

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 400
3173583

BETWEEN :AMANDA-denice: PRIDE
Applicant

AND CONSTRUKT ARCHITECTS LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: The applicant in person
Matthew Morrissey and Alison Maelzer, counsel for the
Respondent

Investigation meeting: On the papers

Submissions received: 10 July 2023 from the Respondent
25 July 2023 from the Applicant

Determination: 27 July 2023

COSTS DETERMINATION

[1] The respondent (C) has applied for a contribution to its costs from the Applicant (Amanda) in relation to defending the application she brought claiming unjustified dismissal to which I also investigated disadvantage in her employment. In my determination dated 21 June 2023 (my determination)¹ I dismissed Amanda's claims against C and struck out her claims against the four directors of C. The issue of costs was reserved.

¹ *Pride v Barker and ors* [2023] NZERA 325

[2] The parties have not resolved the issue of costs. C lodged and served submissions for costs. Amanda returned those submissions with red writing on each page saying 'No consent. No contract'. Nothing else was received from Amanda in response to C's costs submissions by the date due. I reserved my determination.

Costs principles

[3] Clause 15 of Schedule 2 of the Act empowers the Authority to order costs to any party as the Authority thinks reasonable. A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.²

[4] The Authority uses a notional daily tariff³ as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter. This tariff may then be adjusted upwards or downwards according to the circumstances of each case considering things like a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.⁴

C's submissions

[5] C submits that the Authority should consider an uplift from the usual tariff and seeks a contribution of half of the actual costs of \$39,024.10 plus GST incurred. I take this to be an uplift of \$19,512.05 plus GST (\$22,438.86). This is a significant increase to the normal tariff that would otherwise be applied. C seeks this significant uplift because in summary it submits:

- a. there was a 'Calderbank' offer and the claims were without merit;

² Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

³ The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 for the first day and \$3,500.00 for each additional day.

⁴ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

- b. additional work was required given the way in which Amanda engaged with the process and failed to provide clarity for her claims, and filed extensive irrelevant information;
- c. additional work was required in preparing for a two-day investigation meeting that was only a half day due to Amanda's approach at the investigation meeting;
- d. the wrong parties (the four directors of C) were named as respondents, and this required costs to be incurred for a strike out application.

[6] As noted above I received no submissions from Amanda in response to C's application for costs so I will consider costs against the above headings.

Assessment

[7] Firstly, I agree that C should have an order for a contribution to its costs. Amanda was unsuccessful in her claims. The matter was heard across a half day. That attracts a tariff portion of \$2,250.00 as a starting point. I will now consider whether an uplift from that starting point should be ordered.

Amanda's position

[8] Before considering C's submissions I note that ordinarily in a costs submission the person opposing costs, or the level applied for, may give an indication of their financial position and this may weigh against an award, or the level of an award sought. They may also provide me with other information to help me to understand the reason why they may have approached their claim in the way they did particularly if there are submissions (as here) about conduct causing extra unnecessary costs. Amanda has not provided me with anything that assists me about these things so they are not factors that I can take into account.

The 'Calderbank' letter and whether the claims had merit

[9] I am satisfied that Amanda received from C a 'Calderbank' offer⁵ dated 19 December 2022. This was emailed to her. She was given until the end of business on 16 January 2023 to respond. I accept that Amanda did not respond. I note the offer was sent to the same email that Amanda has continued to use during these proceedings. I note the submission for C that this letter was included in material that Amanda put before the Authority in the lead into the investigation meeting causing it to be removed due to its privileged status at that time. This supports that Amanda received the letter. I am satisfied she was able to have read it and considered its contents with considerable time given to do so.

[10] The offer was \$5,000.00 to bring an end to the matter and avoid both the 'time and costs' incurred should the matter proceed. It was appropriately marked 'without prejudice save as to costs' and gave a plain explanation of what that meant. The letter pointed out what I accept was the unmeritorious claim of wanting 'unrebutted affidavits' upheld and referred to the Authority's indications by that stage about the limit to its jurisdiction in relation to this. My determination also refers to having no jurisdiction to uphold these documents.⁶

[11] The Employment Court⁷ has observed that while 'Calderbank' offers are 'front and centre' for the Court when considering costs, the Authority's discretion is broader and sits within the context of a jurisdiction 'intended to be low level, costs effective, readily accessible and non-technical'. That case involved the Court considering as disproportionate an application for costs asking for an uplift of \$20,000.00 to the then one day Authority tariff of \$3,500.00.

[12] Considering all of the above including the Employment Court's guidance here, I find it appropriate C should have a costs' uplift of \$1,500.00 for Amanda's non acceptance of the reasonable Calderbank offer.

⁵ A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked 'without prejudice save as to costs' reserving the right to bring the offer to the Court's (or the Authority's) attention in relation to a later costs' application if the claim is not settled.

⁶ As above at [1] at paragraph [31]

⁷ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

Were additional costs incurred to warrant an uplift?

[13] I accept the submission for C that because Amanda simply wanted her ‘unrebutted affidavits’ upheld against each director of her employer (C), and for significant sums of money beyond those ordinarily claimed in this jurisdiction for grievances, these were claims without merit as should be evident from my Determination. I might consider that because Amanda was an unrepresented party, she may not have understood the process in the Authority or what was expected of her to progress her claims. However, she was provided the opportunity from at least the phone conference call stage onwards to address her claims against her employer C by way of the grievance process, and to provide evidence in relation to the test for justification under s 103A of the Act as set out in my Directions after the phone conference call.⁸ In other words, she was entitled to have had this type of claim investigated and the Authority reframed her claim to better investigate⁹. Amanda did not take up the opportunity provided to her to progress her claims more appropriately in this jurisdiction.

[14] The grievance matters were not legally complex for experienced counsel. However, I accept the submission for C that extra time was required due to Amanda’s above conduct and the filing of considerable irrelevant material that had to be gone through. This material included a return of any documents and communications sent to her including evidence lodged by the respondents all with nonsensical red writing written across it.

[15] I further accept that there was extra time incurred trying to formulate evidence for C from the ‘unrebutted affidavits’ which generally contained a difficult to follow narrative and had minimal references to what Amanda factually alleged happened in relation to her grievance. Without the further brief of evidence that she was directed to provide I accept that extra time for C would have been incurred to extrapolate from this material what was relevant to reply to in evidence so that I could investigate according to s 103A of the Act.

[16] C has provided invoices and narrative breakdowns of its costs and an estimate that the extra costs for the above likely amounted to \$3,496.28. It has reasonably been noted in

⁸ Directions of the Authority dated 22 August 2022.

⁹ Referred to at paragraph [12] of my Determination as relying on Employment Relations Act 2000, s 163(3).

submissions that it is not easy to extrapolate the extra time spent but I accept this amount as a reasonable estimate and order the same as an uplift for the unnecessary extra time incurred.

The wrong parties (the four directors of C) were named as respondents, and this required costs to be incurred for a strike out application

[17] There was no requirement on C or the four directors to apply to strike out the claims after the Investigation Meeting. This could also have been done by the Authority's own motion¹⁰. In the alternative the matter could have been dealt with simply as dismissing the claims against those parties. I am not persuaded this was an additional cost that supports an uplift.

Preparing for a two-day investigation meeting that was only a half day due to Amanda's approach to the investigation meeting

[18] I accept that there was likely preparation for a meeting that would include anticipation of questions to ask the other party and anticipation of questions back the other way. However, this is generally included in the tariff. The two days were set down as the second day in reserve. Before the investigation meeting it ought to have been clear there were only two briefs of evidence for the respondents and a high likelihood that only Amanda would be sworn or affirmed to provide her evidence because no other briefs were received from her. In these circumstances, I am not persuaded that it is a reasonable submission from C to consider that the matter was likely to have lasted beyond one day. I consider the above uplift for extra time awarded covers this aspect.

Summary

[19] While C has incurred significant costs, I refer again to the guidance from the Employment Court noted above at [11] whereby costs in this jurisdiction are modest due to its nature. Accordingly based on the above Amanda is to contribute:

¹⁰ Employment Relations Act 2000, s 221.

- a. \$2,250.00 for a half day investigation meeting
- b. \$1,500.00 because she did not accept a reasonable 'Calderbank' letter
- c. \$ 3,496.28 for extra unnecessary costs incurred

Order

[20] Within 28 days from the date of this determination :Amanda-denice: Pride is to pay Construct Architects Limited \$7,246.28 as a contribution to their costs.

Antoinette Baker
Member of the Employment Relations Authority