IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 128
5398115

	BETWEEN	WENDY VOLLMER Applicant
	AND	THE WOOD LIFECARE (2007) LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Nicole Ironside, Counsel for Applicant Jeff Goldstein and Linda Ryder, Counsel for Respondent
Costs submissions received:	From the applicant on 23 May 2013 From the respondent on 27 May 2013
Determination:	28 June 2013

COSTS DETERMINATION OF THE AUTHORITY

A. The Wood Lifecare (2007) Limited is to pay Wendy Vollmer $19,250 for her legal costs.

B. The Wood Lifecare (2007) Limited is to pay Wendy Vollmer $250.00 for legal costs of the costs application.

C. The Wood Lifecare (2007) Limited is to pay Wendy Vollmer $1226.64 for the hearing fees charged by the Authority.

D. The Wood Lifecare (2007) Limited is to pay Wendy Vollmer the filing fee of $71.56.

[1] On 13 November 2012 I issued an interim determination reinstating Ms Vollmer to her role as charge nurse of the rest home and infection control co-ordinator. On 23 November 2012 I issued a determination ordering disclosure by The Wood of certain documents. On 26 November 2012 Member Doyle issued a

determination that certain documents were without prejudice communications and should not be seen by me.

[2] On 26 April 2013 I issued a determination that Ms Vollmer had been unjustifiably disadvantaged and unjustifiably dismissed. I did not find that Ms Vollmer should be reinstated to her former position. I found that Ms Vollmer's behaviour in relation to the Infection Control Policy meant that remedies should be reduced by 25%. Therefore, I ordered that The Wood pay her wages and Kiwisaver entitlements for a period of 27 weeks after her dismissal and $9,375 for humiliation, loss of dignity and injury to her feelings.

[3] The interim reinstatement hearing took place over half a day on 31 October 2012. The substantive hearing took place over five days on 27, 28 and 29 November 2012 and 30 and 31 January 2013.

Applicant's claim

[4] Ms Ironside has applied for a contribution to Ms Vollmer's legal costs and the full cost of disbursements incurred in relation to the three determinations in which Ms Vollmer was successful - the determination dated 13 November 2012 granting interim reinstatement, the 23 November 2012 determination about disclosure and the substantive determination of 26 April 2013.

[5] Ms Ironside says that the applicant and the respondent were equally successful in the determination about admissibility of evidence (26 November 2013) and she has not applied for any costs in relation to that.

[6] Ms Ironside submits that the respondent should pay 80% of the legal costs of $37,149.06 (excl. GST), which does not include costs for the internal investigation, the suspension, the trespass order, the mediation and the nursing council complaint. She also submits that disbursements of $674.00 should be paid.

[7] Ms Ironside submits that more than the usual daily tariff rate of $3,500 per day should be applied because the respondent put the applicant to unnecessary additional costs.

[8] Ms Ironside submits in the alternative that the usual daily tariff rate of $3,500 per day of investigation meeting should be increased to $5,000 a day or that a daily tariff rate of $3,500 should be applied to nine days – being two days for the interim reinstatement meeting, six days for the substantive hearing and one day for the

interlocutory application of discovery and the preparation of legal submissions for both the interim and substantive hearings as well as the application for costs – for which a bill of $2,903.75 has been rendered (including disbursements and GST).

[9] Ms Ironside submits that the costs awarded should be more than $3,500 per day because:

- the matter was complex with three separate allegations of misconduct made against Ms Vollmer,
- the fact that the respondent did not tell the applicant that it had filled her former position with a permanent appointee until after the applicant had prepared and provided evidence to establish her remedy of reinstatement,
- the summary suspension, the involvement of the police, the issuing of the trespass notice and the successful application for disclosure increased costs,
- Ms Vollmer was completely vindicated of all allegations and she needed to proceed to repair her reputation,
- Ms Vollmer is of limited means and has not been able to find alternative employment.

[10] Ms Ironside also submits that there is no basis for reducing costs because Ms Vollmer was unsuccessful in being permanently reinstated or because of her contributory behaviour, particularly since the contributory behaviour has already resulted in reduced remedies.

Respondent's submissions

[11] The respondent submits that each party should bear its own costs or alternatively that there are special circumstances that should reduce costs from those calculated on a daily tariff basis. The specific factors that should reduce costs are:

- The case was conducted in a way that unnecessarily extended hearing time by calling unnecessary witnesses such as Dr Brooke, Dagmar Rance, Lois Schwass and Dr Hilson,
- Ms Vollmer refused to answer questions in a straightforward manner thus prolonging the proceedings,

- the applicant sought unnecessary documents through an interlocutory application and then failed to refer to them,
- the applicant was only partially successful in the interlocutory application and the respondent was also partially successful,
- the respondent was successful in its application to remove prejudicial material from the bundle and is entitled to a costs award for that application,
- there is no evidence that the costs claimed were reasonably incurred in the absence of a proper record of costs, the time spent or the hourly rate charged,
- the applicant failed to obtain permanent reinstatement,
- the applicant failed to beat its own "without prejudice save as to costs offer".

[12] On 16 August 2012 Ms Ironside made a without prejudice save as to costs request to settle the matter. She offered that Ms Vollmer would voluntarily resign and asked for $30,000 in compensation, nine months of salary. Ms Vollmer's legal costs to that date were $4,975 excluding GST and disbursements. There were a number of other requests made. That offer was not accepted by The Wood.

[13] The ultimate amount recovered by Ms Vollmer was approximately 55% of the amount she had requested to settle.

[14] The respondent suggests that the effect of that offer must be that the applicant is not entitled to recover any costs.

[15] Mr Goldstein submits that if costs are awarded to the applicant then the total hearing time ought not have been more than three days including the interim reinstatement and so the total awarded should not exceed $10,500.

The law on costs

[16] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act. Costs are at the discretion of the Authority.

[17] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party.

[18] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and were outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[1] a judgment of the Full Court of the Employment Court. The Court in the *Da Cruz* case also noted that in exercising its discretion the Authority frequently judges costs against a notional daily hearing rate. That notional rate is currently $3,500 per day.

[19] Costs must be reasonable and costs awards are generally modest. Another principle set out in *Da Cruz* is that without prejudice save as to costs offers can be taken into account in setting the amount of costs.

The 'without prejudice save as to costs' request to settle

[20] A true Calderbank offer is an offer to settle made by the respondent to the applicant once litigation proceedings have been filed. If the respondent makes a reasonable offer to settle that is rejected by the applicant who then goes on to recover less than the offer the existence of the offer can be taken into account to reverse the usual flow of costs. That means that a successful applicant may not recover any legal costs from the respondent or may even be required to pay costs to the respondent. However, in this case the without prejudice except as to costs request was an attempt to negotiate an exit package made by the applicant herself prior to any proceedings being filed. I consider that there is a difference between a reasonable Calderbank offer made by the respondent to settle litigation and a request made by the applicant prior to being dismissed which she ultimately did not meet or beat in the Authority .

[21] I do not agree that the applicant's without prejudice save as to costs request operates to negate any contribution to her costs from the respondent. I also consider that Ms Vollmer was seeking vindication of her professional reputation which was at least partially achieved by my determination, despite her not being reinstated.

[22] I agree with the respondent's counsel that I cannot take into account without prejudice offers the respondent made to the applicant as they were not made "save as to costs" but were entirely without prejudice and the respondent has not agree that privilege is waived.

[1] [2005] ERNZ 808

Was the hearing unnecessarily protracted due to either party's conduct?

[23] I do not agree that the applicant called unnecessary witnesses such as Dr Brooke, Dagmar Rance, Lois Schwass and Dr Hilson. I found these witnesses relevant. In any event these witnesses took very little time out of the 5 days.

[24] Ms Vollmer wished to be reinstated. I do not consider that the respondent having appointed another employee to Ms Vollmer's previous position unnecessarily increased her legal costs. Had I decided that she should have been reinstated on a permanent basis the problem of the new employee would have been one that The Wood had to resolve, not Ms Vollmer through her legal representative.

[25] I do not consider that the issues of the suspension, the police involvement and the trespass notice are factors that should lead to an increase of the daily tariff. In any event, Ms Ironside says that costs related to these matters have not been claimed.

[26] I agree that Ms Vollmer was less than straightforward in answering questions but I do not consider that unnecessarily increased costs so that the daily tariff should be decreased.

[27] I do not agree that the applicant sought unnecessary documents in the interlocutory proceeding. I found the documents relevant and useful. The applicant may not have referred to them during the investigation meeting but the respondent did refer to some of them, to useful effect.

The effect of the two interlocutory matters

[28] The applicant was mostly successful in the application related to discovery of documents. The respondent was mostly successful in having without prejudice documents withheld from the Authority's view.

[29] I consider that both parties should be entitled to $250 for their success in those applications. However, as those amounts cancel each other out I do not award either amount.

Were the costs incurred by the applicant reasonable?

[30] This is an aspect I need to take into account in exercising my discretion. The Authority's support officer asked Ms Ironside for her hourly charge out rate and also whether the costs claimed include time spent at mediation. Ms Ironside's reply was that her hourly rate was $250 and that no costs related to mediation had been claimed.

[31] I consider that the hourly rate was reasonable.

Determination

[32] Ms Vollmer was successful, although not entirely. Therefore the starting point for my consideration is that the hearings took 5.5 days which at $3,500 per day would give an amount of $19,250. The applicant has provided reasons it considers I should increase that amount. Conversely the respondent suggests a number of reasons that I should decrease that amount.

[33] I have considered the parties' arguments and the relevant principles set out in *Da Cruz*. I do not consider that the matter was unduly complex merely that both parties doggedly defended their positions. There are no factors that I consider should increase the daily tariff. Also there are no factors that should decrease the daily tariff approach.

[34] I find that the respondent should pay a contribution of $19,250 to Ms Vollmer's legal costs.

[35] Ms Vollmer has also been charged a fee of $1226.64 by the Department of Labour for the provision of four hearing days at a cost of $153.33 per half day. The respondent must pay that amount to Ms Vollmer, as well as the filing fee of $71.56.

[36] The other disbursements claimed are not disbursements in the true sense being money paid to a third party or actual out of pocket expenses. They are normal office overheads and as such it is not appropriate for the respondent to contribute to these.

[37] Ms Ironside has provided a copy of an invoice of costs incurred for preparing submissions on the application for costs. I consider the respondent should pay a reasonable contribution of $250.00 towards the costs incurred for the costs application.

Christine Hickey
Member of the Employment Relations Authority