondent go into liquidation.

[22] In her memorandum in reply the applicant asked the Authority to make an order for compliance. In my assessment of costs I am unable to give any weight as to whether or not the respondent has complied with the orders made in the substantive determination. If the parties are unable to reach agreement as to when the orders⁸ of the Authority be paid, any recovery action can be made in the usual way⁹ by lodging an application for a compliance order with the Authority.

Determination

[23] This is equity and good conscience jurisdiction and costs awards in the Authority are generally modest. The exercise of my discretion calls for a determination as to what is a fair and reasonable contribution to costs. The normal rule is that costs follow the event and the applicant is entitled to a contribution to her costs. It is also evident that the respondent is in difficult financial circumstances. Anything other than a modest award of costs may result in the respondent entering into voluntary liquidation.

[24] I consider that that the just and fair approach to take in this matter, bearing in mind the limited resources of the respondent, is to apply the Authority's daily tariff and award the respondent to make a contribution of \$3,500 to the applicants costs. This order recognises the work done by the applicant in successfully bringing her claims whilst acknowledging the respondent's financial circumstances. I was not provided any information about any other disbursements other than payment of a filing fee. I order the respondent to pay \$71.56 in this respect.

⁸ Ibid at footnote 1

⁹ Regulation 6 Employment Relations Authority Regulations 2000

Order

[25] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order the respondent to pay the applicant the sum of \$3,500 plus \$71.56 for the filing fee as contribution towards the applicant's costs.

Michele Ryan

Member of the Employment Relations Authority