

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2017] NZERA Wellington 134  
5614856

BETWEEN            NICOLA FRANCIS  
                                 Applicant

AND                    RUAWAI REST HOME 2014  
                                 LIMITED  
                                 Respondent

Member of Authority:        M B Loftus

Representatives:            Jenny Murphy, Advocate for Applicant  
                                 Alastair Hall and Joelle Avery, Counsel for Respondent

Submissions Received:      25 October 2017 from the Respondent  
                                 31 October 2017 from the Applicant

Determination:              21 December 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     On 10 August 2017 I issued a determination in which I dismissed Ms Francis' claim she had been constructively dismissed by the respondent, Ruawai Rest Home 2014 Limited (Ruawai).<sup>1</sup> I also rejected numerous allegations of unjustified disadvantage. A wage arrears claim was first amended then withdrawn.

[2]     Costs were reserved and Ruawai, as the successful party, now seeks a contribution toward those it incurred defending the claim.

[3]     Normally the Authority will use a daily tariff approach when addressing a costs claim.<sup>2</sup> The tariff might then be adjusted depending on the circumstances.

[4]     The investigation took a day which would, applying the tariff applicable to matters filed at the time this was, see a contribution in the order of \$3,500. To that

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<sup>1</sup> [2017] NZERA Wellington 74

<sup>2</sup> refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

should be added time to prepare what were significant submissions which were actually billed at \$3,106.41.

[5] Ruawai, however, seeks a greater sum. It seeks indemnity costs which total \$29,088.

### **Ruawai's submission**

[6] In support of its claim Ruawai refers to various settlement offers and the principle a steely approach should be taken when an unsuccessful party has rejected a calderbank offer which would have put it in a significantly better position than that it occupies as a result of the determination.<sup>3</sup>

[7] The calderbank offer was for \$1,500 and made in response to Ms Francis' initial disadvantage grievances on 31 March 2016 and following a mediation a couple of days earlier. The offer also followed Ruawai's total capitulation in respect to what had then been Ms Francis' prime concern, namely that her employment had not been recognised as permanent. That occurred on 8 March and prior to the mediation.

[8] The offer was rejected.

[9] I note comments in the calderbank letter which, it is submitted, explain why. In particular the letter records Ms Francis had advised Ruawai her only concern was the attainment of permanent employment (with which she had been successful prior to the mediation) and the other disadvantage claims were not ones with which she agreed but which she had been bullied into pursuing by Ms Murphy. The letter also makes other negative observations about Ms Murphy's conduct alleging she was jeopardising an existing employment relationship and records *...Ms Francis [had] explained that the continuation of the grievance relates to her ability to pay [Ms Murphy's] fee.*

[10] Submissions are also made about concerted attempts by Ruawai to resolve the issues and the fact it was careful to highlight fundamental flaws in the claim which were subsequently confirmed by the determination. In summary it is submitted:

*Put frankly, the applicant's approach, through her advocate was unreasonable, combative and unnecessarily protracted.*<sup>4</sup>

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<sup>3</sup> *Fagotti* at [109]

<sup>4</sup> Respondent's submission at [15]

[11] Comment is also made about the fact that upon the completion of evidence I gave a very strong oral indication the claim was, as Ruawai had earlier suggested, fundamentally flawed and was not going to succeed. Explanations were given as to why. Notwithstanding that Ms Francis chose to prepare significant submissions aimed at convincing me to change my view after the investigation.

[12] Ruawai responded by asking Ms Francis carefully reflect on the wisdom of proceeding in such a fashion given what was said to be a strong indication with no ambiguity. The e-mail says:

*We maintain that the claim is fundamentally flawed. Responding to the latest submissions (which includes material that was not in evidence, was not pleaded or is otherwise unsustainable) will add significantly to costs. We say, irresponsibly.<sup>5</sup>*

[13] The e-mail advises Ruawai's counsel would give Ms Francis a further window during which she could consider her position and make some overture to bring the matter to an end before it started generating the costs referred to above. The e-mail advised failure to do so would see it used to support any subsequent costs application.

[14] It is submitted there were a number of aspects of the applicant's conduct (or more correctly her representatives') which unnecessarily increased costs. These include:

- a. The claims lacked merit and some lacked any form of legal foundation but were, as the evidence quickly confirmed, driven by Ms Francis' desire to attain not only an employment agreement but one which met her needs which centred around significantly increasing her income.
- b. A submission that unfortunately for Ms Francis the approach taken was directly attributable to Ms Murphy and answers given by Ms Francis made it clear she had no idea what was going on or control over what was being done on her behalf. It is submitted that had Ms Francis obtained competent representation both parties might have avoided unnecessary costs but while there could be some sympathy for Ms Francis as a result of having placed her trust in such deficient

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<sup>5</sup> E-mail Avery to Murphy dated 11 October 2016

representation Ruawai should not be required to bear the resulting cost. This last comment reflects various answers Mr Francis gave during the investigation which appeared to confirm she had abrogated all responsibility for her claims management and passed decision making to Ms Murphy.

- c. That the alleged grievances became a moving feast with some claims being introduced as late as submissions. Trying to respond to such an approach also increased costs.

### **Ms Francis' reply**

[15] Ms Francis responds by asserting the costs claim is ill-founded and based on actual costs which are unreasonably high. Ms Francis' argument is supported by reference to the facts and continuing assertions that she was hard done by. It is also asserted Ms Francis had no option but to pursue her claim as Ruawai refused to bargain in good faith.

[16] Ms Murphy takes issue with the submission concerning the quality of her representation. She labels them derogatory and unprofessional and asserts they do not warrant response.

[17] It is submitted *All instructions came from [Ms Francis] and this was confirmed at the investigation meeting.*<sup>6</sup> On this I must side with Ruawai. As Mr Hall submitted answers given by Ms Francis in the investigation often indicated she had little idea about what was being done on her behalf but this is not an issue I need resolve. I cannot award costs against Ms Murphy and ultimately Ms Francis must carry the responsibility.

[18] I also note a suggestion in an e-mail from Ms Murphy appended to Mr Hall's submission that Ms Francis might argue impecuniosity though it also conceded she has some access to funds.<sup>7</sup> That has not occurred in the submission.

[19] It is further submitted the addition of claims in submission was the result of my having failed to properly utilise s 122 of the Employment Relations Act to Ms Francis' advantage. All I can say is that if correct that should have been addressed via

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<sup>6</sup> Applicants submission at [7]

<sup>7</sup> e-mail Murphy to Avery dated 24 August 2017

a challenge. None was taken but I also note the assertion relates to a claim I should somehow have found Ms Francis was redundant. I still fail to see how.

[20] It is submitted the calderbank ... *should be set aside as it did not address the real issue at the time, which was a lack of a permanent IEA that fairly reflected Nikki's position.*<sup>8</sup> That submission is inherently flawed. The permanent IEA had been conceded three weeks earlier with the remaining issues relating to Ms Francis' view she warranted a pay rise.

[21] That Ms Francis is still arguing she should have been given a pay rise is reflected elsewhere in the costs submission. Indeed a letter sent in response to the calderbank on Ms Francis' behalf is appended to her costs submission. Amidst other things it demands an increased hourly rate and alterations to the hours of work.

[22] That is the position which underpinned six of her seven disadvantage claims.<sup>9</sup> They were found totally untenable and that was one of the major thrusts of the substantive determination. Ruawai was under no obligation to concede these claims and I am bemused they are still being promoted, especially in a costs setting.

### **Determination**

[23] Having considered my notes of the substantive investigation, the submissions on costs and the law applying thereto I must say I have sympathy with Mr Halls' approach. The points made when addressing Mr Francis' submission highlight why.

[24] The claim was ill-conceived and aimed at an outcome unobtainable by the means used. That aim, namely the procurement of a pay rise, was never going to be achieved via the use of disadvantage personal grievance claims yet six of the seven had this as their goal. A further claim, namely that there had been an actual dismissal in December 2015 had no factual foundation whatsoever. The only claim that had validity, namely misuse of fixed term contracts, was conceded as soon as it was raised. Mr Hall repeatedly raised the inherent problems with the claims and gave Ms Francis amply opportunity to reconsider. She chose not to.

[25] At the end of evidence I gave a strong oral indication the claims were going to fail and Ruawai again allowed an opportunity for Ms Francis to resile. Instead she

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<sup>8</sup> Applicants submissions at [5]

<sup>9</sup> n 1 at [28]

chose to continue despite further attempts from Ruawai to remove the need for additional cost.

[26] I can only conclude this litigation was ill-conceived and poorly executed, at least in respect to the way Ms Francis handled it. That put Ruawai to unnecessary costs that should have been avoided.

[27] In considering the grounds for contemplating indemnity costs<sup>10</sup> I note one is the pursuit of claims that should never have been taken. This is borderline but I conclude the circumstances are such I should stop short of such an order. I have some concerns about attributing severe consequences for decisions which I accept were those of the representative on someone of limited means.<sup>11</sup> Poor judgement, which I conclude is what has driven these claims, is not the wilful pursuit of an improper course of action which *Bradbury* indicates is required for an award of indemnity costs. Furthermore the calderbank could not have addressed the constructive claim given its timing.

[28] That said I do conclude the conduct here warrants a significant increase in the tariff and conclude a doubling is appropriate. I also think indemnity costs (or close thereto) should apply to those incurred by Ruawai in preparing final submissions. By then the outcome was clear and the opportunity to resile should have been taken.

[29] For the above reasons I order the applicant, Nicola Francis, pay the respondent, Ruawai Rest Home 2014 Limited, the sum of \$10,000.00 (ten thousand dollars) as a contribution toward the costs Ruawai incurred in successfully defending Ms Francis' claim.

M B Loftus  
Member of the Employment Relations Authority

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<sup>10</sup> *Westpac Banking Corporation* [2009] 3 NZLR 400

<sup>11</sup> Notwithstanding the lack of an impecuniosity argument the evidence leaves little doubt Ms Francis is of limited means