

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

**[2020] NZERA 91
3027232**

BETWEEN JACQUELINE HIGHFIELD
Applicant

AND CANTERBURY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Amy Keir, Counsel for the Applicant
Penny Shaw, Counsel for the Respondent

Costs Submissions 24 February 2020 from Applicant
12 February 2020 from Respondent

Determination: 27 February 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 29 January 2020 ([2020] NZERA 35), I found that the Applicant, Ms Jacqueline Highfield, had been unjustifiably disadvantaged in respect of one personal grievance claim, but not unjustifiably disadvantaged in respect of a further three personal grievance claims which she had raised against the Respondent, Canterbury District Health Board (CDHB).

[2] Costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and both parties have filed submissions in respect of costs.

[3] The matter involved a one and a half day investigation meeting in March 2019 which had been adjourned in order that the parties could attempt to resolve matters between themselves, and a further two days of an investigation meeting held on 9 and 10 December 2019.

[4] Ms Shaw, on behalf of CDHB, citing actual costs of \$30,474.55 plus GST is seeking costs on the basis of one half of the amount of costs which would have been awarded if one party had been wholly successful.

[5] Ms Keir, on behalf of Ms Highfield submits that Ms Highfield is entitled to an award of costs on the basis that she:

- a) enjoyed sufficient success in the Authority to uphold the principle that costs follow the event;
- b) remains in an employment relationship with CDHB;
- c) made reasonable and realistic attempts to resolve the matter via Calderbank Offers;
- d) would not have achieved any remedy without initiating proceedings;
- e) her unsuccessful claims did not occupy a disproportionate amount of hearing time; and
- f) any other outcome would deprive her of the benefit of her established grievance.

Submissions for the Respondent

[6] Ms Shaw submits that the matter, which was argued at two separate investigation meetings involved four separate personal grievances of unjustifiable disadvantage, all based on separate facts.

[7] The four claims of unjustifiable disadvantage were that CDHB had:

- a) mismanaged Ms Highfield's return to work;
- b) failed to properly and fairly investigate Ms Highfield's bullying complaint;
- c) drew unsubstantiated conclusions and took punitive actions in response to Ms Highfield's bullying complaints; and
- d) unilaterally transferred Ms Highfield's area of work on 31 May 2019.

[8] It is submitted that whilst Ms Highfield may have been successful in one of her personal grievances, the time involved in preparation for, and required at, the investigation

meeting for that portion of her claim was small. In contrast it is submitted that the successful defence of the other three personal grievances occupied the majority of the investigation meeting.

[9] As such, it is submitted that CDHB was overall the more successful party and should be awarded costs.

[10] The Respondent further submits that, although there was some double up in preparation for the second investigation meeting, in the situation whereby: (i) the ‘surprise’ evidence given by Ms Highfield in the first investigation meeting, namely that the transfer to Ward 12 caused the aggravation of her injury; (ii) the introduction of a new personal grievance, namely the transfer to Outpatients; and (iii) the fact that the Authority sat for two long days; the daily tariff should be applied to three days not two.

Submissions for the Applicant

[11] Ms Keir for Ms Highfield submits that the matter was complex, involving four separate disadvantage claims. Although the claims were related to separate events, each was a key part of a narrative that continued to evolve because Ms Highfield has remained employed by CDHB throughout the course of the proceedings. As such the grievances are not discrete, but a development from the initial grievance, and it is not appropriate or possible to seek to apportion hearing time to each individually.

[12] It is submitted that there is no suggestion that the later grievances were unreasonably raised. Moreover, with the exception of one witness, all witnesses called addressed matters relating to the initial grievance in addition to the subsequent ones.

[13] The parties’ enduring employment relationship, and therefore ongoing obligation of good faith, is submitted as being an important ‘nuance’ in assessing costs, and favours an award in Ms Highfield’s direction.

The Calderbank Offers

[14] Ms Keir submits that Ms Highfield made two Calderbank Offers to CDHB to resolve the matter prior to the second investigation meeting being heard.¹ A Calderbank Offer is an offer ‘without prejudice save as to costs’ offer.

[15] The first was made on 30 October 2019 in a letter headed ‘Without prejudice save as to costs’ (the First Calderbank Offer). This proposed resolution on the basis of a financial

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

settlement. It is submitted that whilst the proposal was greater than the eventual outcome for Ms Highfield, it also proposed the settlement of matters not before the Authority.

[16] The First Calderbank Offer was stated as being open for acceptance by 1 November 2019, but no response was received from CDHB, although the parties did attend mediation as had been suggested in the First Calderbank Offer.

[17] A second Calderbank Offer was made on behalf of Ms Highfield on 20 November 2019 (the Second Calderbank Offer). This proposed that the parties agree the future of Ms Highfield's employment with CDHB, and the matter be settled on the basis that Ms Highfield be granted an amount of leave and a contribution to her legal costs. This Second Calderbank Offer was rejected by CDHB.

[18] Ms Keir submits that Ms Highfield's costs in the authority were \$29,214.06 plus \$306.66 incurred as disbursements. Of this amount nearly \$21,000.00 was incurred following the First Calderbank Offer, and approximately \$12,450.00 was incurred after the Second Calderbank Offer.

Principles

[19] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[20] Costs are at the discretion of the Authority².

[21] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

[22] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

Costs Award

[23] In this matter both parties had some degree of success. In *Coomer v J H McCallum and Son Ltd* the Employment Court observed that in these cases of mixed success, the Authority must: “stand back and look at things in the round”.⁴ In this case, I accept the submission that the three later grievances were not unreasonably raised, but observe that they were not upheld by the Authority.

[24] I take into consideration the fact that attempts were made on Ms Highfield’s behalf to resolve the matter. Whilst the Respondent did not respond to the First Calderbank Offer and rejected the proposed basis for resolution of matters made in the Second Calderbank Offer, I note that both parties had attended the mediation which preceded the Second Calderbank Offer.

[25] I further take into consideration both the fact that there is an ongoing employment relationship in this case, and that the Applicant, should costs not be awarded in her favour, would effectively be deprived of having any benefit in her success in respect of the first personal grievance.

[26] This matter occupied three and a half days of investigation meetings in total. On the basis of the usual daily tariff in the Authority that equates to \$13,250.00 (on the basis of \$4,500.00 for the first day, and \$3,500.00 per full day of hearing time thereafter).

[27] Having weighed all the various considerations, I find that this is a case in which, balancing the degree of success achieved by both parties and recognising both the interrelated nature of the grievances and the ongoing nature of the relationship between the parties, it is appropriate for the Authority to use its discretion by making an award that takes these factors into account.

[28] CDHB is ordered to pay Ms Highfield the sum of \$5,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000. CDHB is also ordered to pay Ms Highfield the disbursements incurred of \$306.66.

Eleanor Robinson
Member of the Employment Relations Authority

⁴ *Coomer v J H McCallum and Son Ltd* [2017] NZ EmpC 156 at [43]