



New Zealand Employment Relations Authority Decisions

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M'nijel v Lush (New Zealand) Limited (Wellington) [2011] NZERA 403; [2011] NZERA Wellington 104 (20 June 2011)

Last Updated: 30 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 104
5333308

BETWEEN LEILA M'NIJEL

Applicant

AND LUSH (NEW ZEALAND)

LIMITED

Respondent

Member of Authority: P R Stapp

Submissions received: 27 April and 3 and 5 May 2011 for the Applicant

3,4 and 6 May 2011 for the Respondent

Determination: 20 June 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] This determination has been issued following an application to recall the determination issued to the parties to correct an error. A date of an offer to settle before the investigation meeting has been corrected with reference to it being the day before the investigation meeting and the applicant replying on the same day, but this does not change the determination on the quantum of costs for the reasons given. I have also made reference to the applicant's claim as a two thirds percentage of the actual costs in paragraph 2 below.

[2] This is an application for costs which were reserved in the Authority's determination dated 12 April 2011 [2011] NZERA Wellington 55. The applicant has claimed \$5,845 costs and the \$71.56 filing fee as a two thirds percentage of the actual costs. The respondent has claimed an award of the amount of the usual daily rate on the basis that the hearing was unnecessary when an offer was made to settle the day before the investigation meeting to cover costs.

[3] The applicant was successful in a number of her claims, albeit not on all the claims especially a claim for reinstatement that was dismissed.

[4] The Authority's investigation meeting involved the usual telephone conference for case management. The parties followed a timetable prior to the investigation meeting to provide written statements and all documents. The Authority's investigation meeting took a full day.

[5] "Calderbank" offers to settle from the respondent were made up until the investigation meeting. Two earlier offers (\$2,000 and \$4,000) did not exceed the actual amount awarded to the applicant by the Authority. I have used the gross amount awarded to the applicant and not deducted tax because the gross amount was the award made to the applicant and it is off that that tax is deducted for the applicant. It is reasonable to expect costs for preparation would have commenced prior to the

requirement for written statements being provided in 15 February 2011. The last offers to settle were made on 23 February for a total of \$8,500 and the applicant replied on the same date.

[6] I have decided to apply costs in the usual way. Costs follow the event. This is a matter for the applicant to receive a contribution towards her costs despite the attempts made by the respondent to settle, which by the time the last offer was made was too late.

[7] The offers to settle were rejected by the applicant. I hold that that was reasonable because of proximity of final offer to the investigation meeting.

[8] I hold that the timing for that offer was too late and the costs had already been incurred by the applicant because of the commitment of a representative for the day plus his preparation for the hearing and submissions. The applicant's costs for the entire matter have been estimated at \$8,875.12 (including GST). She was awarded \$5,653.25 financial remedies by the Authority. The best offer from the respondent to try and settle was \$8,500 the day before the investigation meeting. Costs had been incurred by the applicant at that time and her representative was committed to the scheduled investigation meeting and preparation.

[9] It is hard to quantify the remedy of reinstatement, except in terms of any lost wages in the event of it not being granted. I accept the applicant, as was her right, genuinely was seeking reinstatement and this may have reflected on her stance to financial remedies.

[10] On the basis of the usual tariff that is applied by the Authority I assess a reasonable contribution towards costs at the upper end of the scale for a one day investigation meeting to minimise depriving the applicant of receiving the benefit of her success on the monetary remedies. The applicant presumably went into the investigation with her eyes open to the risk of the claim for reinstatement being dismissed. Therefore she should have to bear some of the cost because the investigation required time to cover that issue. It is unfortunate for her that she will have to personally meet a small portion of the costs but since the amount of her actual costs is an estimate it remains a possibility she can come to some arrangement with her representative on the final figure. I accept that she needed representation and attendance at the investigation meeting, and that such attendance involved preparation including submissions. I hold that the sum should be \$3,000 plus the filing fee of \$71.56.

[11] Lush (New Zealand) Limited is required to pay Leila M'Nijel \$3,000 costs plus the filing fee of \$71.56.

P R Stapp

Member of the Employment Relations Authority

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