

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 388
5366667

BETWEEN SHERYL RITCHIE
 Applicant

A N D IDEA SERVICES LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Applicant
 Paul McBride, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 10 October 2012 from Respondent
 24 October 2012 from Applicant

Date of Determination: 31 October 2012

COST DETERMINATION OF THE AUTHORITY

- A. Ms Sheryl Ritchie is ordered to pay Idea Services Limited:**
- (a) \$4,000 towards its costs in respect of the substantive claims;**
 - (b) \$123.43 towards its disbursements;**
 - (c) \$200 costs in respect of this application.**

Employment relationship problem

[1] In a substantive determination dated 27 September 2012 the Authority held that Idea Services Limited's dismissal of Ms Sheryl Ritchie was justified. It further held that Ms Ritchie was disadvantaged by Idea's unjustifiable action in failing to fulfil its contractual obligations to appropriately address the potential hazard presented by a service user's behaviour. Ms Ritchie was awarded \$1,000 distress compensation for her unjustified disadvantage grievance.

[2] The parties were encouraged to agree costs, but that has not occurred. The respondent now seeks full indemnity costs.

The parties' submissions

[3] The respondent seeks full indemnity costs of \$11,100 being the costs it says it incurred after it made a *Calderbank* offer together with \$1,200 towards its pre-*Calderbank* offer costs, plus disbursements of \$657.58 which included counsel's travel expenses of \$493 and \$164.58 for copying and binding costs in respect of the joint bundle. The respondent also seeks \$500 for the costs of this application.

[4] The applicant submits that although the applicant only succeeded to a modest degree with her claims, she did establish that the respondent had failed to provide a safe workplace in that it had failed to follow its contractual obligations to deal with the hazards presented by a service user's behaviour.

[5] Mr Oldfield submits that was a significantly adverse finding to the respondent which also gives some guidance to the parties, as well as to the applicant's Union which was a party to the collective agreement, about the respondent's contractual health and safety obligations. Mr Oldfield submits that costs should therefore lie where they fall because each party had some measure of success.

[6] The respondent's *Calderbank* offer was dated 16 May 2012 and it was an offer without admission of liability to pay the applicant \$1,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) without any admission of liability and on a confidential basis as a full and final settlement of any claims she may have relating to her employment and its termination.

[7] Mr Oldfield submits that the applicant's success was greater than the *Calderbank* offer because it established the respondent's liability in a public forum. He says that in addition to receiving the same compensation offered in the *Calderbank* letter, the applicant also obtained a determination that the respondent had breached its contractual health and safety obligations in circumstances where the respondent had refused to admit liability for that. The determination is public so Mr Oldfield submits it gives guidance to the respondent on what it is required to do to keep its employees safe in future.

[8] Mr Oldfield submits the applicant's rejection of the *Calderbank* offer was not unreasonable because the respondent offered very modest compensation but did not offer to address the circumstances which had given rise to her complaint.

[9] Mr Oldfield also challenges the reasonableness of the costs incurred by the respondent. He claims it should not be including the costs of discovery in the costs claimed from the Authority on the basis it wrongly initially resisted disclosure of documents but then provided the same documents by consent subsequently. Mr Oldfield submits that reasonable costs would be closer to \$7,200 rather than the \$13,500 the respondent claims it spent.

[10] Mr Oldfield submits that if the Authority is minded to award costs then it should adopt the usual tariff based approach and that no adjustments should be made to the current notional daily tariff of \$3,500.

Costs' principles

[11] The Authority's power to award costs arise from Schedule 2, clause 15 of the Act. This confers a wide discretion for the Authority to award costs on a principled basis.

[12] The principles guiding the Authority's approach to costs is set out by the full court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v. Da Cruz*¹. Those principles are so well recognised that I do not need to restate them.

[13] The general principle is that costs follow the event, and there is no reason to depart from that in this case but the costs awarded do need to reflect that the respondent was not wholly successful and that the applicant did have some measure of success in respect of one aspect of her unjustified disadvantage claim. I find that the respondent as a predominantly successful party is entitled to a contribution towards its actual legal costs.

¹ [2005] 1 ERNZ 808.

Outcome

[14] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers' Union & Ors*² observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I therefore adopt that approach to costs in this matter.

[15] The Authority's investigation involved a one day investigation meeting. The parties also filed written submissions which were of assistance to the Authority when determining this matter.

[16] I have adopted the current notional daily tariff of \$3,500 as my starting point so must now consider whether there are any factors which would warrant adjusting that notional tariff.

Factors warranting decrease in notional tariff

[17] I consider that the applicant's success in respect of one aspect of her unjustified disadvantage grievance warrants a \$1,000 reduction to the notional daily tariff.

Factors warranting an increase to the notional tariff

[18] I consider the *Calderbank* offer is a factor which warrants an increase to the notional daily tariff. This without prejudice except as to costs offer was made two months before the Authority's investigation and prior to most of the hearing preparation being undertaken.

[19] The Court of Appeal in *Bluestar Print Group (NZ) Ltd v. Mitchell*³ encouraged a *steely* approach to costs where *Calderbank* offers had been unreasonably refused. I therefore consider it reasonable to increase the notional daily tariff by \$1,500 to reflect the *Calderbank* offer.

[20] Although the applicant was awarded the same amount of distress compensation offered by the respondent in its *Calderbank* letter, I consider she achieved elements of success over and above the settlement terms offered to her,

² [2011] NZEmpC 13.

³ [2010] NZCA 385 at [20].

namely a finding of liability and publicity. I therefore decline to award indemnity costs or to increase the notional tariff by more than \$1,500.

Orders

[21] After adjusting the notional daily tariff in a principled manner, I order the applicant to pay the respondent \$4,000 towards its actual costs. I also award the respondent \$200 costs to compensate it for the costs it incurred in respect of this costs application.

Disbursements

[22] I decline to award the respondent's counsel's travel disbursements of \$493 on the basis that it could have elected to instruct Auckland based counsel and avoided this cost. It was the respondent's decision to instruct out-of-town counsel so I do not consider it reasonable for the applicant to bear the cost of that.

[23] I do consider that the respondent should be reimbursed for the actual disbursements (as opposed to normal office based expenses) associated with the copying and binding of the joint bundle, but I consider it should only be reimbursed for 75% of the disbursements to reflect the applicant's partial success on one aspect of her claim. I therefore award the respondent \$123.43 disbursements.

Rachel Larmer
Member of the Employment Relations Authority