

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 502
3096372

BETWEEN

JOSEFINE BENNIEN
Applicant

AND

CAREVETS HAMILTON
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Daniel Church, counsel for the applicant
Scott McKenna and Jessica Heinstman, counsel for the
respondent

Submissions received: 13 October 2021 from the applicant
28 October 2021 from the respondent

Date of determination: 12 November 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination in a claim by Josefine Bennien against Carevets Hamilton Limited (Carevets or the company).¹

[2] Dr Bennien's claim that she was an employee of Carevets, was disputed by the company. Dr Bennien was held to have been an employee. Carevets was ordered to pay Dr Bennien wages, arrears, holiday pay and travel costs. A penalty was ordered for breaches of Carevets' statutory obligations. Dr Bennien was not granted leave to

¹ *Bennien v Carevets Hamilton Limited* [2021] NZERA 433.

pursue a personal grievance claim out of time and her claim for special damages or indemnity costs was unsuccessful.

[3] The parties were to seek to resolve cost and a timetable set if they were unable to do so. Submissions seeking costs were lodged on behalf of Dr Bennien.

[4] Submissions on behalf of Carevets were lodged on the morning after the last day for lodgement. On inquiry by the Authority, reference was made to on-going wi-fi difficulties. This was at a time when Hamilton was in a Covid-19 lockdown.

[5] I took that as an application for leave to lodge the submissions out of time and sought Dr Bennien's view. Her counsel indicated that she did not consent to the granting of leave, stating that every day she was without what she was owed prejudiced her. Mention was also made of this being indicative of Carevets' behaviour throughout the process.

[6] Leave was granted and Carevets' submissions considered.

What submissions were made?

[7] Dr Bennien claims \$16,000 as a contribution to her costs. Invoices were provided showing more than this amount had been spent. This amount of costs is claimed on the basis of Carevets' conduct tending to increase costs and Calderbank offers rejected, as outlined below.

[8] Submissions for Carevets seek that costs be set at \$4,500, based on the daily tariff for a one-day meeting.

What principles apply to costs?

[9] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. The Authority's discretion is governed by principles which were outlined by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.² These include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience.

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

[10] In addition, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

What costs should be awarded here?

[11] Although Dr Bennien was not entirely successful in all her claims, proceeding to an Authority investigation meeting was the only way for her to achieve what she has achieved. She is entitled to a contribution towards her costs.

[12] The starting point is the daily tariff; \$4,500 for the first day and \$3,400 for subsequent days. The evidence in this matter was heard over one extended day with the submissions heard on another day by telephone. On the basis of those two days I assess the tariff to be \$6,000.

Calderbank offers

[13] On 21 May 2020 Dr Bennien's representative made a Calderbank offer to Carevets. The letter is clearly marked "Without prejudice save as to costs" and was made well before substantial costs were incurred in preparation for and attendance at the investigation meeting. Dr Bennien offered to settle this matter for payment of outstanding salary, holiday pay, flights reimbursement, \$5,000 compensation and a contribution to costs.

[14] Although somewhat differently made up, the resulting payment to Dr Bennien was a little less than she was awarded in the determination, once the penalty to be paid to her is taken into account. This was a reasonable offer which Carevets did not accept. Had it done so Dr Bennien would have avoided a considerable amount of additional costs.

[15] A Calderbank offer was made by Carevets on 5 August 2020. The offer was to pay what Carevets calculated Dr Bennien's wages and holiday to be, along with reimbursement of her travel costs. The wages were calculated by a different method which Carevets believed was correct. That method was rejected by the Authority, making the award of wages and resulting holiday pay somewhat higher.³ No offer to make any contribution towards costs was included in Carevets' offer.

³ *Above n 1 at [71]*.

[16] Carevets' offer was made a sufficient time before the investigation meeting to avoid the incurrence of costs for that part of the proceeding. However, the rejection by Dr Bennien of that offer was reasonable in light of the subsequent determination which awarded her more, even without consideration of costs.

[17] After the Authority issued its determination, Dr Bennien's representative approached Carevets' representative seeking to resolve costs. A "without prejudice save as to costs on costs" offer was made seeking payment of \$12,000 towards costs. This was rejected on behalf of Carevets. No counter offer was made.

Carevets' actions which increased costs

[18] There was a lack of engagement, with Carevets initially not lodging a statement in reply nor making any contact with the Authority. A minute including a timetable was issued and a date set for an investigation meeting by zoom. Carevets first made contact almost two months after it was served with the statement of problem. Although I accept that this occurred during New Zealand's first lockdown, I did not find the absence of any contact with the Authority earlier to be satisfactorily explained. The investigation meeting was vacated on the company's application.

[19] Carevets' late engagement resulted in additional cost to the applicant, with her evidence having to be redrafted to take into account of the company's position as set out in its statement in reply lodged only with leave as it was out of time.

[20] Once it was involved Carevets pursued a multitude of arguments, including that Dr Bennien was not an employee, had not worked as such and there was no valid employment agreement either because the agreement was unlawful when entered into or was frustrated. A belated claim made shortly before the investigation meeting argued that Dr Bennien had agreed to work without pay and so had no wage entitlement. None of those arguments were accepted.

[21] I conclude that a substantial uplift is warranted due to Carevets' actions having unreasonably increased the costs.

What costs are awarded?

[22] Dr Bennien is entitled to a substantial uplift on the bases of the Calderbank offers and the company's conduct during the course of this proceeding. I order Carevets

to pay Dr Bennien within 21 days of the date of this determination \$12,500 as a contribution towards her costs.

[23] Carevets is also ordered to pay Dr Bennien \$71.56 for the Authority's filing fee within 21 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority