

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 75A/09  
5115496

BETWEEN

LUCY ORA HAMON  
Applicant

AND

COROMANDEL  
INDEPENDENT LIVING  
TRUST  
Respondent

Member of Authority: R A Monaghan

Representatives: P Weston, advocate for Applicant  
M Edwards and M Salmen, counsel for Respondent

Memoranda received: 26 June 2009 from applicant  
21 April and 3 July 2009 from respondent

Determination: 4 August 2009

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated, 10 March 2009 I found Lucy Ora Hamon was not dismissed. Costs were reserved and the parties have filed memoranda on the matter.

[2] The respondent sought a contribution to its costs either as 66% of its actual and reasonable costs of \$28,782 - being \$18,996.12 - plus disbursements of \$3,013.18 (incl GST), or in the sum of \$15,000 plus disbursements of \$3,013.18 (incl GST).

[3] The applicant says the respondent is not entitled to any award of costs as it was the author of its own misfortune. The submission appears to be based on a view that the respondent and its representatives 'cynically engaged in attacks on the applicant based on a commercial appraisal that the applicant was vulnerable and would succumb to threats.'

[4] Both parties filed communications made without prejudice save as to costs. In a letter dated 13 August 2008 the respondent offered \$7,000 in full and final settlement of all matters arising out of her claim. The offer was open for acceptance until 15 August 2008. In an emailed message dated 14 August 2008 the applicant indicated she would settle for \$15,000.

### **Determination**

#### 1. Contribution to costs

[5] In support of the application for an order in the terms sought the respondent cited the factors in **PBO Limited (formerly Rush Security Limited) v Da Cruz**<sup>1</sup>, submitting further that these factors did not limit the Authority's discretion and each case is to be considered in the light of its own circumstances. There was also some reliance on the judgement of the Court of Appeal in **Binnie v Pacific Health Limited**<sup>2</sup>, particularly in respect of the request for a contribution of 66% of its costs, as well as a number of decisions of the Employment Court regarding costs in the Employment Tribunal.

[6] The appropriate approach here is to bear in mind that the Authority's awards of costs fall within an identifiable range per day of hearing, but that the circumstances of a particular case might warrant adjusting the resulting rate up or down. Factors identified in decisions such as **Binnie**, and the others cited, can be taken into account in determining whether to increase or decrease the rate. However **Binnie** itself does not apply to the Authority.

[7] The respondent has pointed out that: the determination was entirely in its favour; significant costs were incurred in having to defend a claim that was pleaded in a very broad and general way; a significant proportion of time was spent on the allegation that the parties were in a partnership, an allegation that was fanciful and could not be proved; and the applicant was unwilling to have an informed discussion regarding the merits of the claim or to pursue a negotiated resolution in a meaningful way. Finally, reliance was placed on the offer made without prejudice save as to

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<sup>1</sup> [2005] ERNZ 808

<sup>2</sup> [2002] 1 ERNZ 438

costs, and there was a submission that the applicant should have been advised her claim was groundless and she should accept the offer.

[8] The applicant's submissions opened by referring to the respondent's written submissions and inferring that the submissions comprised the totality of the submissions. However the respondent had attached documentation in support of its submissions, although this was filed separately, and it is not reasonably open to the applicant to draw the inference relied on. I do not accept the objection based on the lack of particulars of the costs incurred.

[9] Secondly - whether or not time-based costing as used in some legal practices is a flawed methodology, and whether or not the costs incurred here resulted from such a methodology - I do not accept the broadly-stated submission that a time-based costing method should not flow into the calculation of costs. It is relevant to consider whether the work done and the fees incurred were reasonable, but nothing in the material provided indicates that the fees were not reasonably incurred. This is particularly so in the light of the way in which the problem was framed, and the extent of the factual background the respondent was obliged to address as a result.

[10] Thirdly in relation to the costs actually incurred I do not accept the submission that the respondent was obliged to utilise the most cost-effective form of representation available to it – namely a lay advocate – rather than engaging solicitors as it did. Moreover I do not accept that, having engaged solicitors to represent it, it was obliged to bear the costs in excess of the rates that might be charged by lay advocates (whatever the measure of that may be). As for the hourly rates actually charged, as distinguished from the usual chargeout rates of the solicitors concerned, according to a table the respondent provided these were at most \$250 plus GST. In general the Authority has regarded such rates as reasonable.

[11] Concerns were also expressed about the respondent's conduct of the case. However concerns about the conduct of a case are relevant in a costs setting only to the extent that they add unnecessarily to the time taken for the investigation or to the costs incurred in respect of the matter. Here the length and complexity of the investigation was a function primarily of the nature and extent of the substantive problem as it was framed. Most of the complaints about the conduct of the case

amounted to complaints about the respondent's conduct, and the conduct of counsel. They refer to exchanges which annoyed or angered the applicant and her advocate. To the extent that the conduct occurred, I do not accept that it added unnecessarily to the time taken for the investigation.

[12] Otherwise the principal complaint concerned the conduct of the respondent in respect of settlement. It was submitted that the respondent's approach to negotiations involved unlawful conduct that was predatory and oppressive, and its claim for costs should be disallowed. It was said that the matter would have settled at mediation had the respondent and its agents not 'engaged in inflammatory acts contrary to the Employment Relations Act.' For completeness I record that counsel was not the respondent's representative at mediation.

[13] The 'inflammatory acts' complained of centred on an allegation that a threat was made during mediation to disclose certain information about the applicant. However the alleged threat was never properly part of the evidence before the Authority despite the provisions of s 148 of the Employment Relations Act 2000 being drawn to the advocate's attention on several occasions.

[14] The content of the offers made without prejudice save as to costs did not indicate predatory or oppressive conduct by the respondent. Further they disclose that, aside from the circumstances of the alleged threat, the parties' offer and counter-offer at mediation were the same as those in the subsequent communications made without prejudice save as to costs. That is, the respondent was offering the sum of \$7,000 in settlement while the applicant sought \$15,000. There was no foundation for the applicant's assertion that the matter would have settled at mediation, or prior to the investigation meeting, but for the respondent's conduct. It is speculative at best, and I do not accept it.

[15] This is particularly so because the applicant's substantive claims had no merit, and the respondent expressed that view to her prior to the investigation meeting. Viewed in that light, the offer of \$7,000 to settle was reasonable.

[16] Overall, as the successful party the respondent is entitled to a contribution to its costs. If I apply a daily-rate based approach, then at a rate of \$3,000 per day the contribution is:

$$3 \times \$3,000 = \$9,000.$$

[17] However this problem rested to a substantial degree on a misconceived view of the nature of the relationships between the applicant and Wahine Ora respectively with the respondent. In tandem with this was a misconceived view of the applicant's obligations to the respondent regarding conflicts of interest. This is so to the extent that the matter should be reflected in costs.

[18] Further to the parties' attempts to settle, in the light of the essentially unmeritorious nature of the applicant's claim the respondent's offer should have been accepted.

[19] For these reasons I would adjust the daily rate upwards to \$4,500. The calculation is:

$$3 \times \$4,500 = \$13,500$$

[20] The applicant is ordered to contribute to the respondent's costs in that amount.

## 2. Disbursements and witness' expenses

[21] Disbursements and witnesses' expenses were quantified as follows:

(a) travel costs, expenses and allowances for witnesses attending the first two days of the investigation meeting (Mr Noonan and Ms Wishnowsky);

\$1,387.76 (plus GST)

(b) travel costs, expenses and allowances for witnesses (Mr Noonan, Ms Wishnowsky and Ms Hide-Bayne) and attending the final day of the investigation meeting;

\$ 747.74 (plus GST)

(c) fees charged by Raewyn Kirkman in respect of professional attendances associated with the investigation meeting, and travel;

\$ 350.38 (plus GST)

Total \$ 2,485.88 (plus GST)

[22] In respect of the first two days of the investigation meeting, the cost of accommodation for two witnesses for two nights was \$476 (incl GST). The cost of parking for two days was \$60 (incl GST), and the cost of travel using a vehicle owned by the respondent was \$272.08. The total is \$808.08 (incl GST if any). The applicant is ordered to reimburse the respondent in that amount, less any GST.

[23] In respect of the final day of the investigation meeting, a supporting invoice was filed in respect of Mr Noonan's accommodation. The charge for one night's accommodation was \$140 (incl GST), parking for one day was \$25 (incl GST) and the cost of travel using a vehicle owned by the respondent was \$290.32. The total is \$455.32 (incl GST if any). The applicant is ordered to further reimburse the respondent in that amount, less any GST.

[24] Ms Kirkman participated in the investigation as a witness to and participant in certain relevant events. She drove from Hamilton to do so. The applicant is ordered to further reimburse the respondent for Ms Kirkman's travel costs of \$169.

[25] The respondent sought reimbursement of costs incurred in having an IT service provider attempt to recover electronic documents the applicant had deleted from a laptop she used during her employment. I do not regard that as a cost incurred in respect of this matter and make no order in respect of it.

### **Summary of orders**

[26] The applicant is ordered to pay the respondent:

- a. \$13,500 as a contribution to its costs; and
- b. \$1,432.40 less any GST as disbursements and witnesses' expenses.

R A Monaghan

Member of the Employment Relations Authority

