IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 206
5283526

BETWEEN	BRENDA BENGE Applicant	
A N D	CANTERBURY LIMITED Respondent	COLLEGE

Member of Authority:	Helen Doyle
Representatives:	Phil Butler, Advocate for Applicant Penny Shaw, Advocate for Respondent
Submissions Received	23 July 2012 from Applicant 14 August 2012 from Respondent
Date of Determination:	24 September 2012

COSTS DETERMINATION OF THE AUTHORITY

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[1] In my determination dated 9 July 2012, I found in favour of the applicant that she was both unjustifiably disadvantaged and dismissed. The Authority made awards to the applicant in the combined sum of $18778.54. The issue of costs was reserved and the Authority now has submissions from Mr Butler and Ms Shaw.

The applicant's submissions

[2] Mr Butler refers to the leading Employment Court judgment on costs in *PBO Ltd v. Da Cruz* [2005] ERNZ 808 and the reference at [44] to the basic tenets when considering costs which the Authority has held to since its inception. The Court considered these principles appropriate to the Authority and consistent with its functions and powers. Mr Butler acknowledges that costs are often awarded on a

tariff approach in the Authority but submits that approach should not be applied in a rigid manner without regard to the particular characteristics of the case.

[3] Mr Butler sets out the actual GST exclusive costs incurred by the applicant as $10654.55. This figure includes costs for mediation of $954. Mr Butler seeks an award of costs on behalf of the applicant in the sum of $7,219 together with reimbursement of a filing fee of $70. The costs award claimed is made up of $5,149 being costs claimed on an indemnity basis following the respondent's rejection of a Calderbank offer for less than was ultimately awarded and a further sum of $2000 in relation to earlier costs. It excludes the costs of mediation and GST.

[4] Mr Butler submits that there should be an increase to the usual daily tariff for a one day meeting because of the rejection of the Calderbank offer. In relation to that he submits that the offer should have been accepted because it was about 36% of the claim and provided a reasonable contribution to costs and the applicant had a very high chance of success. Further Mr Butler submits that the respondent's conduct in maintaining that Ms Benge was a casual employee; that it did not employ permanent employees with guaranteed hours and that Ms Benge was not dismissed added to the preparation time required. Further that the respondent failed to comply with the Authority direction in respect of witness statements and provision of documents which required the Authority to intervene.

The respondent's submissions

[5] Ms Shaw accepts that the principles in *Da Cruz* are relevant to be considered and that currently the usual practice is to award a daily tariff of $3,500 per hearing day. Ms Shaw submits that genuine attempts were entered into by the parties to resolve this matter without the need for an investigation meeting. She submits that at all times the respondent believed it had a casual relationship with the applicant and that this reflected the usual nature of relationships in the industry. The respondent believed, in terms of the dismissal, that it did not have to offer further work and does not accept that these positions it took had little chance of success.

[6] Ms Shaw submits the matter occupied a day's hearing time and was not factually or legally complex that would justify an award over the usual daily tariff. Further, she submits that the parties owe it to each other to try to reach settlement and that costs prior to or relating to mediation should not be awarded and that delay in this

matter was caused by the Christchurch earthquake and that the respondent's premises were in the red zone and inaccessible and the respondent should not be punished for these circumstances.

Determination

[7] Costs generally follow the event and there is no good reason in this case why an award of costs should not be made in the applicant's favour. The investigation meeting took a day and the daily tariff is now recognised as $3500 per day. The tariff can be adjusted if required.

[8] Costs are not to be used as a punishment or expressions of disapproval however conduct which increased costs can be taken into account in inflating or reducing an award.

[9] There were delays on the part of the respondent in complying with directions of the Authority. Some of these can be explained by earthquake difficulties but others cannot. The original investigation meeting set down for 9 March 2011 had to be adjourned. As at that date the statements of evidence for the applicant had been lodged but the respondents had not. The respondent's statements of evidence were not lodged by 22 February 2011 but some documents may have been within an office inside the cordon at that time. The matter was then set down for an investigation meeting on 5 May 2011 but that date was adjourned at the request of Ms Shaw due to ongoing difficulties obtaining documents from its building and other issues about availability of witnesses. In June 2011 Mr Butler raised concerns that he had identified material on the respondent's website that it had been successful in retrieving documents from its former premises that would seem inconsistent with Ms Shaw's instructions. A telephone conference with the Authority Mr Butler and Ms Shaw was held on 30 June 2011. Ms Shaw advised that the respondent's director had a number of commitments overseas for the remainder of the year which would make scheduling a meeting difficult until the end of the year. The Authority asked for a copy of the director's travel itinerary and e-tickets to fix a date for a meeting in consultation with the representatives. The Authority asked for the respondent's evidence to be lodged and served by 29 July 2011.

[10] Ms Shaw then advised that she was having difficulty obtaining instructions from her client and asked for an extension until 15 July 2011 for complying with the

first direction. The direction to lodge witness statements by 29 July 2011 was never complied with. There was no explanation received as to why that may be and a further telephone conference had to be held, fixing the date the investigation meeting and to timetable again evidence from the respondent. The applicant is entitled to be reimbursed for the additional costs associated with receiving communication from the Authority about and attending telephone conferences in June and November 2011.

[11] I can ascertain from the invoices sent what the costs were to the applicant. For the telephone conference in June she was charged $190 exclusive of GST and then further attendance required following June involved in setting down and attending a telephone conference were $133. The daily tariff should be adjusted upwards to reflect those additional costs in the combined amount of $323.

[12] The issues regarding the matters advanced by way of defence of the claim and the offer of settlement can be considered together. The Authority can in exercising its discretion take into account *without prejudice save as to costs* offers. Depending on the circumstances of the offer and the case itself these may or may not result in a higher award to the successful party – *David Watson v New Zealand Electrical Traders Limited T/A Bray Switchgear* (2006) 4 NZELR 59. The offer by the applicant was headed *without prejudice save as to costs*. Although the offer only remained open for five working days it clearly followed an earlier offer by the respondent that was rejected so I do not find the time frame unreasonable. The offer was for a sum considerably less than what the claim was and ultimately less than what the Authority awarded.

[13] I accept Ms Shaw's submission that the parties should try and settle matters and that the outcome of a case before the Authority is not always clear. In this case one of the main issues was whether the applicant was a casual employee or whether she had been offered 23 hours per week, the answer to that in turn going to the issue of dismissal. A perusal of the hours worked by the applicant, documents available to the respondent, would have established that the applicant worked regularly 23 hours per week for the employment period in question. There was some considerable risk to the respondent in this case. The respondent did try to settle the case. The applicant then made an offer. Given the outcome it cannot be said it was an unreasonable offer.

[14] I think this matter could and should have been settled and had the offer been accepted further costs would not have been incurred. The respondent has also

attempted to resolve the issue but its offer was not accepted. I do not consider indemnity costs are called for but an adjustment should be made upward to the daily tariff by $1200.

[15] The daily tariff of $3500 is increased by the sums of $1200 and $323 to arrive at a figure for costs of $5023 together with the disbursement of $70 being the filing fee.

[16] I order Canterbury College Limited to pay to Brenda Benge $5023 costs and $70 being the filing fee.

Helen Doyle
Member of the Employment Relations Authority