

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 72
5598926

BETWEEN

MARSHA WHAIAPU
Applicant

AND

P & W PAINTERS LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Linda Ryder, counsel for the applicant
Not represented

Costs submissions received: From the applicant on 28 February 2017
No submissions from the respondent

Determination: 10 May 2017

COSTS DETERMINATION OF THE AUTHORITY

P & W Painters Limited must pay Marsha Whaiapu a total of \$8,278.22, made up of:

- (a) \$7,900.00 towards her legal costs;**
- (b) \$306.66 for hearing fees; and**
- (c) \$71.56 for the filing fee she paid to lodge her claim.**

[1] On 8 February 2017, I issued a determination finding that P & W Painters Limited (PWP) unjustifiably constructively dismissed Ms Whaiapu and awarding her remedies.

[2] I reserved costs and set a timetable for submissions. I advised the parties to try to agree on costs between them. If that was not possible, I allowed the party seeking costs 28 days to lodge submission on costs and the other party 14 days to lodge any submissions in opposition.

[3] On 28 February 2017, Ms Ryder for Ms Whaiapu lodged her costs submissions. She sent a copy to Ms Drewitt, who was PWP's lawyer at the investigation meeting. However, on 7 March 2017, Ms Drewitt advised the Authority that she no longer acted for PWP.

[4] On 3 April 2017, the Authority had not received any response to Ms Ryder's submissions from PWP. The Authority officer sent an email directly to Mr Pitches, the director of PWP, which enclosed Ms Ryder's costs submissions and gave him until 10 April 2017 to make a response. As at 10 May 2017, the Authority has not received any submissions on costs from Mr Pitches.

[5] I have proceeded to make my determination after only hearing from one party because I am confident that PWP has had an adequate opportunity to respond and has chosen not to do so.

The application for costs

[6] Ms Whaiapu claims total costs and expenses of \$12,378.22, being \$12,000 costs, the filing fee of \$71.56 and hearing fees for two half days at \$153.33 per half day.

[7] The meeting took 1.5 days, with a further half day to hear submissions.

The law

[8] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000.

[9] The principles the Authority applies are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.¹ In *Fagotti v Acme & Co Limited*,² the Employment Court recently affirmed these principles.

[10] Costs principles include:

- a. A discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.

¹ [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

² [2015] NZEmpC 135

- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case-by-case basis.
- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct that 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. 'Without prejudice' offers can be taken into account.
- h. Awards of costs will be modest, and must be reasonable.
- i. Frequently costs are judged against a notional daily rate.
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.
- k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

[11] The investigation meeting lasted two days.³ The daily tariff, at that stage, was \$3,500. Therefore, the starting point for my consideration is \$7,000.

Applicant's submissions

[12] Ms Ryder submits that there should be an uplift in the daily tariff to \$12,000 because of the Calderbank offer made by Ms Whaiapu on 25 August 2016. Ms Whaiapu offered to settle for \$9,000 in compensation and legal costs of \$3,500 plus GST.

[13] The offer was open for acceptance until 2 September 2016, at least 6 weeks before the investigation meeting.

[14] I awarded Ms Whaiapu a little over \$21,000. PWP did not accept the Calderbank offer. It did not respond to the offer.

[15] I am satisfied the Calderbank offer was a reasonable and valid offer. It is also clear that in failing to accept it both PWP and Ms Whaiapu have incurred greater legal costs. If PWP had accepted the Calderbank offer, it would have saved itself and Ms Whaiapu significant legal costs.

[16] Ms Ryder submits that the actual legal costs incurred after the Calderbank offer expired are \$19,500 plus GST. However, she does not ask for indemnity costs and instead claims that I should increase the tariff by \$5,000, or \$2,500 per day, to \$12,000.

[17] Recently in *Booth v Big Kahuna Holdings Limited*⁴ Judge Inglis wrote:

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...⁵

[18] Judge Inglis' further like comments in *Stevens v Hapag-Lloyd (NZ) Ltd*⁶ were cited with approval by the Full Court of the Employment Court in *Fagotti v Acme & Co Ltd*:⁷

...Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's assessment of an appropriate notional daily rate...) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to ... apply significant legal resources to the pursuit or defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate ...⁸

⁴ [2015] NZEmpC 4

⁵ *Booth*, at [15]

⁶ [2015] NZEmpC 28

⁷ [2015] NZEmpC 135, at [107]

⁸ *Stevens*, *ibid*, at [94]-[95], footnotes omitted.

[19] I have taken those comments into account, as well as the Calderbank offer, and consider that it is appropriate to increase the daily tariff by \$300.00 to a total of \$7,600 for the two-day (equivalent) meeting.

[20] I also accept that in the absence of any engagement from PWP to discuss costs Ms Ryder needed to make a written submission on costs. In this case, the submission was relatively straightforward. I consider costs of \$300 to be a reasonable contribution for PWP to pay towards the preparation of this submission. Therefore, PWP must pay \$7,900.00 towards Ms Whaiapu's legal costs.

[21] The Authority has also charged Ms Whaiapu \$306.66 in hearing fees for the second equivalent day of hearing. That is also a cost that PWP must pay Ms Whaiapu.

[22] The total of the costs that PWP must pay is \$8,278.22.

Christine Hickey
Member of the Employment Relations Authority