

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 132  
5583565

BETWEEN                      JUANITA VASZILYKO  
   Applicant  
  
A N D                              SOUTH PACIFIC MEATS  
   LIMITED  
   Respondent

Member of Authority:        David Appleton  
  
Representatives:              Philippa Tucker, Counsel for Applicant  
   Christine Pidduck, Counsel for Respondent  
  
Investigation Meeting:        On consideration of the papers  
  
Submissions Received:        30 May, 13 June & 19 July 2016 for Applicant  
   28 June & 26 July 2016 for Respondent  
  
Date of Determination:        9 August 2016

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1]     By way of a determination dated 15 March 2016<sup>1</sup> the issue of costs was reserved. The parties were to seek to agree how costs were to be dealt with between them. The parties have been unable to agree. I also reserved costs in the second determination dated 15 July 2016<sup>2</sup> which dealt with overtime and attendance payments that were due to the applicant. This determination disposes of the issue of costs in respect to both matters.

[2]     Ms Vaszilyko seeks an award of costs in the sum of \$8,686.47 in respect of the first matter, and \$439.47 in respect of the second matter.

---

<sup>1</sup>            [2016] NZERA Christchurch 31  
<sup>2</sup>            [2016] NZERA Christchurch 115

**The first matter**

[3] The Authority's investigation meeting in respect of the first matter took place over slightly less than two full days, although I shall treat the matter as having taken up to two full days, for the sake of simplicity.

[4] Ms Vaszilyko is in receipt of legal aid and is required to make a repayment out of the proceeds of the proceedings. Ms Tucker submits that the respondent failed to provide a timely response, or any response to the personal grievance letter, and did not make any offers of resolution at mediation. Ms Tucker submits that this failure unnecessarily and unreasonably protracted the proceedings.

[5] Ms Tucker submits that, based on the number of days it took to prepare for the investigation meeting, the costs incurred are modest as she reduced her hourly rate from \$270 to \$134, given that Ms Vaszilyko was in receipt of legal aid. Ms Tucker says that, therefore, the potential liability that the respondent faces is less than it would have done if Ms Vaszilyko had been privately funding her claim.

[6] In effect, Ms Tucker submits that the respondent should pay Ms Vaszilyko's costs on an indemnity basis.

[7] Ms Pidduck states that Ms Tucker had stated in correspondence to her dated 18 April 2016 that the applicant had incurred costs of \$9,977.40, which is different from that now sought. She also questions the "filing fee" of \$378.22 that is sought. On this latter point, however, that sum will be made up of the Authority's \$71.56 fee for lodging the statement of problem, together with the fee of \$306.66 for a full second day of investigation meeting.

[8] Ms Pidduck denies that there was conduct on the part of the respondent that unnecessarily increased costs. She objects to the reference by Ms Tucker to alleged conduct of the respondent during the mediation process and in the period leading up to the investigation meeting, as discussions were carried out under the cloak of a without prejudice and confidential mediation process. Ms Pidduck submits that an appropriate sum to award for the first matter is \$7,000, being the daily tariff rate for a two day investigation meeting.

## Legal principles

[9] The Authority's power to award costs is set out in para.15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

***15 Power to award costs***

*(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*

*(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[10] When determining how legal costs and expenses should be dealt with, the Authority must take into account the principles set out in *PBO Ltd v. Da Cruz*<sup>3</sup>. These principles include the following:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.

---

<sup>3</sup> [2005] 1 ERNZ 808

- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

## **Discussion**

[11] First, I accept that costs should follow the event, and that a costs award should be made in favour of Ms Vaszilyko. The starting point is the daily tariff which is currently \$3,500 per complete day of hearing, which results in a potential costs award of \$7,000. I must consider whether it is appropriate to uplift or in some other way vary this sum.

[12] As noted above, the applicant is effectively seeking an award of indemnity costs from the respondent. Indemnity costs are awarded only in exceptional circumstances. Those circumstances were summarised by the Employment Court in *Richard & Jennifer Adams t/a Untouchable Hair & Skin v. Shannen Brown*<sup>4</sup>. The Court held that indemnity costs were appropriate where a party had acted “vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding”. The threshold for such an order therefore requires exceptionally bad behaviour.

[13] I am satisfied that the same principles should apply to the assessment of costs in the Authority.

[14] There is absolutely no evidence to suggest that the respondent behaved exceptionally badly. The main plank of Ms Tucker’s argument is that, apparently, no offer was made to settle by the respondent to the applicant. However, it is open to the applicant to make a “without prejudice save as to costs” offer and to invoke that at the costs stage in the case of an unreasonable refusal to accept such an offer. Whilst there is a suggestion in Ms Pidduck’s submissions that Ms Tucker may have made a without prejudice save as to costs offer, no details about such an offer have been made available to the Authority by either counsel. Therefore, if such an offer was made, the

---

<sup>4</sup> [2016] NZEmpC 13, at [44]

Authority is simply unable to assess whether the respondent's refusal to accept such an offer was unreasonable or not.

[15] Whilst there was a reasonable amount of factual evidence that the Authority had to consider in this matter, it was certainly not significantly complex. Nor were the legal issues that needed to be examined. Therefore, I do not accept that indemnity costs should be awarded to Ms Vaszilyko, nor that factual or legal complexity justifies an uplift in the daily tariff.

[16] Ms Tucker's point that, had Ms Vaszilyko not been legally aided, the respondent would be facing a higher claim, is not relevant as the Authority must assess what costs have actually been incurred, and whether they are reasonable. I do not disagree that the sum of \$8,686.47 appears to be eminently reasonable in light of the work that I presume Ms Tucker would have had to have done. That finding, in itself, does not justify an uplift, however.

### **Conclusion**

[17] Having established that costs should follow the event, and that a contribution should be made to Ms Vaszilyko's costs based on the Authority's daily tariff, and having further found that there appears to be no valid basis upon which to increase the sum of \$7,000 in respect of a two day investigation meeting, I find that this is the sum that the respondent should pay. In addition, the respondent should refund to Ms Vaszilyko the lodgement fee of \$71.56 and the fee of \$306.66 in respect of the second investigation meeting day.

### **The second matter**

[18] This was determined on the papers, after the receipt of written submissions from the parties' counsel. I found that the respondent was in agreement with Ms Vaszilyko's calculation of overtime, and that its calculation of her entitlement to attendance allowance was greater than that sought by her. The parties disagree as to whose fault it was that agreement could not be reached earlier, without the need for the Authority's intervention.

[19] In such circumstances, it would not be just to award costs against the respondent. I therefore order that costs should lie where they fall in respect of the second matter.

**Orders**

[20] I order that the respondent pay the following contribution towards Ms Vaszilyko's costs:

- (a) The sum of \$7,000.00; and
- (b) The further sum of \$378.22.

David Appleton  
Member of the Employment Relations Authority