

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 173
3000114

BETWEEN MOIRA BRISCOE
Applicant

A N D OCEANIA DAIRY LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Timothy Jackson, Counsel for Applicant
Raewyn Gibson, Advocate for Respondent

Submissions Received: 28 September 2017 from Applicant
13 September 2017 from Respondent

Date of Determination: 9 October 2017

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

The substantive determination

[1] In the substantive determination dated 3 August 2017, I decided that Ms Briscoe did not have any personal grievance and I reserved costs.

The claim for costs

[2] The successful respondent (Oceania) seeks costs based on the daily rate but with an uplift to reflect what Oceania claims was behaviour by Ms Briscoe which materially added to its costs in defending her claim. In addition, I am asked to take account of two Calderbank offers which were made prior to the hearing and which by virtue of the fact that they would have provided Ms Briscoe with a better result than she achieved at hearing, are said to be operative Calderbank offers.

The response

[3] Submissions for Ms Briscoe resist the costs claim by Oceania, relying on dicta indicating that costs in the Authority will be modest, that the full rigour of the law on operative Calderbanks may not apply, and the contention that the Authority's daily tariff approach is *ultra vires*.

[4] It is suggested that Ms Briscoe would be penalised personally by any costs award and the claim that Ms Briscoe unduly prolonged the hearing is denied. Put simply, it is suggested that Ms Briscoe has suffered enough from what is described as "the respondent's conduct".

Discussion

[5] The law on costs fixing in the Authority is well settled. The leading case until recently was *PBO Limited v DaCruz* [2005] ERNZ 808. That decision was reaffirmed more recently by the Full Court in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

[6] In the latter case, the full Court said:

We have not been persuaded that the broad principles stated by the full Court in *DaCruz* should now be departed from or even altered, either in general or in this case in particular...

[7] That being the case, it is difficult to see how it can be contended for Ms Briscoe that there is no jurisdiction to adopt a notional daily rate since that is specifically approved in *DaCruz* and reaffirmed in *Fagotti*.

[8] Moreover, the Authority has gone to some lengths to notify changes to that daily tariff regime through Practice Notes on its website and by publicity in Law Society and Employment Law Institute publications.

[9] Submissions for Ms Briscoe also relied on dicta in a number of recent judgments of the Employment Court expressing some doubt about whether the Court of Appeal's "steely" approach to Calderbank offers was to be visited on parties in a forum such as the Employment Relations Authority.

[10] Against that view must be put the decisions of the full Court in *DaCruz* and *Fagotti* which would appear to affirm that without prejudice offers can be taken into account.

[11] At the very core though of the submissions for Ms Briscoe is the contention that she has “suffered” at the hands of Oceania and ought not to be made to suffer further by an impost of costs which she would need to meet from her personal resources.

[12] Whatever the detail of the legal principles that will apply to costs awards in the Authority might be, one fundamental principle must be seen to stand above all else and it is the principle that costs follow the event. No person, whatever their circumstances, should imagine that they can commence legal proceedings against another in this Authority and effectively have a free hit; across the whole civil law jurisprudence the principle that a party proceeding against another, risks contributing to the others’ costs where that other party has success, is unchallenged.

[13] There is nothing before me to suggest that Ms Briscoe is impecunious or is unable to pay a reasonable award of costs save for the contention that any award will come from her personal funds (surely a truism) and the contention that she “was affected” by Oceania’s conduct. Moreover, it is suggested that Oceania is well resourced and therefore able to absorb the cost of funding its own legal advice.

[14] Despite what Ms Briscoe says in her defence, it is the case that she referred in her evidence to unnamed persons who had allegedly made relevant admissions, refused to name those persons until the hearing itself, and thus caused Oceania additional cost in resisting the claims purportedly made by those individuals. That said, I am not persuaded that that cost was significant but I am satisfied that it was additional and that it could have been avoided if Ms Briscoe had simply disclosed the names when she filed her evidence or in the alternative, not sought to use what might be called “secret witnesses” at all.

Determination

[15] The starting point for any consideration of costs fixing in the Authority is the daily rate identified by the Authority in respect to the particular proceeding. This matter took two days to hear. Under the current regime, the first day is calculated at

\$4,500 and each subsequent day at \$3,500. That means that the starting point is a total figure of \$8,000 in this present proceeding.

[16] I propose to add to that a figure of \$500 for additional costs incurred by Oceania in resisting Ms Briscoe's evidence through unnamed parties and I allow a further sum of \$500 in regard to the two Calderbank letters (both of which were operative Calderbanks) tendered by Oceania and rejected by Ms Briscoe.

[17] While neither of those Calderbank offers were overly generous, they were both of them a significant advance on the position that Ms Briscoe achieved in the Authority's determination of the matter and of course by accepting one or other of those Calderbanks at the time they were offered, she would also have saved herself additional legal costs for her own counsel as well as the risk of contributing to the costs of the other party were she unsuccessful (which of course she was).

[18] Accordingly, I direct that Ms Briscoe is to pay to Oceania the sum of \$9,000 as a contribution to the legal costs Oceania sustained in successfully resisting Ms Briscoe's claim.

James Crichton
Chief of the Employment Relations Authority