

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 78
5445269

BETWEEN ANTONINA KNIGHT
 Applicant

A N D PRINTEK SUPPLIES
 LIMITED t/a DATATEK
 PACIFIC
 Respondent

Member of Authority: T G Tetitaha

Representatives: S E Greening, Counsel for the Applicant
 H Patel, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 21 November 2014 from the Applicant
 27 November 2014 from the Respondent

Date of Determination 17 March 2015

COSTS DETERMINATION

A. The respondent is ordered to pay the applicant \$2,638.75 towards her actual legal costs.

Employment relationship problem

[1] The Authority in its substantive determination dated 17 November 2014¹ held that Antonina Knight was unjustifiably dismissed by Printek Supplies Limited t/a Datatech. The respondent was ordered to pay Antonina Knight compensation of \$5,000 pursuant to s123(1)(c)(i) Employment Relations Act 2000.

¹ *Knight v Printek Supplies Ltd t/a Datatek Pacific* 17 November 2014 [2014] NZERA Auckland 470

[2] The applicant now applies for costs. Her costs incurred were \$3,208.13 for a one day investigation meeting.

Issues

[3] The following issues are to be determined:

- a. What is the starting point for assessing costs?
- b. Are there any factors that warrant adjusting the notional daily tariff?

What is the starting point for assessing costs?

[4] The correct approach to assessing costs in this matter is for the Authority to adopt its usual notional daily tariff based approach to costs.² The current notional daily tariff is \$3,500. This matter involved a one day investigation meeting. The starting point for assessing costs is therefore \$3,500.

[5] The applicant's actual costs of \$3,208.13 fall below the notional daily tariff. Her filed invoice shows how these were incurred. They appear reasonable.

[6] There is well established principle that costs awarded should not exceed those actually incurred.³

[7] The applicant seeks recovery of all her costs or indemnity costs because they fall below the Authority's notional daily tariff. The leading case on indemnity costs is the Court of Appeal decision in *Bradbury & Ors v. Westpac Banking Corporation*⁴. Indemnity costs are exceptional so require "exceptionally bad behaviour" or may be awarded where a party has behaved either badly or very unreasonably.⁵

[8] This matter does not meet the very high threshold required before indemnity costs may be imposed. Accordingly there shall be a reduction of the starting point by one third to reflect this. The starting point for awarding costs shall be \$2,138.75.

² *Mattingly v Strata Title Management Ltd* [2014] NZEMPC 15 at [16]

³ Rule 14.2(f) High Court Rules

⁴ [2009] NZCA 234

⁵ *Supra*

Are there any factors that warrant adjusting the notional daily tariff?

Factors which warrant a reduction

[9] The respondent submits it provided a *Calderbank* offer of \$3,800 (GST inclusive) which “*sits closer to the amount awarded*” and seeks a reduced costs award of \$481.22 being 15% of actual costs.

[10] An offer to pay compensation at a level that is reasonable might be regarded as conveying vindication. A “steely” approach is required. The scarce resources of the Authority should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling and countervailing factors⁶.

[11] The *Calderbank* offer dated 12 September 2014 of \$3,800 was GST inclusive. The net amount is \$3,304.35. The offer does not specify what part (if any) pertains to costs as opposed to compensation. At the time the offer was made, the applicant had filed a statement of problem and begun preparation for hearing. From the invoices, preparation of \$880.00 had been undertaken up to October 2014. Accordingly the respondent’s *Calderbank* was in effect offering \$2,424.35 towards compensation. The majority of costs incurred were post *Calderbank* offer of \$1,888.00 excluding GST and disbursements.

[12] Standing back and considering the above, the *Calderbank* offer cannot be reasonable in the circumstances. The net offer was approximately half of what was achieved at hearing. It lacked transparency as it did not state what part related to costs as opposed to compensation. As previously stated, the costs incurred were reasonable especially in circumstances where the majority of cost occurred after the *Calderbank* offer had been received.

[13] There are no other factors warranting a decrease to the starting point.

⁶ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [19] and [20]

Factors which warrant an increase

[14] The applicant submits there should be an increase in costs due to the unsuccessful counterclaim. She refers to the lack of evidential foundation and the unnecessary preparation.

[15] A counterclaim was filed and Ms Knight was put to the expense of filing a response. It was not pursued at hearing.

[16] An uplift to reflect the unsuccessful counterclaim is warranted. The uplift in costs shall be \$500.00.

Outcome

[17] The respondent is ordered to pay the applicant \$2,638.75 towards its actual legal costs.

TG Tetitaha
Member of the Employment Relations Authority