New Zealand Employment Relations Authority Decisions

Moxon v Pathways Health Limited t/a Pathways (Christchurch) [2011] NZERA 953; [2011] NZERA Christchurch 201 (14 December 2011)

Last Updated: 25 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 201
5286967

BETWEEN ALICIA MOXON Applicant

AND PATHWAYS HEALTH LIMITED t/a PATHWAYS Respondent

Member of Authority: Representatives:	Philip Cheyne Barbara Buckett, Counsel for Applicant	
	Simon Menzies, Counsel for Respondent	
Submissions Received	2 November 2011 & 29 November 2011 from Applicant 18 November 2011 from the Respondent	the
Determination:	14 December 2011	

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 6 October 2011 I upheld Ms Moxon's personal grievance claim, awarded her distress compensation and reinstated her by removing a warning that had been issued to her. Costs were reserved with a timetable for submissions. I now have a claim for costs by Ms Moxon, a response and cross claim for costs by Pathways and a response from Ms Moxon to the cross claim. This determination resolves the question of costs.

[2] Ms Moxon seeks full indemnification of her pre-litigation costs. That was in issue in the substantive proceedings and was declined for the reasons explained in the determination dated 6 October 2011. I will refrain from repeating what was said in the earlier determination. The pre-litigation costs are not relevant for present purposes.

[3] I am told that the actual costs associated with the investigation meeting are

$28,913.017 (sic) plus GST. The promised copies of invoices never eventuated. There is also the lodgement fee and meeting fees. Further, I am told that the costs associated with the second mediation are $3,000.00 plus GST and the costs associated with the preparation of the memorandum on costs are $2,500.00 plus GST. The costs, counsel's hourly rate of $430.00 and a junior's hourly rate of $285.00 are all said to be reasonable and within acceptable guidelines. For the reasons explained below it is not necessary to comment on that assertion.

[4] Both counsel refer me to *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 for relevant principles. In addition, counsel for Pathways refers me to *Heap v Calibre Plastics Limited* ERA Wellington, WA95B/08
25

September 2008 where the Authority referred to the observation in *Da Cruz* about the need to ensure that the costs being incurred are reasonable in light of the amount in remedies and costs likely to be recovered from the Authority. The observation remains salient. The relevance of *Da Cruz* also means that the authorities cited about the approach to an assessment of costs in Court proceedings (such as *Binnie v Pacific Health Limited* [2003] NZCA 69; [2002] 1 ERNZ 438) do not assist as to principle in the present case.

[5] For the respondent, there is a submission that Ms Moxon should not be regarded as the successful party because she failed on the issue of special damages to cover her pre-litigation costs. It is submitted that Ms Moxon succeeded in relation to certain issues but they were issues that were not really in contest. I am in a position of relative disadvantage because I only have the statements of problem and reply, the statements of evidence, documents related to the disciplinary process that preceded the issue of the warning and correspondence between the parties. I am of course not privy to counsels' advice to their clients. In the material available to me there are assertions about the justification of the warning. There is not an acceptance of Ms Moxon's personal grievance and lack of justification for the warning. For the purposes of the litigation I assess Ms Moxon as the successful party. She established a personal grievance and an entitlement to remedies. Her lack of success on the issue of special damages is a factor to be weighed in assessing the amount of costs.

[6] There are submissions in favour of and against the assessment of litigation costs on an indemnity basis in the circumstances of this matter. I do not intend to

canvass the submissions here other than to say that I prefer the submissions for the respondent. There is nothing about the present case to bring it within the type of case mentioned in *Jansen Limited v Tree* [2011] NZEmpC 72 and *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.

[7] The respondent's position is that it should have costs awarded in its favour at

$3,000.00 per day on a daily tariff basis in light of Ms Moxon's rejection of *Calderbank* offers made in the lead up to the Authority's investigation meeting. The last of those offers was on 11 November 2010. The offer included the removal of the (by then expired) warning from Ms Moxon's file and $15,000.00 towards costs or compensation. Ms Moxon was awarded compensation of $9,000.00 so on the face of it she did not do better by continuing with the litigation.

[8] In response counsel for Ms Moxon has provided further correspondence between the parties conveying various proposals. I gather from reading this correspondence that I still have only a partial picture of the correspondence and communications between the parties about resolution. I take it that the items referred to but not included in the correspondence provided to the Authority are without prejudice rather than *Calderbank* offers. It is difficult to fairly and accurately assess the positions of the parties when the Authority cannot get a full picture of the exchanges. I must do the best I can with what is properly before me.

[9] I am referred to *T & L Harvey Limited v Duncan* [2010] NZEmpC 36. The case shows how finely judged these situations can be. The employer's challenge to the whole of the Authority's determination resulted in a reduction of the remedies previously awarded to the employee. In it substantive judgment the Court nonetheless indicated that the employee should be regarded as the successful party to the challenge because she maintained a personal grievance claim despite the challenge. When it came to costs it emerged that the employer had made a *Calderbank* offer in total a little less than the total awarded under the judgment. It became a question of whether the employee would have been entitled to a contribution to her costs in the Court proceedings as at the date of the *Calderbank* offer. For reasons peculiar to that case, it was the employer who would have been entitled to a modest order of costs at that date. Accounting for that sum meant that the employee would have done better by accepting the *Calderbank* offer. As a result, the employee was disentitled to costs.

Public vindication was not an issue because the employee already had the benefit of the Authority's determination upholding her personal grievance. The Court's approach is helpful in the present case.

[10] The only *Calderbank* offer that needs serious consideration is the last offer. The offer was for compensation of $15,000.00. Ms Moxon recovered $9,000.00 from the Authority. The offer also stated *...the warning will then be removed from your client's file and your client will thereafter be treated on the basis that there is no formal record on her file.* As to costs to date it stated *Both parties will thereafter be responsible for their own costs.* The offer was made on 11 November 2010 and expressed to be open for acceptance until Monday 15 November 2010.

[11] The investigation meeting was scheduled for 8, 9 & 10 December 2010. The *Calderbank* offer expired shortly before the applicant was due to lodge statements of evidence. By the time of the offer it is fair to think that substantial preparation for the witness statements would already have been done. The Authority had dealt with the respondent's unsuccessful application for separate investigation and determination of a preliminary matter. The statement of problem and assembly of relevant documents would have required a substantial investment of time. It appears from counsel's invoices supplied prior to the investigation meeting in support of the special damages claim that litigation costs stood at about $5,700.00 as at 31 August 2010. I am left to guess but I expect that litigation costs probably would have been more than double that by the time of the *Calderbank* offer. The real issue though is what sum would the applicant have been entitled to at that point on a *Da Cruz* basis? It is of course difficult to make an assessment on a daily tariff basis if a matter settles before an investigation

meeting. I probably would have awarded something like half of the award that would be made for the full investigation. The result of that assessment is that Ms Moxon has done better than she would have done by accepting the *Calderbank* offer.

[12] There is another factor that means that Ms Moxon should be awarded costs as the successful party. The *Calderbank* offers did not acknowledge her personal grievance. The warning expired in accordance with a condition of its issue. The offer was to remove the warning from her file upon its expiry and treat her in the future on the basis of no formal record on her file. That fell short of an acknowledgement that

of a lack of justification for the warning in the first place. It was always Ms Moxon's position that she should not have received a warning and the Authority's findings support that contention.

[13] I confirm that Ms Moxon should be regarded as the successful party and there is no reason why she should not have costs awarded in her favour.

[14] Counsel refers me to *Chief Executive of the Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73. In that case the Employment Court had to assess costs for an Authority investigation meeting. The Court commented that $3,000.00 per day should be seen as an appropriate starting point for the Authority's tariff rather than the upper figure. That matter was a 2 day investigation meeting, there were written submissions later considered by the Authority and the Court commented that *The case undoubtedly required considerable preparation including detailed analysis of closed circuit video footage. In these circumstances a realistic allowance for preparation is appropriate*.

[15] Here, there was no video footage but there was considerable documentary evidence, important parts of which were disclosed late by both parties. Neither should benefit from the additional time expended. Ms Moxon's lack of success regarding the special damages issue should be brought to account by a modest reduction in the overall award. Otherwise most of the time was expended on unravelling the facts as they related to her personal grievance claim. I will take $3,500.00 (GST inclusive) as the appropriate daily rate. The matter occupied three investigation meeting days but, to recognise the importance of the matter especially to Ms Moxon, I will follow *Tawhiwhirangi* and extend that by one day to accommodate the comprehensive written submissions provided and a further day as an additional allowance for preparation in light of the considerable volume of documentation. That gives a total of $17,500.00 which I reduce to $15,000.00 by reason of the lack of success on the special damages issue.

Conclusion

[16] Pathways must pay Ms Moxon costs of $15,000.00.

[17] Counsel did not provide me with details of the meeting fees incurred by Ms Moxon. If receipts for the meeting fees and the lodgement fee are provided to Pathways they must also pay Ms Moxon those amounts.

Philip Cheyne

Member of the Employment Relations Authority
