

proceedings, and her resistance to attempts to settle the matter, including a Calderbank offer.

[4] Ms Graamans opposes TDHB's application and says costs should lie where they fall. She submits that the application for a declaration was initiated by TDHB, that costs accrued by TDHB were excessive and if the meeting was unnecessarily prolonged then TDHB was the cause. She submits that each of these factors give grounds to find TDHB should bear its own costs.

Discussion

[5] The principles which guide the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*². In that case the Court referred to a number of principles which give guidance to the Authority when it considers costs. Those principles are now so well established that I have not restated these in full. Costs are usually considered against a notional daily rate which at the present time is \$3,500. However the Authority should not apply the tariff in a rigid manner and the rate can be adjusted upwards or downwards depending on the circumstances of the case. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.

Should costs follow the event?

[6] In essence the dispute before the Authority was about whether Mrs Graamans' terms of employment exempted her from performing certain duties. Mrs Graamans says the proceedings were generated and progressed by TDHB in the form of a declaration. Alternatively Mrs Graamans says the issue the Authority was required to determine is distinguishable from investigations requiring inquiry into misconduct. She says in each of these circumstances costs should lie where they fall.

[7] Mrs Graamans submits that the matter could have been easily resolved, the inference being that TDHB should not have filed at the Authority. I do not accept this aspect of her submissions or that there were "*no unsuccessful parties*" as a consequence of the Authority's determination. It was abundantly clear that the issue the Authority was required to decide was a matter that had been the subject of dispute between the parties for some considerable time. Mrs Graamans' submissions reveal

² [2005] ERNZ 808

that settlement would only have been likely if TDHB had agreed to adopt Mrs Graamans' position on matters. I accept TDHB's submissions that it was only until it had exhausted all reasonable means to resolve the matter that it lodged its statement of problem requesting a declaration.

[8] Historically where an issue between parties was a dispute as to terms and conditions, costs often lay where they fell, although the existence of a Calderbank offer frequently impacted on that appraisal. More recently the Court has held there is no special allowance as regards costs for any particular class of employment case³.

[9] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. In the circumstances of this matter I have not been provided with reasons which give cause to depart from the principle that costs should follow the event.

TDHB's costs

[10] I have considered the legal costs and disbursements of TDHB and whether its expenditure was reasonably incurred and if not, what proportion was reasonable. I appreciate that counsel for TDHB has disclosed full timesheets showing a precise breakdown of the work carried out over time. The documentation has assisted my assessment as to the reasonableness of the costs incurred. On the basis of what has been disclosed, it appears considerable preparation was undertaken and the work performed seems reasonable. I now turn to consider what would be a fair contribution to the actual costs that I have found were reasonably incurred.

Attempts to settle

[11] Counsel for TDHB refers to a Calderbank offer made nine days prior to the investigation. A Calderbank offer is one of the matters that the Authority can properly take into account in the exercise of its discretion in determining costs.

[12] In the present case it was the applicant, TDHB, who made the Calderbank offer. The letter was largely about the efficacy of the parties' employment relationship given Ms Graamans had reported in various documents filed with

³ *NZ Meat Workers Union v Affco NZ Ltd* [2012] NZEmpC 154

Authority that she no longer had trust and confidence in her employer. TDHB offered Ms Graamans an exit package. Mrs Graamans advised she did not wish to resign from her position and rejected the offer. I conclude that the offer made was primarily to resolve matters quite separate to the issues requiring determination. In these circumstances I have not taken into account the Calderbank offer.

Conduct of the parties

[13] TDHB refers to correspondence sent to Mrs Graamans relatively soon after lodging its statement of problem with the Authority whereby TDHB inquired whether Mrs Graamans would agree to have the matter determined on the papers. TDHB says the request was made to avoid an investigation meeting and to resolve the matter expediently. Mrs Graamans refused the invitation and indicated she wished the parties to be available for questioning if required by the Authority. I regard Mrs Graamans' preference was reasonable in the circumstances. The Authority is frequently able to dispose a matter "on the papers" where the matter is simple and there are no issues of factual dispute. While there were no complex legal or procedural issues that arose in the investigation I consider the Authority was assisted by the parties' attendance and in particular where, in this case, examination of historical evidence was required.

[14] Each of the parties allege that the other prolonged the duration of the Authority's investigation by introducing unnecessary evidence and information. TDHB referred to an additional lengthy directions conference and also to Ms Graamans' assertion of a personal grievance claim in an amended statement in reply. The matter of an alleged personal grievance was dealt with relatively efficiently and I am not satisfied that a second conference call increased costs to an extent where costs should be uplifted. I find it appropriate to allow some leeway to Ms Graamans' approach to the Authority's investigation given that she represented herself throughout.

[15] Each party provided evidence it considered important so as to support its respective position. While some evidence was not directly relevant to the issue the Authority was required to decide, I am unwilling to conclude that either parties' conduct should be reflected in an increase or decrease of costs in all the circumstances.

Determination

[16] I do not believe that the Authority would be justified in adopting an approach other than awarding the standard notional daily rate. This is a case where the applicant was successful. The meeting occupied a fulsome day. I consider it appropriate to order Mrs Graamans to contribute \$3,500 to TDHB's costs.

[17] TDHB claims disbursements of \$71.56 for a filing fee, office expenses of \$344.65, and witness expenses totalling of \$59.94. Claims for disbursements are limited to disbursements in the true sense of payment of money spent in order to obtain goods or services from a third party, as opposed to the expense of office overheads⁴. I regard TDHB's claim for office expenses is a component of counsel's cost of practice and does not warrant a separate assessment.

Summary of order

[18] I order Mrs Graamans to contribute to TDHB's costs the sum of \$3,500 plus \$131.50 in total for witness expenses the filing fee.

Michele Ryan
Member of the Employment Relations Authority

⁴ *Oldco PTI New Zealand Ltd v Houston EmpC* Auckland AC 18A/06, 6 June 2006.