IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 90
3027492

	BETWEEN	MARIANNE VENEKAMP Applicant
	A N D	SOUTHERN FARMS NZ LIMITED Respondent
Member of Authority:	David Appleton	
Representatives:	Damien Pine, Counsel for Applicant Sarah McKenzie, Counsel for Respondent	
Submissions Received:	28 January 2019 from Applicant 15 February 2019 from Respondent	
Date of Determination:	20 February 2019	

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

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[1] By way of a determination dated 15 October 2018[1], the Authority found that Ms Venekamp had been unjustifiably constructively dismissed. She was awarded remedies totalling $40,000. Costs were reserved.

[2] The parties have been unable to agree how costs should be disposed of, and Ms Venekamp seeks an order from the Authority for a contribution towards her costs from the

[1] [2018] NZERA Christchurch 150

respondent. Whilst the parties' submissions have been lodged after the timeframe set out in the substantive determination, I give them leave to do so.

[3] Mr Pine for Ms Venekamp submits that there should be an uplift in the contribution to be made towards her costs, for two main reasons:

a. The approach of the Respondent in relation to settling the matter prior to the Investigation Meeting; and

b. Additional costs incurred by Ms Venekamp "due to the respondent's untenable defence and inconsistent approach between his statement in reply and evidence in the Investigation Meeting".

[4] The Authority's power to award costs derives from clause 15 of Schedule 2 of the Employment Relations Act 2000, pursuant to which the Authority may order any party to a matter to pay to any other party such costs and expenses as it thinks reasonable. The Authority applies the principles set out in *PBO Ltd v Da Cruz*[2] in fixing costs. It is not necessary to set those principles out in full here, as they are well known.

The starting point

[5] The starting point is the application of the Authority's daily tariff, which is $4,500 for the first full day of the investigation meeting. The investigation in Invercargill lasted four hours. That gives a starting point of $3,000, as submitted by Ms McKenzie. Should there be an uplift applied to this sum?

[2] [2005] 1 ERNZ 808

The respondent's approach in settling the matter

[6] A week before the investigation meeting, the Authority received an email from the respondent's representatives to say that the parties had "come to an agreement to settle the matter". Mr Pine says that Ms Venekamp incurred $1,155 plus GST by her representatives addressing the proposed settlement matters with the respondent's solicitor, and then a further $600 plus GST to determine whether there had been an enforceable offer and acceptance of terms of settlement.

[7] A case management conference call took place on 3 August 2018 to discuss whether the investigation meeting should be adjourned to give the respondent time to sign off the settlement agreement. It was decided that it should not be. I also gave the parties the chance to discuss matters without prejudice prior to the investigation meeting starting on 8 August 2018.

[8] I do not know exactly what occurred to prevent the settlement, but infer from Mr Pine's submissions that he blames the respondent. I do not accept that it is necessarily reasonable to award costs to a party on the basis of an abortive attempt at settlement. However, even if it were, without knowing exactly what happened in the settlement negotiations, and why it happened, I cannot safely apportion any blameworthy conduct to the respondent which could be said to be responsible for increased costs incurred by Ms Venekamp. Settlement negotiations often break down for a myriad of reasons, and often close to the investigation meeting. That fact alone cannot justify an uplift in the respondent's cost contribution. I therefore decline to uplift the $3,000 for this reason.

The respondent's untenable defence and inconsistent approach

[9] It is true that the respondent stated in its statement in reply that it had terminated Ms Venekamp's employment in accordance with a 90 day trial period. However, the narrative in that statement in reply also stated that Ms Venekamp had said that she "would rather stop working". The evidence of Mr Haas, on behalf of the respondent, contained in his brief of

evidence, which was served and lodged by 20 July at the latest, was that the employment had ended by mutual agreement. In his oral evidence, he had said that Ms Venekamp had resigned.

[10] Whilst the details of the respondent's evidence had evolved somewhat over time, and its case as pleaded in the statement of reply was confusing and somewhat contradictory, it had never radically changed, and the evolution was not sudden. Mr Pine would have been alerted from the start that the respondent was both trying to rely upon a trial period and arguing that it had not dismissed Ms Venekamp.

[11] It is often the case that evidential threads have to be teased apart, and then the law applied to the picture that eventually emerges. That is part of the investigatory process. It is commonplace for different, sometimes contradictory fact scenarios to have to be entertained, and parallel arguments mustered in response. An Authority investigation is a dynamic process, and representatives need to be able to keep up with the emerging picture.

[12] Mr Pine did that admirably, but his success in doing so does not justify an uplift in costs. The investigation was not significantly more complex than many, as is demonstrated by the fact that it lasted only four hours.

[13] I would add, for the avoidance of doubt, that the fact that Ms Venekamp succeeded "on all facets of her claim" as Mr Pine put it, also does not justify an uplift. That success entitles her to a contribution towards her costs, but not more.

Conclusion

[14] Ms Venekamp is entitled to a contribution towards her legal costs, but not to an uplift. She is therefore entitled to receive $3,000 from the respondent.

Order

[15] I order the respondent to pay to Ms Venekamp the sum of $3,000 as a contribution towards her costs, such sum to be paid no later than 14 days from the date of this determination.

David Appleton
Member of the Employment Relations Authority