IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 144
3020976

	BETWEEN	KRISTINE TROUSSELOT Applicant
	A N D	OXFORD BAPTIST CHURCH Respondent
	BETWEEN	OXFORD BAPTIST CHURCH Applicant
	AND	KRISTINE TROUSSELOT Respondent
Member of Authority:	Helen Doyle	
Representatives:	Peter Cahill, Advocate for applicant Stephen Corlett, Counsel for respondent	
Submissions Received:	2 October 2018, from Applicant 18 September 2018, from Respondent	
Date of Determination:	9 October 2018	

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Kristine Trousselot is ordered to pay to the Oxford Baptist Church costs in the sum of $8,500.

The substantive determination

[1] In the substantive determination dated 30 August 2018 the Authority found that the applicant was not unjustifiably constructively dismissed or disadvantaged by the actions of the respondent. The respondent was unsuccessful with its counterclaim.

[2] The Authority reserved the issue of costs and submissions have now been received from the applicant and respondent.

The respondent's submissions

[3] The respondent seeks costs in the sum of $12,000. It says that the way the applicant pursued her claim unnecessarily increased costs. Further that the applicant unreasonably refused to accept two "Calderbank offers" which meant further costs were unnecessarily incurred.

[4] Mr Corlett refers to the principles applicable to the Authority in exercising its discretion as to costs in *PBO Limited v Da Cruz*[1] and reaffirmed in *Fagotti v Acme & Co Ltd.*[2] He submits that although the respondent was unsuccessful with its counterclaim the majority of the hearing was required to investigate the applicant's claim and therefore it should be considered the successful party for cost purposes.

[5] Mr Corlett submits that as part of the constructive dismissal and disadvantage claims the applicant pursued no less than ten separate complaints whereas the Church only had one claim. The applicant, he submits, sought remedies in excess of $40,000 and the Church's claim was for $2,356.99. He submits that even though the counterclaim was unsuccessful there were still findings made of a breach.

[6] Mr Corlett states that applying the current daily tariff and the two days required for investigation, the starting point is $8,000. He submits that the majority of the applicant's allegations were either relatively historic and/or had very little prospect of success.

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1 *PBO Limited v Da Cruz* [2005] ERNZ 808
2 *Fagotti v ACME & Co Limited* [2015] NZEmpC 135

[7] Mr Corlett refers to a determination in the Authority where there was an uplift of tariff costs for the respondents having to defend and reply to a considerable number of wide ranging allegations where the applicant was ultimately unsuccessful.[3]

[8] Mr Corlett submits that both "Calderbank offers" were reasonable, very generous and had either been accepted, the additional costs of filing the evidence, preparing for and attending a two day hearing and filing subsequent submissions would not have been incurred.

[9] Mr Corlett refers to the Court of Appeal in *Bluestar Print Group NZ Group v Mitchell*[4]*:*

> The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences to costs.

The applicant's submissions

[10] Mr Cahill submits that some of the ten allegations made by the applicant were not referred to during the investigation meeting, and not considered in the determination. Mr Cahill refers to two of these matters and also submits that the counterclaim was actually for $4,207.75.

[11] Further he submits the "Calderbank offers" were not accepted because the applicant wanted the Senior Pastor to make an announcement in a newsletter or verbally at a service that there had been a misinterpretation by members of earlier comments in newsletters bringing into question the applicant's honesty.

[12] The applicant submits that this is a rare case where costs should lie where they fall and that the applicant has incurred costs of her own, and to add to those would create undue hardship as well as enduring a misconception that she was a thief in a small town.

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3 *Elisara v ALLIANZ New Zealand Limited* [2017] NZERA Auckland 366
4 *Bluestar Print Group v Mitchell* [2010] NZCA 385 at [18]

[13] It was also submitted that the grounds to raise costs do not exist and that the respondent had an opportunity to settle the dispute before costs increased and it is their actions that have caused costs to rise to the level that has been claimed.

Discussion and analysis

[14] Clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act) provides that the Authority may order any party to pay to any other party such costs and expenses as the Authority thinks reasonable.

[15] The applicant's submission is that the respondent is not entitled to seek costs. It is a fundamental principle that costs follow the event. I accept the respondent is the successful party taking into account the matters at issue before the Authority.

[16] The applicant submits that costs should lie where they fall. The reason advanced is that the applicant has incurred costs of her own and to add to those would cause undue hardship as well as enduring misconceptions about her actions in a small town. There is no information before the Authority of the applicant's ability to pay. I accept that the applicant will have incurred costs of her own and has concerns about misconceptions about her actions in the small town in which she lives. I do not find, in the exercise of my discretion as to costs, that those are matters that persuade me costs should lie where they fall.

[17] The exercise of the discretion to award costs is to be undertaken in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval however conduct that increases costs unnecessarily can be taken into account in inflating or reducing an award. "Without prejudice save as to costs" offers can be taken into account.

[18] The Authority has used a notional daily tariff approach as a starting point. The full Court of the Employment Court in *Da Cruz* did not consider there was anything wrong in principle with such an approach as long as it is not applied in a rigid manner and the Authority has regard to the particular characteristics of the case.[5] More recently in *Fagotti* the full Court of the Employment Court confirmed the value of a commonly applied and well publicised notional daily rate for costs in the Authority.[6]

[19] The daily tariff at the current time is $4,500 for the first day of an investigation meeting, and $3,500 for each subsequent day. This matter occupied two investigation meeting days and although the second day finished at 3.30pm submissions were timetabled. It is appropriate to start an assessment for costs on the basis of the daily tariff for two days which is $8000. I have then considered whether the tariff should be increased or reduced.

Was there conduct unnecessarily increasing costs?

[20] There were quite wide ranging complaints forming the basis of the unjustified constructive dismissal/unjustified disadvantage claims. The evidence lodged on behalf of the respondent to address the claims was reasonably succinct as were submissions and I am not satisfied that it added considerably to the time and costs to defend the claim. The respondent put most of its energies sensibly into the more recent matters before resignation and during the notice period.

[21] I was referred to another Authority determination by Mr Corlett where there was uplift on the basis of the wide-ranging allegations when the applicant was ultimately unsuccessful.[7] That matter was complex with the statement of problem being 400 pages in length with an application for urgency. The complexity of the matter was recognised by an additional uplift for two days preparation of $7000. I consider this matter is distinguishable because this matter does not have the same elements of complexity.

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[5] *PBO v Da Cruz* above n 1 at [46]
[6] *Fagotti v Acme* above n 2
[7] *Elisara v Allianz New Zealand Limited* [2017] NZERA Auckland 366

[22] It is not unusual in constructive dismissal claims to have evidence about a number of matters over an extended time period. I am not satisfied that this matter was more complex or wide ranging than other such constructive dismissal/unjustified disadvantage claims the Authority deals with so as to result in an increase to the costs. I am not minded to make an adjustment upwards on the basis of the conduct of the claim.

Counterclaim

[23] The respondent was not successful with its counterclaim. The majority of the time at the investigation meeting was occupied by the applicant's claim but the counterclaim did have to be addressed by the applicant in a statement in reply, evidence and submissions. I find a reduction of $1000 to the daily tariff is in order to reflect that the claim was unsuccessful.

Calderbank offers

[24] In an email dated 8 February 2018 headed "without prejudice save as to costs" Mr Corlett on behalf of the respondent set out an offer for payment of the sum of $11,450 made up of $8000 for compensation and $3,450 as a contribution towards costs. A draft settlement agreement was attached. That offer was rejected the following day.

[25] In a further email dated 13 February 2018 and headed "without prejudice save as to costs" Mr Corlett attached another draft settlement agreement which included payment of $15,000 compensation and costs in the sum of $3,450. That offer was rejected on 15 February 2018.

[26] The applicant says that the offer was refused because she wanted an announcement in Church to restore her reputation.

[27] Both settlement offers were made a reasonable time before the Authority investigation meeting set for 17 and 18 April 2018 and in advance of significant preparation costs.

[28] The Employment Court in *Mattingly v Strata Title Management Ltd* noted the "steely approach" endorsed by the Court of Appeal in respect of costs where an offer of settlement is unreasonably rejected. It stated that it has not been approved in relation to an assessment of costs in the Authority. It was stated that a somewhat diluted approach is appropriate in the Authority including in light of the Court's observation in *Da Cruz* that Authority awards will be "modest." It found it was clear that the effect of an offer is ultimately at the discretion of the Authority with regard to the circumstances of the particular case.[8]

[29] I accept there were non-financial elements that the applicant considered in declining the offer. These were concerns about reputational damage and the applicant wanted an announcement made in Church. That was not however a remedy that the Authority could grant. I find that the offers to pay compensation were both at a level that may be regarded as including an element of recognition of the applicant's concern.[9]

[30] It was clear from both offers that if rejected the respondent reserved its right to seek increased costs which it has now done. I find that the rejection of the offers by the applicant was unreasonable. As a result the respondent incurred additional costs in preparing for, and attendance at, an investigation meeting.

[31] I consider that there should be uplift to the daily tariff of $750 per day being a total of $1500. That is an award in favour of the respondent in the sum of $8,500.

Conclusion

[32] I find that an award of costs in the sum of $8,500 is fair and reasonable in all the circumstances.

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[8] *Mattingly v Starta Title Management* [2014] ERNZ 1 at [27]
[9] *Bluestar Print Group (NZ) Ltd v Mitchell* Court of Appeal [2010] NZCA 385 at [19]

[33] I order Kristine Trousselot to pay to the Oxford Baptist Church the sum of $8,500 being costs.

Helen Doyle
Member of the Employment Relations Authority