IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 528
3243479

	BETWEEN	OLIVIA VAN EEKELEN Applicant
	AND	MAXWELL JACKSON LIMITED Respondent
Member of Authority:	Antoinette Baker	
Representatives:	Ramses Hunt, counsel for the Applicant Robert Thompson, advocate for the Respondent	
Submissions Received:	16 August 2024 from the Applicant 28 August 2024 from the Respondent	
Date of Determination:	4 September 2024	

COSTS DETERMINATION OF THE AUTHORITY

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[1] I issued a determination on 19 July 2024[1] finding that Ms van Eekelen had been disadvantaged in her employment by the actions of the respondent (MJ). I awarded her $10,000.00 in compensation. Ms van Eekelen's claims that she had been unjustifiably (constructively) dismissed and that MJ had breached her employment agreement in relation to an availability of hours provision (and penalty sanction) were not successful.

[2] The parties were asked to resolve costs between themselves. Costs have not been resolved. Ms van Eekelen asks now for an award of costs based on the first day tariff of $4,500.00. MJ in reply says that there should be a reduction of $3,000.00 to consider Ms van Eekelen's 'mixed success' based on the greater part of her claim being

[1] *Van Eekelen v Maxwell Jackson Limited* [2024] NZERA 435.

unsuccessful. It also refers to a 'Calderbank' letter which it submits would, if it had been accepted, have left Ms van Eekelen better off.

[3] The Authority has the discretion to award costs after the event.[2] 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.[3]

[4] The Authority uses a notional daily tariff adjusting the tariff up or down as appropriate depending on the case. Such an adjustment may take into consideration a liable party's means to pay costs, settlement offers made by either party, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs. [4]

[5] The current tariff applied for a one-day Authority investigation meeting is $4,500.00. This amount is considered a starting point for assessing a reasonable contribution to the legal costs incurred by a party preparing for and taking part in an investigation meeting but generally not including preparation and attendance at mediation. The investigation meeting for the substantive matter here took a day. The starting point is therefore $4,500.00.

Should there be a reduction to the starting point?

Letter to settle

[6] I accept that the respondent made an offer to settle that was in the form of a 'Calderbank offer[5]' however it offered to settle matters with a payment of compensation of $5,000.00, half of the award made to Ms van Eekelen as a result of her grievance for disadvantage. With an award of costs at the tariff as a starting point ($2,000.00 was offered by the respondent) Ms van Eekelen is not now worse off even after reconciling her fees that have been provided to me in invoice copy. I do not accept this supports a reduction.

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[2] Employment Relations Act 2000, Schedule 2, clause 15.
[3] *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.
[4] https://www.era.govt.nz/determinations/awarding-costs-remedies
[5] An offer made by one party to settle the claim on terms. The offer is marked 'without prejudice save as to costs'. The purpose of a Calderbank offer is not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled.

Lack of success on all parts of the claims

[7] It is submitted for the respondent that I consider her matter was one that was largely not successful, in other words one of 'mixed success' to which the respondent successfully defended most of it. While there was time taken to investigate the factual matrix relating to the grievances, the same factual matrix and in particular the events of the last meeting led to a finding that Ms van Eekelen had been disadvantaged. I accept that there was much time spent considering and responding to the issue of whether the availability provision applied. However, even though I eventually found it did not apply, this was only after carefully considering the interpretation exercise before me which included hearing from the respondent that the agreement it provided contained a templated clause that did not in reality apply to Ms van Eekelen. In other words, I do not find this was a frivolous exercise that may lead me to conclude Ms van Eekelen's conduct unnecessarily increased the respondent's costs. To an extent the level of remedy reflects the outcome of her lack of success. Accordingly, I do not find it appropriate to adjust the one day tariff.

Order

[8] Maxwell Jackson Limited is ordered to pay Olivia van Eekelen the sum of $4,500.00 as a contribution to her costs.

Antoinette Baker
Member of the Employment Relations Authority