IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 30
5598020

	BETWEEN	PCA Applicant
	A N D	DAVID ORSBOURN MEDICAL SERVICES LIMITED T/A ENHANCESKIN Respondent

Member of Authority:	Peter van Keulen
Representatives:	Anjela Sharma, Counsel for Applicant Luke Acland, Counsel for Respondent
Submissions Received:	12 September 2017 and 24 November 2017 from Applicant 6 November 2017 and 4 December 2017 from Respondent
Date of Determination:	28 February 2018

COSTS DETERMINATION OF THE AUTHORITY

A. There is no order for costs for either party in this matter.

B. I do not need to determine the application to join Dr Orsbourn as a party to the proceedings and there is no additional order for costs relating to the application to join him.

Application for costs

[1] In a determination dated 12 July 2017[1] I determined that David Orsbourn Medical Services Limited (Enhanceskin) had unjustifiably dismissed PCA but had not breached the duty of good faith. As a result, I awarded remedies to PCA for compensation and reimbursement but I did not impose a penalty against Enhanceskin.

[1] [2017] NZERA Christchurch 123

[2] In my determination, I reserved costs in order to give the parties an opportunity to try and resolve the question of costs.

[3] The parties have not been able to resolve costs and PCA, through her counsel, now seeks costs.

[4] PCA seeks to have costs awarded in her favour applying the daily tariff on an increased basis because:

a. Enhanceskin behaved unreasonably over settlement that PCA says should have been agreed (and in fact argued was agreed);

b. PCA had to apply to the Authority and have the issue of whether there was a binding settlement between the parties, determined;

c. Enhanceskin unreasonably refused to agree to attend mediation and a direction from the Authority was required;

d. PCA has incurred additional costs in making the application for costs that I am to determine.

[5] In contrast, Enhanceskin says costs should be awarded to it because:

a. Enhanceskin was successful in defending PCA's application that there was a binding settlement between the parties;

b. PCA unreasonably refused an offer of settlement and did not better the proposed terms of settlement sufficiently in my determination.

[6] PCA has also made an application to join David Orsbourn as a party to the proceedings for the costs application. Dr Orsbourn is a director and shareholder of Enhanceskin. PCA says Dr Orsbourn has had control of this case on behalf of Enhanceskin and has acted with impropriety causing unfair prejudice to PCA.

[7] Enhanceskin and Dr Orsbourn oppose the application to join Dr Orsbourn as a party to the proceedings.

Costs

[8] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[2]. The principles and the approach to be adopted by the Authority have been reaffirmed recently by the Full Court in *Davide Fagotti v. Acme & Co Ltd* [3].

[9] I have considered the power to award costs and the principles relating to the exercise of that power as expressed by the Employment Court.

[10] Whilst a big factor between the parties is the disputed settlement (which is discussed in detail below), the circumstances of the settlement offer and refusal together with my subsequent determination does not escalate this to a situation where the principles applicable to *Calderbank* offers apply and the presumption of costs following the event should be reversed.

[11] I am satisfied that as PCA was largely successful with her claims, my staring point is to look at an award of costs in her favour.

[12] The next step is to consider quantum of any costs to be awarded; the quantum of any costs award is normally assessed by applying the daily tariff. I can depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a *Calderbank* offer are more appropriate.

[13] There are no circumstances in this case that warrant imposing costs on some basis other than the daily tariff. I am satisfied that the daily tariff is the correct approach.

[14] The applicable rate, for the daily tariff, is $3,500.00 as the statement of problem was lodged in March 2016. The investigation meeting, held on 19 April 2017 took one half day. So, the applicable daily tariff amount is $1,750.00.

[2] [2005] 1 ERNZ 808
[3] [2015] NZEmpC 135

[15] The next step is to consider whether the daily tariff amount should be increased or decreased based on a number of factors raised by counsel in their submissions.

[16] The factors relevant to the consideration of the increase or decrease of the daily tariff include:

a. Costs awards in the Authority will be modest;

b. It is open to the Authority to consider whether all or any of the party's costs were unnecessary or unreasonable;

c. Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;

d. Without prejudice offers can be considered;

e. Impecuniosity of the other party may be relevant;

f. A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[17] The key issue between the parties for costs is the disputed settlement discussions. The settlement issue was ultimately the subject of an application by PCA asserting that there was a binding settlement, seeking a determination to that effect. Member Appleton dealt with this application and issued a determination on 23 November 2016[4] finding that there was not a binding settlement between the parties. In his determination Member Appleton summarised the exchange of offers and counter offers which led to the disputed settlement[5]:

> Accordingly, I have examined the correspondence, and have been able to reach a view. I summarise the material correspondence[[6]], without disclosing its contents, as follows:
>
> a. On 31 October 2016 an offer to settle was made by Mr Acland to Ms Sharma.

[4] [2016] NZERA Christchurch 209
[5] At [3]
[6] I omit reference to exchanges which do not contribute to the substantial enquiry that I am undertaking.

b. Ms Sharma replied on 3 November 2016 by letter, which contained a counter offer.

c. On 8 November 2016 Mr Acland rejected the counter offer, and repeated the original offer.

d. On 9 November 2016, Ms Sharma made a counter-offer and repeated conditions stipulated in her first counter-offer of 3 November.

e. On 10 November 2016, Mr Acland rejected the counter-offer and repeated that the offer made by the respondent on 8 November stood (which had stated that the original offer of 31 October stood). Hence, Mr Acland is repeating the original offer.

f. Around 90 minutes later, Ms Sharma stated that her client accepted the sum offered by the respondent, but required that other conditions stated in her earlier counter-offers must stand. Therefore, this communication was another counter-offer.

g. Around 60 minutes later, not having heard from Mr Acland, Ms Sharma wrote and said "my client will settle on the basis of your clients offer as presented". She says she would draft a record of settlement.

h. Around 90 minutes later, Ms Sharma sent to Mr Acland a draft record of settlement.

i. Around two hours later, Mr Acland replied saying that the draft needed to have another term inserted, (which he had not raised up to that point).

j. Ms Sharma replied and asked for an explanation of the term, which Mr Acland furnished later that afternoon.

k. Finally, Ms Sharma replied in the evening of 10 November saying that her client was not agreeable to the addition, and taking issue with Mr Acland's approach. At this point, negotiations effectively broke down, and disagreement arose as to whether there had been a binding agreement or not.

[18] Member Appleton concluded that Ms Sharma's action of making a counter offer on behalf of PCA, as set out in paragraph [17](f) above, meant any previous offer made by Mr Acland on behalf of Enhanceskin was rejected and unable to be accepted subsequently. Ms Sharma's purported acceptance of the Enhanceskin offer was not binding as she had previously rejected it and it was no longer available to be accepted.

[19] What followed was a further offer from Enhanceskin, referred to at paragraph [17](i) above, which reflected the terms of its previous offer, that Ms Sharma had tried to accept on behalf of PCA, with an additional term relating to a limited

exception to the confidentiality provision. This exception would enable Enhanceskin to disclose the terms of settlement to the relevant forum that would hear any claim Enhanceskin might bring against a third party. Specifically, this was an exception that would enable Enhanceskin to pursue its HR agent - the HR agent having played a role in the events that gave rise to PCA's claim against Enhanceskin.

[20] PCA would not accept this proposed term and settlement was not concluded.

[21] The key point on the settlement was, the parties failed to agree terms because PCA would not accept a limited exception to the confidentiality provision. All other terms were agreed, including the financial aspects.

[22] There was no logical reason for PCA to refuse to agree to this additional term as it was of no consequence to her[7]. If confidentiality was important to PCA in order to protect her identity and avoid any publicity then that aspect remained protected notwithstanding the exception.

[23] Further, proceeding with her claim through the Authority, as she did, PCA would never have been able to preserve the confidentiality around any remedies she received or prevent Enhanceskin using my determination, albeit subject to non-publication of PCA's identity, to pursue its agent.

[24] I have considered the circumstances of this claim, the negotiation between the parties counsel and the irrational failure to by PCA to accept what appears to be a perfectly acceptable exception to a confidentiality provision. My conclusion is that PCA's decision not to agree the exception, and refuse to settle on this basis when all other terms were agreed, was simply a vindictive act because PCA did not want Enhanceskin to be able to pursue its agent. Rather paradoxically, continuing through the Authority enabled Enhanceskin to do just that.

[25] The short point is, this matter should have settled on the terms proposed by Enhanceskin largely because the financial terms were agreed and the confidentiality around the claim and terms of settlement was preserved sufficiently for both parties. There was nothing more to be gained by progressing this matter through the Authority. And whilst PCA did receive more in terms of remedies than what was agreed in the settlement this was not her motivation for refusing settlement and she

[7] There was no explanation provided by PCA in the email exchanges concerning the offer.

did not obtain what she wanted - being able to prevent Enhanceskin from pursuing a claim against its agent.

[26] So the refusal of an offer over one term which PCA could never hope to achieve in the Authority was unreasonable, and in my view, this means the daily tariff should be reduced to reflect the costs incurred by Enhanceskin from the refusal of the offer. This work includes preparation of witness evidence, preparation for the investigation meeting including submissions and attending the investigation meeting. I think a fair reflection of the value of this work is 60% of the applicable daily tariff.

[27] There are then two other factors to consider. First, PCA failed in her claim for a penalty to be imposed against Enhanceskin for an alleged breach of good faith. This warrants a further, modest, reduction in the daily tariff. The breach of good faith allegation made up only a portion of PCA's claim and I assess that value at 20% of the applicable daily tariff.

[28] Second, there is the interim application regarding settlement that PCA lost. Again, this warrants a reduction in the daily tariff. I think a fair reflection of the value of the work undertaken and costs that Enhanceskin would be entitled to is $500.00. This is to be reflected in a reduction of this amount from the daily tariff.

[29] Adding these three reductions together comes to $1,900.00, which means the daily tariff is reduced to zero.

[30] The final point to consider is the question of disbursements. PCA seeks the filing fee of $71.56. Given my analysis of PCA's conduct of this matter, particularly the unreasonable refusal of the offer made by Enhanceskin and my conclusion that the daily tariff should be reduced to zero, I conclude that in equity and good conscience I cannot award PCA the disbursement she seeks.

[31] So, after the analysis of the submissions put forward by both parties and the application of the appropriate reductions, I come to the unusual, but entirely appropriate position given the progression of this matter, that the daily tariff is to be reduced to zero. And, PCA is not entitled to her disbursements. As a result there is no order for costs for either party in this matter.

[32] As there is no order for costs for either party, and in particular for PCA, PCA's application to join Dr Orsbourn to these proceedings for costs purposes is redundant and does not need to be determined by me.

Determination

[33] There is no order for costs for either party in this matter.

[34] I do not need to determine the application to join Dr Orsbourn as a party to the proceedings and there is no additional order for costs relating to the application to join him.

Peter van Keulen
Member of the Employment Relations Authority