

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 387  
3085473

BETWEEN VIRGINIA HENRY  
Applicant

AND SOUTH WAIKATO  
ACHIEVEMENT TRUST  
Respondent

Member of Authority: Robin Arthur

Representatives: Erin Burke, counsel for the Applicant  
Jessie Laphorne and Tariqa Satherley, counsel for the  
Respondent

Submissions From the Respondent on 16 August 2021 and from the  
Applicant on 27 August 2021

Determination: 6 September 2021

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. Virginia Henry must pay \$14,000 as a contribution to the costs of representation incurred by South Waikato Achievement Trust in responding to her personal grievance application.**

[1] South Waikato Achievement Trust (SWAT) sought an award of costs after an Authority determination found it acted justifiably in dismissing Virginia Henry.<sup>1</sup> The parties had not been able to agree the issue of costs between themselves.

[2] SWAT proposed \$15,000 as the appropriate amount to award as a contribution to its costs for representation during the three-day long investigation meeting held about Ms Henry's personal grievance. It was said to have spent \$62,626 on legal fees between January 2020 and May 2021 in responding to her claim.

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<sup>1</sup> *Henry v South Waikato Achievement Trust* [2021] NZERA 340.

[3] The contribution SWAT sought comprised two elements. Firstly, SWAT said Ms Henry should pay the Authority's usual daily tariff for costs. The tariff is \$4,500 for the first day and \$3,500 for each following day, in this case totalling \$11,500. Secondly, SWAT asked for an uplift on the tariff because Ms Henry had turned down an offer to settle the matter earlier and because the investigation meeting was said to have been unnecessarily extended to a third day because of time taken by Ms Henry's counsel canvassing matters not relevant to the issues to be determined. The settlement offer was relevant because, if accepted, it would have resulted in a better outcome for Ms Henry than the Authority's eventual determination which had declined her grievance application.

[4] Ms Henry opposed an order for costs at the level sought by SWAT. She submitted she was not responsible for the investigation meeting taking three days instead of the two days originally scheduled by the Authority. She also submitted that she had reasonably refused the earlier settlement offer because she was "seeking vindication, reinstatement and justice (for herself and others)". Instead she proposed any costs award against her should be no more than \$8,000 to reflect the tariff amount for a two-day hearing, with no uplift for not accepting SWAT's settlement offer.

### **The daily tariff**

[5] The Authority's discretion to award costs is guided by established basic tenets which allow for the use of a daily tariff adjusted upward or downward to take account of factors relevant to the particular case.<sup>2</sup>

[6] In this case there was no dispute Ms Henry was liable to make some contribution to the costs incurred by SWAT as she was not successful in pursuing her grievances.

[7] The investigation meeting took three days. There was nothing about the circumstances of this case that suggested use of the daily tariff was not the appropriate means for assessing costs. Applying the tariff was consistent with the principle that costs in the Authority should be modest. Relative to SWAT's actual legal costs, the tariff rate is modest. And applying the tariff was consistent with the principle that costs are awarded as a contribution to costs reasonably incurred, not a full reimbursement. In this case SWAT spent more than four times on legal fees than the amount than, on

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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].

its own assessment, could be sought on a tariff basis. This was an appropriate adjustment for what could be claimed as reasonably incurred because its actual costs, for example, presumably included the cost of the two counsel who represented SWAT at the investigation meeting. Such expenditure, in most circumstances, would not be taken as reasonably incurred for the purposes of a costs assessment in the Authority.

[8] Taking the tariff rate total of \$11,500 as the appropriate starting point, two basic tenets have been considered as possibly requiring an upward adjustment of costs. The first concerned whether how Ms Henry, through counsel, unnecessarily extended the length of the investigation meeting and therefore costs. The second concerned the weight that should be given, if any, to SWAT's settlement offer.

### **Conduct unnecessarily increasing costs?**

[9] Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct but, where such conduct unnecessarily increases costs, the tariff may be adjusted upward.

[10] Ms Henry did not accept SWAT's contention that the Authority's investigation meeting took three rather than two days because her counsel, in questioning SWAT's witnesses, traversed matters not directly relevant to the issues requiring determination.

[11] Her memorandum in reply on costs, referred to other reasons for the meeting extending over three days. Delay was caused on the first day by dispute over evidence given by a witness for whom Ms Henry had sought a summons. Further delay was caused on the second day when an issue arose over photos of injury to a resident, when they were taken, and whether Ms Henry had provided copies of those photos to SWAT's chief executive Russell Ensor. Those photos and messages were available on Ms Henry's mobile phone and were admitted as evidence only on the second day of the investigation meeting.

[12] Ms Henry's memorandum on costs also criticised what it described as "laborious cross examination" of Ms Henry by SWAT's counsel resulting in the third day of the investigation meeting taking longer than necessary. By contrast, her memorandum described the questioning of SWAT witnesses by Ms Henry's counsel as carefully prepared, relevant and as efficient as possible.

[13] Neither party's submissions were persuasive on this point. Both parties were responsible for the investigation needing to run into a third day.

[14] The photos and messages sent from Ms Henry's phone, for instance, were in the possession of both parties but were not included in the evidence provided in advance of the investigation meeting. The photos themselves, the date and time they were taken and when Ms Henry had forwarded them for the attention of Mr Ensor all proved to be relevant and useful evidence of fact. The time taken to sort out that issue was necessary for the investigation.

[15] Ms Henry cannot eschew responsibility for the time and difficulty that arose in dealing with the evidence of the summonsed witness. She had asked for the summons to be issued. Ultimately that evidence did not really assist Ms Henry's cause but neither could SWAT say the time taken on it, which contributed to the questioning of other witnesses not being completed within two days, unnecessarily extended the investigation meeting time and unnecessarily increased its costs.

[16] Similarly, both parties bore responsibility for the length of time taken in additional questioning of witnesses by their respective counsel. Typically such questioning often proves to be of limited, if any, assistance to the investigating member but is permitted by the Act and, possibly, contributes to each parties' sense that the evidence of the other party has been thoroughly and fairly examined.<sup>3</sup> In this case, each party made full use of that opportunity and neither could reasonably complain that the other party doing so was unnecessarily increasing costs.

### **An uplift for not accepting a reasonable settlement offer**

[17] In April 2020 SWAT made an offer to settle Ms Henry's grievance on a "without prejudice save as to costs" basis. It extended the offer on 7 May 2020 for a further seven days.

[18] SWAT's settlement proposal, made for what it described as "commercial realities associated with litigation", offered \$40,000 gross in full, final and confidential settlement. This sum was described as comprising \$12,000 for lost wages, \$20,000 for distress compensation and \$8,000 towards her legal costs.

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<sup>3</sup> Employment Relations Act 2000, s160(2A).

[19] By letter dated 11 May 2021 Ms Henry, through counsel, rejected the offer because she considered the damage to her reputation from how SWAT had investigated its concerns and dismissed her could not be compensated by money. Her letter said that damage “can only be relieved by a public determination in her favour”. The letter said the principles regarding settlement offers had been explained to Ms Henry by her counsel but her position was that SWAT’s conduct was indefensible. It said Ms Henry needed “a public determination that at the very least, exposes SWAT’s conduct and the unfair treatment she was subjected to, and at the most, shows that she did not do anything wrong and her dismissal was grossly unfair”.

[20] The relevant principles regarding settlement offers, as referred to in the letter from Ms Henry’s counsel, allow for adjustment of costs where a party has turned down an earlier offer to settle on terms better than the final outcome achieved in the Authority determination. For an unsuccessful party this means they may have to pay more of the other party’s costs. For a successful party, this means the amount they may be able to recover for their own costs may be reduced or extinguished.

[21] In the Authority jurisdiction, such settlement offers are not given the full weight or effect that they may be given in litigation in the Employment Court or elsewhere in the civil courts. In those other forums, operating on traditional adversarial principles, a party may have to pay all or most of the legal costs incurred by the party whose better settlement offer was turned down. In the Authority some weight must be given during the costs assessment to the effect of an earlier, superior settlement offer but, because costs in the Authority are awarded only at a modest level, this does not provide for a full indemnity of such costs.

[22] Two inter-related questions arose for resolution on this point in the present case. Firstly, was SWAT’s offer of settlement a reasonable one? Secondly, did Ms Henry’s wish for vindication of her conduct mean she had reasonably refused the offer and so no weight could be given to it in the costs assessment?

[23] The answer to the first question is yes. Assessed against the likely range of outcomes if SWAT were found to have acted unjustifiably, the settlement offer made in April and May 2020 was reasonable. It provided amounts that were around the level that could be expected to be awarded for a successful grievance application of the kind

Ms Henry had made. It would also have provided that result without the subsequent time and expense required to participate in an investigation meeting.

[24] The answer to the second question is no. The notion that Ms Henry could have achieved vindication of the type referred to in her counsel's letter of 11 May 2020 was flawed from the outset. An inquiry carried out by her employer found Ms Henry had belatedly reported an incident concerning possible physical abuse of a resident and made that report only when it suited her for other reasons. The employer's representative concluded this was serious misconduct and the Authority's investigation found the conclusion was justified. This was not a situation in which Ms Henry could reasonably have expected vindication of her actions or, in the senior role she held, blamed others for not doing more earlier about the incident of concern.

[25] While a desire for vindication of her own views about the particular incident of concern and various personnel of SWAT with whom she was at odds may have motivated Ms Henry's pursuit of her case, and rejection of the settlement offer, she did so at her own risk having, as her counsel's letter of 11 May 2020 indicated, been advised of the principles regarding settlement offers. The Court of Appeal has indicated that a "steely approach" on costs needs to be taken in cases pursued for the purpose of vindication but resulting in a monetary outcome inferior to an earlier settlement offer.<sup>4</sup> The court's direction applies to the Authority's exercise of its discretion to award costs.<sup>5</sup>

[26] Review of a sample of Authority determinations on costs where an uplift has been made to give weight to reasonable settlement offers show a range in such adjustments of between \$1,500 and \$4,000. The final costs outcome in such cases was, of course, also subject to other potential adjustments for factors such as party conduct, unnecessarily incurred costs and the financial means of the party ordered to pay costs.<sup>6</sup>

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<sup>4</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [19].

<sup>5</sup> *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [109].

<sup>6</sup> See, for example, *McKeown v Universal Communications Group NZ Limited* [2018] NZERA Auckland 80 (uplift of \$4,000 on tariff for a two day investigation meeting, after applying a downward adjustment for financial circumstances); *Pender v Lyttleton Port Company Limited* [2018] NZERA Christchurch 161 (uplift of \$3,500 on tariff for one day investigation meeting); *Maheta v Airbus Express Limited* [2020] NZERA 52 (uplift of \$3,250 on tariff for one-and-a-half day investigation meeting); *Mokaraka v Department of Corrections* [2019] NZERA 636 (uplift of \$3,000 on tariff for two-and-a-half day investigation meeting); *Cuttriss v Pact Group* [2019] NZERA 706 (uplift of \$2,000 on tariff for one day investigation meeting) and *Dunn v Air New Zealand* [2020] NZERA 265 (uplift of \$1,500 for one day investigation meeting).

[27] Balancing the relevant principles regarding a “steely approach” to cases where the unsuccessful party did not accept an earlier, better settlement agreement and the need for costs awards in the Authority to be modest, an uplift of \$2,500 on the total tariff amount was appropriate in the particular circumstances of this case.

### **Capacity to pay**

[28] Ms Henry submitted that no more than \$8,000 should be imposed as a costs award because her income from her current job was considerably lower than the position from which she was dismissed. It was submitted that an order for payment of costs at the level sought by SWAT would amount to almost one third of her annual net salary and would be inconsistent with concerns that low-income workers should not be discouraged from pursuing cases in the Authority.

[29] While those were valid considerations, the information about Ms Henry’s capacity to pay a costs award was insufficient to draw that conclusion in her particular case. It did not disclose what assets or other means of meeting a costs award she may have, including by way of a loan from a financial institution, family or friends.

[30] The question of capacity of an unsuccessful party to pay costs, in the particular circumstances of each case, also needed to be weighed with other relevant factors. In this case the principles concerning the need for costs in the Authority to be relatively modest and to give some effect to unreasonably rejected settlement offers have already been taken into account. Those factors weighed against a downward adjustment of the limited upward adjustment already made to the tariff rate.

### **Outcome**

[31] For the reasons given Ms Henry must pay SWAT the sum of \$14,000 as a contribution to its costs of representation. The payment must be made within 28 days of the date of this determination.

Robin Arthur  
Member of the Employment Relations Authority