

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 303
5361884

BETWEEN CATHERINE TAN
 Applicant

AND MORNINGSTAR INSTITUTE
 OF
 EDUCATION LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: G Pollak, counsel for applicant
 P Pa'u, advocate for respondent

Memoranda received: 1 August 2012 from applicant
 18 July 2012 from respondent

Determination: 3 September 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 19 June 2012 I found Ms Tan was dismissed on the ground of redundancy but that the dismissal was justified.

[2] Costs were reserved, and the parties have filed memoranda on the matter.

[3] Mr Pa'u sought an order for a contribution in the sum of \$6,000 to the respondent's post-mediation costs of \$7,500, plus disbursements of \$250. He acknowledged this was higher than the amount that would be awarded if a notional daily tariff were applied,¹ but relied on the existence of a Calderbank offer and other attempts to resolve the matter.

[4] Mr Pollak accepted that as the losing party in the Authority it was appropriate for the applicant to contribute to the respondent's costs. He suggested a contribution of \$1,250 for an investigation meeting of a little over half a day.

¹ With reference to the principles in *PBO Limited v da Cruz* [2005] ERNZ 808.

The Calderbank offer

[5] The Calderbank offer was contained in a letter headed without prejudice save as to costs, dated 8 December 2011 (the first offer). The offer was made after the statement of problem had been lodged and after mediation had occurred. The offer was framed as a payment of \$2,000 under s 123(1)(c)(i) of the Employment Relations Act 2000, without admission of liability. It was expressed to be open for acceptance until 5 pm on Friday 16 December 2011.

[6] The offer was made again in an emailed message to Mr Pollak dated 25 January 2012, and remained open for acceptance until 29 February 2012 (the second offer).

[7] The offer was made for a third time in a message dated 11 April 2012 (the third offer), although the investigation meeting was scheduled for 16 April. Mr Pollak pointed out that the first offer was made after Ms Tan had incurred costs by lodging her statement of problem in the Authority and attending mediation. The offer was silent on costs, and did not appear to take these matters into account. Since the parties' statements of evidence were lodged in the Authority in March 2012 I infer that few if any additional costs had been incurred by either party between that time and the making of the second offer, although significant additional costs would have been incurred by the making of the third offer.

[8] Mr Pollak also acknowledged that the applicant had made a settlement offer. In the absence of any information to the contrary I infer he was acknowledging a statement in Mr Pau's memorandum to the effect that, on 7 December 2011, the applicant sought \$10,000 under s 123(1)(c)(i) plus a contribution to costs of \$2,000. Neither party commented on whether the offer was made without prejudice, or without prejudice save as to costs. Accordingly I note that the applicant made an offer, and that the parties were some distance apart in their attempts to settle.

[9] The respondent's first and second offers are relevant in that they included a monetary offer yet the applicant was ultimately unsuccessful in her claims, and the offers were made in a timely way when both parties' costs must still have been at low levels.

[10] By the same token, the offers do not address costs when the applicant had already incurred at least some costs. In addition the offers were expressed to be made with no admission of liability when there were issues of substance between the parties. The respondent should not have seen itself as an employer faced with an unmeritorious claim but who makes a pragmatic offer to avoid further litigation. There was a failure in communication between the parties over the purpose and outcome of the 12 August 2011 meeting, and conflicts in the evidence about the content of the discussion during the meeting. Each party also misunderstood in a material way the intentions of the other on 19 August 2011.

[11] As a result, although the applicant would have been better off financially if she had accepted the offer, the offer could have better reflected the genuineness of the issues between the parties.

Other relevant factors

[12] Mr Pa'u drew attention to the parties' efforts to agree on costs. Nothing in that information assisted with the present determination, and since some of the associated material was stated to be without prejudice I doubt the appropriateness of providing it in any event.

[13] Mr Pa'u also sought to argue that the applicant's conduct had added unnecessarily to costs. In that he discussed the extent of the need to prepare the respondent's case and respond to the remedies sought by the applicant, these activities were no more than would ordinarily be expected in litigation. I accept that the last minute withdrawal of the claim for reinstatement was unhelpful, but I do not accept that anything in that or the other matters raised added unnecessarily to the respondent's costs. Nor do I accept that anything in the applicant's claims was unreasonable to the point that the work required to prepare the response should be reflected in costs.

Order for costs

[14] A notional daily rate of \$3,500 is commonly applied for a one-day investigation meeting in the Authority. The meeting here took more than half a day

and there was no lunch break, so I approach it as a one-day meeting. Accordingly the starting point for assessing costs is \$3,500.

[15] The only question of substance affecting whether the notional daily rate should be increased or decreased concerned the offers to settle. For the reasons set out above I give the first and second offers weight, but I discount some of that weight for the reasons also set out. The overall effect, however, is that the notional daily rate should be increased.

[16] Taking into account all of the above considerations I conclude that the notional daily rate should be increased to \$4,500.

[17] There was no information regarding disbursements beyond that contained in an invoice to the respondent, and I make no further order in respect of them.

[18] Ms Tan is therefore ordered to contribute to the respondent's costs in the sum of \$4,500.

R A Monaghan

Member of the Employment Relations Authority