

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 706
3037431

BETWEEN ANGELA CUTTRISS
 Applicant

AND PACT GROUP
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Jenny Guthrie, counsel for Applicant
 Fiona McMillan, counsel Respondent

Investigation Meeting: On the papers

Submissions received: 6 and 22 November 2019 from the Applicant
 21 November 2019 from the Respondent

Date of Determination: 13 December 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 21 October 2019 I found Angela Cuttriss had been unjustifiably disadvantaged in her employment by actions of her employer, Pact Group (Pact). I awarded Ms Cuttriss \$3,000, less contribution, as compensation for the humiliation, loss of dignity and injury to feelings she had suffered.

[2] I noted that was a modest amount but was the full amount of compensation Ms Cuttriss had sought. I assessed her contribution to the situation that gave rise to her personal grievance at ten percent and, accordingly, the award of compensation reduced to \$2,700. The issue of costs was reserved. Ms Cuttriss now seeks a contribution to her costs.

Submissions of the parties

[3] Ms Cuttriss submits Pact had a number of opportunities to settle the matter for a very reasonable sum prior to the Authority's investigation meeting. In particular she refers to a letter to Pact sent by her legal representative on a "without prejudice except as to costs", or Calderbank, basis on 4 December 2018, some seven months before the investigation meeting which took place on 18 July 2019. The offer comprised two elements, compensation and costs.

[4] If Pact had accepted the offer for settlement, which had no time limit imposed on it, the matter would have been resolved for half the sum awarded in compensation to Ms Cuttriss. Pact rejected the offer and counter-offered, on a time-limited basis, a lower sum as an ex gratia payment in full and final settlement of all matters relating to Ms Cuttriss' employment. That was rejected and Ms Cuttriss made a further offer, this time subject to a time limitation, comprising only legal and related costs. Pact rejected the offer and counter-offered, on a time-limited basis, not to pursue costs against Ms Cuttriss if she withdrew her application. The third and final offer and counter-offer proceeded on a similar basis.

[5] Ms Cuttriss, through her legal representative, Ms Guthrie, seeks a contribution in excess of the Authority's notional daily tariff based on her three rejected Calderbank offers which, she noted, were all made after mediation had occurred in November 2018. She also submits that all three Calderbank offers had been made before Pact's witnesses' briefs of evidence were due to be filed in the Authority.

[6] Ms Guthrie provided her records for Ms Cuttriss' matter, including time spent and the value of that time, from first contact up to, and including, the investigation meeting. The total value of the services was \$18,111 and included \$5,683 attributable to mediation and pre-mediation attendances.

[7] Ms Guthrie noted that, while work had been carried out on Ms Cuttriss' matter between 11 June and 2 October 2018, no time and therefore no value for that time, had been recorded. She says it was during that time that a statement of problem was prepared and lodged in the Authority and the Authority directed the parties to mediation. While it was not entirely clear, I take it Ms Guthrie provided this information to support the submission for an increase to the daily tariff.

[8] Pact, in submissions made by its legal representative, Ms McMillan, accepts Ms Cuttriss is entitled to a contribution to her costs on the basis that her claim succeeded in the Authority. Ms McMillan resists, however, the notion that any increase to the notional daily tariff is justified. She submits it was reasonable for Pact to defend Ms Cuttriss' claim, noting that Ms Cuttriss had withdrawn her claim of constructive dismissal.¹

[9] Ms McMillan submits that both parties made settlement offers reflecting the modest nature of the claim sought and that Ms Cuttriss would have been better off if she had accepted Pact's first counter-offer of \$1,000 in March 2019 before she incurred the majority of her legal costs. In her submission, it was reasonable for Pact to have rejected Ms Cuttriss' first offer, despite the modest sum sought, because of the significance of the underlying principle for Pact. This includes the distinctive requirements of the Pact workplace, which relate to the nature of the work performed by the support staff for the vulnerable clients for whom they cared.

Should costs be awarded?

[10] Both parties' submissions referred to principles for awards of costs in the Authority that were referred to with approval by the Full Court of the Employment Court in *PBO Limited (formerly Rush Security Ltd) v da Cruz*.² The Full Court revisited, and confirmed, those principles in 2015.³

[11] Those principles include that the discretion to award costs is not to be exercised arbitrarily but in accordance with principle. Costs will usually follow the event, which normally results in the successful party being entitled to a reasonable contribution to its actual costs from the unsuccessful party. Costs should be modest and are to be considered in the light of the particular circumstances.

[12] Costs are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. If a party's conduct has unnecessarily increased costs, that factor may be taken into account in the award that is made. However, costs are not to be used as a punishment or as an expression of disapproval of a party's conduct.

¹ That claim was formally withdrawn on 4 December 2018.

² [2005] 1ERNZ 808.

³ [2015] NZEmpC 135

[13] After considering the submissions of the parties and the principles referred to above I conclude it is appropriate to award costs to Ms Cuttriss. I accept Ms McMillan's submission that an award of full or indemnity costs is not warranted, although it is not apparent to me from Ms Guthrie's submissions that she is seeking such a costs award. As earlier noted, my understanding is that she seeks an uplift to the daily tariff.

[14] I accept Ms Guthrie's submission that the three Calderbank offers made to resolve Ms Cuttriss' claims are relevant to an award of costs and merit an increase to the daily tariff, which is \$4,500 for a one-day hearing. The first Calderbank offer to settle, made on 4 December 2018, was for payment of \$1,500 compensation and a further \$2,996.56 for costs, disbursements and the Authority filing fee.

[15] The offer was made shortly after the parties had attended mediation and before either party would have incurred significant costs in preparation for the Authority proceedings. In the context of that time frame it was a very reasonable and pragmatic offer. I do not find Pact's rationale for rejecting the offer to be compelling.

[16] The further Calderbank offers, made respectively on 21 December 2018 and 31 May 2019, were equally reasonable and pragmatic. If Pact had accepted the 21 December offer, the matter would have been resolved by the payment of legal costs and other administrative charges totalling \$2,659.06. If it had accepted the 31 May 2019 offer, settlement would have been effected for just over \$3,000 in total.

[17] Taking \$4,500 as a starting point for an award of costs I consider it reasonable to increase that amount by \$2,000 in respect of the three Calderbank offers rejected by Pact.

Orders

[18] Pact Group is ordered to pay Ms Cuttriss, within 28 days of the date of this determination, \$6,500 as a contribution to the costs she incurred in successfully bringing her personal grievance application to the Authority. It is further ordered to reimburse her \$71.56, being the Authority filing fee.

Trish MacKinnon
Member of the Employment Relations Authority