

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 666
3024233

BETWEEN SARA HUGHES PARRY
 Applicant

AND MAX BURGER LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Tim Carter, counsel for the Applicant
 Seth Fraser, counsel for the Respondent

Submissions Received: 5 August 2019 from the Respondent
 22 August 2019 from the Applicant
 23 August 2019 from the Respondent
 26 August 2019 from the Applicant

Date of Determination: 19 November 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] Sara Parry was granted legal aid and pursued several causes of action against her previous employer, Max Burger Ltd (MBL). The claims were not able to be substantiated and were ultimately dismissed. Costs were reserved.¹

[2] MBL has now applied for an order, pursuant to s 45(5) of the Legal Services Act 2011 (LSA), to have the Authority specify what order for costs it would have been made had Ms Parry not been protected by s 45(2) LSA against an order for costs.

[3] Notably, MBL does not allege there are exceptional circumstances such that the protection provided under s 45(2) should be extinguished. Rather, it says, that in the absence of proper evidence to support the claims, the case should not have

¹ *Parry v Max Burger Ltd* [2019] NZERA 399

proceeded. It asks the Authority to make an order that it would have ordered \$11,000 plus GST in costs – in effect the total sum of invoiced costs.

[4] Ms Parry does not oppose an order of the type requested, but submits the order should state no costs would have been ordered or, alternatively, that costs would have been reduced.

The law

[5] The Authority's discretionary power to award costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) is guided by a range of principles set out *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* by the Full Court.²

[6] The principles are now so well established I have not restated them in full. Relevant to this matter:

- costs generally follow the event;
- without prejudice offers may be taken into account;
- costs are not to be used as a punishment or an expression of disapproval for an unsuccessful party's conduct, although conduct that increases costs unnecessarily can be taken into account in inflating or reducing an award.

The Authority's tariff

[7] Accepting that costs generally follow the event, I am satisfied that it is appropriate for the Authority to specify what order it would have made in this case. At issue is the quantum of the order.

[8] The Authority currently applies a notional daily tariff set at \$4,500 for a one day investigation meeting. The investigation into Ms Parry's claims lasted a full day. Applying the daily tariff the starting point for an order in this matter is \$4,500.

Were costs unnecessarily increased?

[9] Both parties submit the others conduct unnecessarily increased costs.

² [2005] ERNZ 808

[10] Counsel for Ms Parry submits that MBL delayed resolution of her claims and, by inference, this increased costs. I am unwilling to accept costs would not be at issue between the parties had MBL attended mediation at first instance. I note that on receipt of Ms Parry's statement of problem the Authority directed the parties to mediation which they duly attended. I have no information which leads me to conclude the parties would have resolved their differences had mediation occurred at an earlier date.

[11] A number of unsworn statements written by past employees, no longer present in New Zealand, were lodged with the Authority in support of Ms Parry. However, the statements did not contain information relevant to the claims before the Authority.³ I am not persuaded any purported delay to the progress of the investigation by MBL impacted on the evidence Ms Parry was able to produce, or on her costs. Nor am I satisfied that MBL's failure to send wage and time records to Ms Parry's representative provides justification for a decrease to the tariff. It was apparent during the Authority's investigation that Ms Parry was in possession of payslips which provided her with information equivalent to that contained in her payroll records.

[12] I accept however that Ms Parry was required to arrange service of her statement of problem on MBL and some costs were likely incurred as a consequence. But no additional information quantifying the cost of that activity was furnished and I can give only limited weight to this submission.

[13] In contrast, MBL submits, to the effect, that Ms Parry conduct was marked by a diffuse approach towards the issues that required determination and the provision of evidence. I tend to agree. I accept it likely that MBL's costs were moderately increased in the lead up to the investigation meeting by the volume of correspondence sent on behalf of Ms Parry to MBL seeking its response, and a large quantity of documents lodged which required review despite these having had no apparent direct relevance to Ms Parry's claims.

[14] I note also that Ms Parry's claims altered during the course of the meeting which resulted in an adjournment and subsequent discussions between the Authority

³ As noted in the substantive determination; above at n1 [23].

and counsel. The length of the investigation meeting was increased as a consequence which I must find marginally increased MBL's costs.

Calderbank offer

[15] MBL refers also to a *Calderbank* offer of \$2,000 sent to Ms Parry's counsel more than 6 weeks' prior to when the investigation meeting was scheduled to begin and before evidence was exchanged. Whilst the offer was modest compared to the sum claimed, given the concessions Ms Parry made during the investigation regarding matters on which her primary claim relied and which she must be taken to have been aware of at the time the offer to settle was made, it was unreasonable of her to have rejected it without further explanation.

[16] Ms Parry would have been better off had she accepted the settlement offer, and MBL would have been spared the expense of defending the claims made against it. This is a factor which I have taken into consideration when determining the appropriate level of costs in this matter. However Ms Parry's refusal to accept the offer does not inevitably result in an award which would effectively provide indemnity costs for MBL. An award of that nature requires exceptionally bad behaviour to be evident, which was not apparent in this case.

[17] Taking into account the possibility of increased costs for Ms Parry to serve documents, alongside her rejection of a reasonable offer to settle and conduct which I find increased MBL's costs unnecessarily, an award of \$7,000 would have been appropriate.

Orders

[18] If Ms Parry's liability regarding costs was not affected by s 45(2) of the Legal Services Act, the Authority would have made an order requiring Sara Parry to contribute the sum of \$7,000 towards legal expenses incurred by Max Burger Limited to defend the claims against it.

Michele Ryan
Member of the Employment Relations Authority