

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 455
3174924

BETWEEN ANGELA CHRISTIE-BARNETT
 Applicant

AND LAWLER & CO
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Pieter Venter, counsel for the Applicant
 John Reardon, counsel for the Respondent

Costs Submissions: 31 July and 16 August 2023 from the Applicant
 17 July and 7 August 14 March 2023 from the Respondent

Determination: 18 August 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 3 July 2023 ([2023] NZERA 344), the Authority found that the Applicant, Ms Christie-Barnett, had not been unjustifiably dismissed from her employment by the Respondent, Lawler & Co (Lawler),

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately, they have been unable to do so, and the parties have filed submissions in support of a costs application.

[3] The matter involved two days of meeting time. Mr Reardon on behalf of Lawler citing actual costs of approximately \$20,000.00, is seeking a contribution to costs in the amount of \$10,000.00 plus disbursements of \$299.56.

[4] Mr Reardon submits that the respondent offered to settle the costs on the basis that Ms Christie-Barnett pay the sum of \$8,000.00, that being the amount equivalent to the usual notional daily tariff in the Authority for a two-day investigation.

[5] This amount was contested by Ms Christie-Barnett on the grounds that were not accepted as accurate or justifiable by Lawler.

[6] Subsequent communications did not resolve the issue of costs and have resulted in the costs submissions which are before the Authority.

[7] On 17 July 2023 Lawler submitted a costs submission for a contribution to costs in the sum of \$8,000.00 plus disbursements of \$299.56.

[8] In a submission dated 31 July 2023, Mr Venter on behalf of Ms Christie-Barnett submitted that any costs awarded to Lawler should be reduced on the ground of financial hardship.

[9] In a submission dated 7 August 2023, Mr Reardon on behalf of Lawler submitted that weight should be given to a Calderbank offer, that is a “without prejudice save as to costs” offer by letter made by dated 7 March 2022.¹ That offer was to settle the matter for \$10,500.00. On that basis Lawler is now seeking an award of \$10,000.00 plus disbursements by way of a contribution to costs award.

[10] On 15 August 2023 Mr Venter submitted for Ms Christie-Barnett that it appeared Lawler was only producing the Calderbank Offer at this later stage because Ms Christie-Barnett was seeking reduced costs.

[11] Further it was re-submitted that the Authority should exercise its discretion by awarding reasonable costs taking into account the financial hardship Ms Christie-Barnett was experiencing. An affidavit by Ms Christie-Barnett was provided in support of the reduced costs application.

Principles

[12] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA).

[13] Costs are at the discretion of the Authority². The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

[14] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary, modest, and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[15] A tariff-based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a two-day Investigation Meeting this would normally equate to an award of \$8,000.00.

Costs Award

[16] Lawler was the successful party in this case and costs usually follow the event.

[17] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily, and I therefore consider each relevant ground as appropriate.

[18] Firstly, the Calderbank Offer would normally be grounds for considering an uplift in an award of costs, especially in a case such as this in which it was made well in advance of the investigation meeting, and before incurring any preparation costs for the investigation meeting.

[19] However, it was not part of the Lawler's original costs submission dated 17 July 2023 which I find indicates that it was not a primary ground for seeking an uplift until the submission on behalf of Ms Christie-Barnett dated 31 July 2023 seeking decreased costs. Accordingly, I am not minded taking it into consideration.

[20] Secondly it is submitted that a costs award against Ms Christie-Barnett would be adverse considering her financial situation. I accept that it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, I also note the observation of Chief Judge Inglis that:

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.⁴

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁴ *Tomo v Chekmate Precision Cutting Tools Ltf* [2015]EmpC 2 at [22].

[21] Lawler was the successful party and is entitled to an award of costs. In considering if this is a case in which it is appropriate for the Authority to use its discretion by making an award below the level indicated by Lawler as appropriate despite the actual costs it incurred in defending this matter, I recognise the merits of the submission regarding Ms Christie-Barnett's restricted ability to pay.

[22] I accept that Ms Christie-Barnett is currently experiencing some financial difficulty, but she is nonetheless in a more financially advantageous position than the majority of New Zealanders.

[23] In balancing these considerations, I consider it appropriate to award costs at the normal tariff rate in the Authority as at the date of filing and to take a two-day investigation meeting as the appropriate measure for costs.

[24] Accordingly, Ms Christie-Barnett is ordered to pay Lawler the sum of \$8,000.00 plus disbursements towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

[25] However, I recommend that Lawler consider making an arrangement with Ms Christie-Barnett to make payment by instalments. I would consider that these should be at the rate of \$800.00 per fortnight until payment is made in full. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority
