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Higgins v Alan Samson Limited (Christchurch) [2016] NZERA 509; [2016] NZERA Christchurch 186 (13 October 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 186
5563929

BETWEEN BRENT HIGGINS Applicant

AND ALAN SAMSON LIMITED trading as Calendar Girls Respondent

Member of Authority: Christine Hickey

Representatives: Shayne Boyce and Kevin Murray, advocates for the applicant

Erin Locke, counsel for the respondent

Costs submissions received:

From the applicant on 10 August 2016

From the respondent on 30 September 2016

Determination: 13 October 2016

COSTS DETERMINATION OF THE AUTHORITY

A. Brent Higgins must pay Alan Samson Limited \$8,000 towards its legal costs.

[1] On 13 July 2016, I issued a determination that Mr Higgins had been an employee of Alan Samson Limited (ASL) for the entire period of his engagement. However, Mr Higgins failed to prove any of his twelve claims of unjustified disadvantage, his claim of constructive dismissal, or his wage arrears, holiday pay or sick pay claims. As a result, I did not award any remedies.

[2] The parties were encouraged to agree on costs, which I indicated would be likely to be based on the daily tariff of \$3,500. The parties have not been able to agree on costs.

[3] ASL has applied for more than the daily tariff. It asks me to uplift the daily tariff to \$17,500. The total fees incurred by ASL from the date of the settlement offer made on 5 November 2015 are \$18,505.

[4] Mr Higgins' advocates have simply written:

We have no instructions from Mr Higgins but would note that there is no good reason for the ERA to order indemnity costs contrary to its ordinary practice of a daily rate of \$3500 per day.

General principles

[5] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the [Employment Relations Act 2000](#). Costs are awarded at the discretion of the Authority.

[6] The principles and the approach adopted by the Authority on which an award of costs is made are well settled. In exercising its discretion, the Authority frequently judges costs against a notional daily rate, which is \$3,500. The successful party can expect a reasonable contribution to their legal costs from the unsuccessful party.

[7] I have taken into account the principles set out in *PBO Limited v Da Cruz*¹ and conclude that a contributory award towards ASL's costs is reasonable.

Discussion

[8] ASL asks me to increase the daily tariff significantly for two main reasons.

[9] First, Mr Higgins did not accept a *Calderbank* offer made to him on 5 November 2015. The offer was open for acceptance until 10 November 2015. ASL offered to pay \$4,000 under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) and \$3,000 plus GST towards Mr Higgins' advocates' costs. Clearly, Mr Higgins has received far less in proceeding to an investigation meeting than he would have if he had accepted the offer to settle.

[10] If a reasonable *Calderbank* offer has been refused by the unsuccessful party, the Authority may consider this as a factor justifying an increase in the applicable daily rate.

1 [\[2005\] NZEmpC 144](#); [\[2005\] ERNZ 808](#)

[11] Mr Higgins unreasonably refused to accept a valid and reasonable offer to settle the proceedings. The effect has been to increase legal costs for ASL by going through with an investigation meeting that would have been unnecessary had the offer been accepted. Mr Higgins must take some responsibility for his part in leading ASL to incur additional costs to defend his claims. This is a factor that will lead to an award higher than \$3,500.

[12] The second reason ASL submits that the costs award should be increased is that Mr Higgins failed, or refused, to clearly provide adequate particulars of the basis for his claims and sufficient detail of the claims, despite multiple requests by ASL.

[13] ASL submits that the proceedings were approached in a "scatter gun" fashion with an assortment of claims raised that were impossible to analyse or respond to properly as they were inexact and insufficiently particularised.

[14] I agree. At a case management teleconference on 20 November 2015 I directed Mr Murray to clarify each of the applicant's claims of unjustified disadvantage by identifying each disadvantage, why it was unjustified and when each alleged disadvantage occurred.

[15] On 23 December 2015, Mr Murray lodged a memorandum that I assume aimed to meet my direction. However, some of the alleged grievances had not been raised within 90 days, and there remained a lack of clarity and specificity.

[16] On 24 March 2016, I directed the applicant's advocates to lodge and serve an application to raise personal grievances out of time if they expected all grievances to be dealt with in the investigation meeting set down for 13 April 2016. I received this on 29 March 2016. ASL made written submissions on 11 April 2016 on the application to raise new grievances out of time. I determined the application along with the substantive issues after the investigation meeting because I needed further details of the claims and evidence of reasons they had not been raised within 90 days.

[17] ASL submits that the applicant's lack of specificity and late attempts to raise grievances caused it to incur greater legal costs. I agree. I stand by my comments in the determination that the way the claims were approached led to a lack of clarity about exactly what the claims were and whether they had been raised within 90 days etc. right up until the day of the investigation meeting.

[18] According to *Da Cruz* costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. However, I can take into account conduct that increased costs unnecessarily in inflating or reducing an award.

[19] The applicant's approach to the proceedings required more exploration and time invested before the investigation meeting than is usually necessary in personal grievance and wage arrears claims such as this. I consider that also increased the time ASL's counsel had to put into preparation for the investigation meeting and into submissions. It is fair that leads to an increase in the daily tariff.

[20] ASL submits that \$17,500, or five times the daily tariff, is a reasonable contribution for Mr Higgins to pay towards its total

costs, particularly because of the substantial costs incurred after the Calderbank offer was rejected.

[21] It was difficult to understand the basis of many of the applicant's claims before the investigation meeting. However, I do not consider that the case was so complex that the amount of extra work required by ASL's counsel was effectively five times that of a standard personal grievance case.

Conclusion

[22] Having taken into account all the relevant factors I consider that Mr Higgins must make a contribution of \$8,000 towards ASL's legal costs.

Christine Hickey

Member of the Employment Relations Authority

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