

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 104  
5418068

BETWEEN

ELISE DILLON  
Applicant

AND

IMPACT            MARKETING  
SOLUTIONS LIMITED  
Respondent

Member of Authority:        Christine Hickey

Representatives:            Anna Oberndorfer, Advocate for the applicant  
   Adam Gallagher, Counsel for the respondent

Costs submissions  
received:                      From the applicant on 29 April 2014  
   From the respondent on 19 May 2014

Determination:                17 July 2014

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**Impact Marketing Solutions Limited is to pay Elise Dillon \$1,750.00 towards her legal costs and \$71.56 reimbursement for the filing fee.**

[1]     On 2 April 2014 I issued a determination that Ms Dillon was unjustifiably disadvantaged by a delay in the respondent approving her parental leave. The respondent was ordered to pay Ms Dillon \$2,500 in compensation. Ms Dillon's other claims of unjustified disadvantage, constructive dismissal and that the respondent breached its duty of good faith to her were dismissed.

[2]     The respondent's claims that Ms Dillon breached her duty of good faith to it were dismissed.

[3]     Both parties seek costs in their favour as a reflection of their respective partial success.

[4] Ms Dillon claims full, or indemnity, costs of \$6,678.75 (being the ex-GST total of Ms Oberndorfer's account) and the filing fee of \$71.56.

[5] Impact seeks \$7,000, a doubling of the daily tariff. The total costs incurred by the respondent are \$27,914.40.

### **Issues**

[6] The issues to be decided are:

- (a) Should indemnity costs be awarded to Ms Dillon?
- (b) If not, what is the starting point for assessing costs?
- (c) Are there any factors that warrant adjusting the notional daily tariff?

### **Should indemnity costs be awarded?**

[7] Indemnity costs are an exception and are only awarded where a party has behaved either badly or very unreasonably<sup>1</sup>.

[8] Despite Ms Oberndorfer's submissions to the contrary this matter does not meet the very high threshold required before indemnity costs would be imposed.

### **What is the starting point for assessing costs?**

[9] The investigation meeting took a full day and so the starting point for assessing costs is the Authority's notional tariff of \$3,500 per day.

[10] Ms Dillon was partially successful in her claims – she succeeded in one out of four claims. However, Ms Dillon also successfully defended all of the respondent's claims.

[11] Impact successfully defended three out of four of Ms Dillon's claims but it was unsuccessful in its three claims for breach of good faith and for a penalty to be awarded against Ms Dillon. Mr Gallagher invites me to consider that for its successful defence of three out of four of Ms Dillon's claims Impact should be entitled to a starting point of \$2,625 in its favour increasing to \$7,000 for the

---

<sup>1</sup> *Bradbury & Ors v Westpac Banking Corporation* [2009] NZCA 234

applicant's behaviour and Calderbank offers made. Mr Gallagher's submissions do not appear to have given any consideration to Ms Dillon's success in defending all of the respondent's claims.

**Are there any factors that warrant adjusting the daily tariff up or down?**

[12] Ms Oberndorfer argues that there should be an increase in the daily tariff awarded to Ms Dillon because of without prejudice offers she made to settle the matter, in particular that of 16 October 2013, which she submits would have allowed both parties to mitigate costs substantially.

[13] I note that the first without prejudice save as to costs offer made by Ms Dillon was for significantly more than she eventually received. I do not take that into account in exercising my discretion on awarding costs.

[14] The second offer dated 16 October 2013 was to settle the matter by accepting \$1,000 compensation under s 123(1)(c)(i) plus \$1,000 plus GST towards Ms Dillon's legal costs. That would have meant that the respondent paid Ms Dillon less than she was awarded by the Authority.

[15] Mr Gallagher argues that the 16 October 2013 offer was not effective because it was made only after the majority of the respondent's legal costs had already been incurred. That is not entirely clear from the invoices supplied which suggest the majority of fees were incurred in October and November. However, that is not the test for effectiveness of a Calderbank offer; an offer must be clear in its terms and provide a reasonable time in which to consider the offer.

[16] The applicant's Calderbank offer of 16 October 2013 was clear in what it offered. The amount of time the respondent was given to consider the offer was not specified although its *prompt attention* was requested. Mr Gallagher responded rejecting the offer on 1 November 2013. I consider that sufficient time was given for the respondent to adequately consider the matter.

[17] The respondent did not consider the 16 October offer reasonable considering the costs it had already incurred and did not accept the offer. However, that does not mean that it was not a reasonable offer as the substantive decision means that Ms Dillon beat that offer.

[18] The respondent made two Calderbank offers to settle, one on 27 September 2013 for \$500 plus GST towards Ms Dillon's legal costs and one on 1 November 2013 that Ms Dillon pay it \$3,000 plus GST towards its legal costs.

[19] Ms Dillon received more through the Authority's decision than she would have if she had accepted either of the respondent's offers so it was reasonable of her to reject the offers and proceed to an investigation meeting. The respondent's offers to settle are not sufficient to overturn the presumption that costs follow the event.

[20] I do not consider that there are any factors that warrant increasing the starting point of the daily tariff payable to Ms Dillon. However, she should not be awarded the full amount of \$3,500 because of her limited success.

[21] Both parties submit that the other's conduct of the matter leading up to the investigation meeting unnecessarily increased costs. I do not consider that either party's behaviour unnecessarily increased the other's costs.

[22] Having had regard to the principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>2</sup> I consider that a contributory award from the respondent towards the applicant's actual costs in the amount of \$1,750 is reasonable. This recognises her success in defending all the respondent's claims as well as her own modest success in one out of her four claims.

[23] The respondent must bear its own costs.

[24] The respondent must reimburse Ms Dillon the \$71.56 she spent to file her claim in the Authority.

Christine Hickey  
Member of the Employment Relations Authority

---

<sup>2</sup> [2005] ERNZ 808