

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 166  
5647066

BETWEEN                      NICOLE HANNAH  
   Applicant  
  
AND                              QUALITY CONSUMABLES  
   LIMITED  
   First Respondent  
  
AND                              ALLAN MCCORMICK  
   Second Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Garry Pollak and Jeremy Lynch, Counsel for the  
   Applicant  
   Mark Ryan, Counsel for the Respondents  
  
Determination:              8 June 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. Within 28 days of the date of this determination Quality Consumables Limited (QCL) must pay Nicole Hannah \$7000 as a contribution to her costs of representation in successfully pursuing her wage arrears claim and personal grievance.**

[1] An Authority determination issued on 8 May 2017 ordered Quality Consumables Limited (QCL) to pay wages arrears to Nicole Hannah and remedies for a personal grievance of unjustified dismissal.<sup>1</sup>

[2] Costs were reserved. The parties were encouraged to resolve any issue of costs between themselves. They were not able to do so. Ms Hannah lodged a memorandum seeking a costs award of \$8000. This sum comprised the Authority's usual daily tariff of \$4500, for what was a one day investigation meeting, and an uplift of a further \$3500. The uplift was sought on the grounds that QCL had unnecessarily delayed lodging documents in the Authority, had ignored the Authority's timetable,

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<sup>1</sup> *Hannah v Quality Consumables Limited & Allan McCormick* [2017] NZERA Auckland 138.

had increased Ms Hannah's cost because extra time was used getting responses from QCL, and had unreasonably not accepted or even acknowledged an offer to settle the matter made soon after she began proceedings in the Authority. The settlement offer was made on a 'without prejudice save as to costs' basis by letter on 28 October 2016.

[3] In its reply memorandum on costs QCL accepted Ms Hannah was entitled to an award of costs but said this should be limited to the daily tariff of \$4500. It said Ms Hannah was not prejudiced by any of the matters raised as warranting an uplift on the tariff. It also criticised her settlement offer as being unreasonable. It said the offer asked for acceptance within seven days, which was not sufficient time "to carry out a litigation risk exercise".

[4] This was a matter where the Authority's usual daily tariff could be appropriately applied as a starting point in assessing costs, then adjusted up or down to account for any particular circumstances or factors in the case and its conduct.<sup>2</sup>

[5] There were no factors or circumstances suggesting a downward adjustment of the tariff was needed. QCL accepted the usual level of tariff was appropriate. Two factors had to be considered that might warrant an upward adjustment: firstly, had QCL's conduct in the proceedings unnecessarily increased Ms Hannah's costs and, secondly, what account should be taken of the Calderbank offer, that is the without prejudice offer to settle?

[6] In November 2016 QCL had applied for leave to lodge a statement in reply out of time. Authority records show Ms Hannah's statement of problem, lodged in the Authority on 28 October 2016, was served at QCL's registered office on 2 November. Two days before the 14 day period for lodging a reply expired, QCL's counsel sent the Authority a memorandum seeking an extension of time, advising he had only recently been instructed. Ms Hannah's counsel opposed the request but the Authority granted the extension sought. A statement in reply was lodged on 18 November, two days later than it was originally due. At the Authority's case management conference, held on 21 December, QCL was directed to provide full pay records for Ms Hannah. Meeting that direction took some time but QCL's records were eventually provided for the Authority investigation.

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[7] Ms Hannah's costs memorandum did not provide any detail on what actual increased costs resulted from QCL's conduct. There was insufficient information to warrant an uplift in the tariff on that ground.

[8] QCL did not deny it had not responded to or acknowledged the settlement offer made on 28 October 2016. Ms Hannah's counsel sent the offer by email to QCL's director Allan McCormick and asked for acceptance by 4 November 2016. By 9 November QCL appears to have instructed counsel. In an email to QCL's counsel that day Ms Hannah's counsel noted QCL had not responded to the offer.

[9] The settlement offer proposed QCL pay Ms Hannah \$16,000 compensation, and \$2500 plus GST as a contribution to her legal costs to that date. The cost of that proposal in October 2016 totalled \$18,800. The orders for wages arrears and remedies eventually made in the Authority's determination in May 2017 totalled \$40,119.

[10] If QCL had accepted the proposed settlement, both parties would have been spared the expense and time required for the Authority investigation, Ms Hannah would not have incurred further legal costs and QCL would have been in a relatively better position, paying Ms Hannah less than half the total amount ultimately awarded by the Authority. The Court of Appeal and the Employment Court have confirmed that the principled exercise by the Authority of its discretion to award costs requires a "steely" approach to such settlement offers.<sup>3</sup> If the offer was reasonable at the time it was made, QCL failure to acknowledge and accept it was a factor that warranted an uplift in the tariff.

[11] The offer made was clear and transparent. The amounts sought were plain and uncomplicated. Its purpose was plainly put: "in order to avoid litigation". QCL provided no basis for its assertion that the seven days allowed for acceptance was unreasonable. There was no information supporting any notion QCL could not have sought advice and calmly reflected on it before the expiry of that period.<sup>4</sup> While Authority records show the Authority did not serve a copy of the statement of problem on QCL until 2 November, the letter of Ms Hannah's counsel lodging the

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<sup>3</sup> *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20] and *Faggoti v Acme & Co Ltd* [2015] NZEmpC 135 at [109].

<sup>4</sup> *Shanks v Agar (t/a Rod Agar & Co)* [1996] 2 ERNZ 578 at 581-582.

statement in the Authority on 28 October showed it was also sent by email to Mr McCormick that day. QCL likely had the full week to consider the proposal. This was ample opportunity to seek advice and respond. If more time were necessary, it could have acknowledged the offer with a suggested extension of time. The public interest in the fair and expeditious resolution of disputes would be undermined if no costs consequences resulted from QCL's actions in ignoring the offer.<sup>5</sup>

[12] An appropriate uplift in the tariff in the circumstances of this case for QCL's unreasonable failure to accept the settlement offer was \$2500.

[13] As a check against another relevant principle, that costs in the Authority should be modest, I note the uplift of \$2500 happens to be the same amount Ms Hannah would have received as a contribution to her legal costs if QCL had accepted her settlement offer in November 2016. The practical effect of the award made in this determination is that the contribution QCL is required to make towards her subsequent costs, from then right through to preparing for and participating in the investigation meeting, is only the daily tariff. It is, overall, a modest costs award.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>5</sup> *Blue Star Print Group (NZ) Ltd v Mitchell*, above n 3 at [18].