# Employment Court of New Zealand



## Mattingly v Strata Title Management Limited [2014] NZEmpC 15 (14 February 2014)

Last Updated: 20 February 2014

**IN THE EMPLOYMENT COURT AUCKLAND**

**[2014] NZEmpC 15**

**ARC 50/13**

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN COLLEEN MATTINGLY Plaintiff

AND STRATA TITLE MANAGEMENT LIMITED

Defendant

Hearing: By submissions filed on 11 October, 1 and 7 November 2013

Appearances: Mr Tim Oldfield, counsel for plaintiff

Ms Gemma Mayes, counsel for defendant

Judgment: 14 February 2014

**JUDGMENT OF JUDGE CHRISTINA INGLIS**

### Introduction

[1] This is a de novo challenge to a costs determination of the Employment Relations Authority (the Authority).1 The parties agreed to the challenge being dealt with on the papers, and have filed extensive written submissions in support of their respective positions.

[2] In the Authority the plaintiff had sought an award of indemnity costs against the defendant. The Authority declined to award such costs, and they are not pursued by the plaintiff in the context of its challenge. The Authority applied a pro rata approach to the notional daily tariff (of $3,500) to reflect the time spent at the

investigation meeting (namely 9.30 am to 2.00 pm, with a lunch adjournment). This

1 [2013] NZERA Auckland 232.



led the Authority to a starting point of $2,000. The Authority Member then considered whether there were any factors that warranted either a decrease or increase to that starting point. The Authority concluded that a $300 decrease was appropriate to reflect the fact that the plaintiff withdrew an age discrimination claim at the beginning of the investigation meeting and a disability discrimination claim during the investigation, thereby putting the defendant to unnecessary costs. The Authority increased costs by $1,500 in recognition of the defendant's failure to accept a reasonable settlement offer made in advance of

the Authority's investigation meeting. A submission that costs should be increased to reflect preparation time and attendances required in providing additional information prior to the investigation meeting fell on fallow ground. In the final analysis the Authority ordered the defendant to pay $3,200 to the plaintiff by way of contribution to its total claimed

costs of $6,361.50.2

[3] The plaintiff seeks an award of $5,250. In summary, the plaintiff submits that the Authority applied the daily tariff in an unduly rigid manner; erred in failing to allow for preparation time and the plaintiff 's success on an application to exclude evidence; failed to adopt a "steely approach" to the defendant's refusal to accept the without prejudice save as to costs offer; was wrong to have described the matter as "straightforward" and failed to approach its costs determination consistently with

equity and good conscience.3

[4] The plaintiff invites the Court to rekindle an earlier approach to costs, namely balancing the quantum of any costs award against the relief ordered in favour of a successful employee party to ensure that they are not left out of pocket. This is said to be consistent with the equity and good conscience jurisdiction enjoyed by the employment institutions.

[5] The defendant submits that the Authority's determination ought not to be lightly interfered with and that the plaintiff should be awarded the same amount as in

the Authority, namely costs of $3,200 together with the filing fee of $71.56.

2 Together with $71.56 by way of disbursements (filing fee).

3 An earlier ground of challenge that the defendant unreasonably refused mediation and accordingly increased the costs that might otherwise have been incurred was subsequently abandoned.

**Approach**

[6] Because this is a challenge to a costs determination of the Authority, the starting point is cl 15(1) of sch 2 to the Employment Relations Act 2000 (the Act). It provides that the Authority may order any party to a matter to pay to any other party such costs and expenses "as the Authority thinks reasonable". The Authority must exercise its discretion judicially and in accordance with principle. The principles

relating to costs awards in the Authority are well established.4 The general approach

to costs in the Authority is by way of application of a notional daily tariff. That currently stands at $3,500.5

[7] As emphasised by the full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, "[t]he unique nature of the Authority and its proceedings means that parties to investigation meetings should not have the same expectations about procedure and costs as they have of the Court".6 The Court observed that there is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. It recognised that flexibility could be injected into the costs assessment process by making upward or downward adjustments "in a principled way without compromising the Authority's modest approach to costs".7 Without prejudice save as to costs settlement offers may be taken into account as a factor increasing the costs contribution that would otherwise be ordered, along with conduct that increases costs unnecessarily.8

[8] In determining a de novo challenge to costs in the Authority the Court must stand in the Authority's shoes, but make its own decision.9 While this approach can be simply stated its application is not without difficulty. As Judge Couch observed in *Metallic Sweeping (1998) Ltd v Ford*:10

[12] That raises the question of how the Court can and should conduct a de novo hearing of an application for costs. As in this case, most claims for

4 See *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 172 808 at [43] – [47].

5 *Pathways Health Ltd v Moxon* [2013] NZEmpC 18 at [36].

6 *Da Cruz*, above n 3, at [41].

7 At [46].

8 At [44].

9 Employment Relations Act 2000, s 183(1).

10 [2010] NZEmpC 129; [2010] ERNZ 433.

costs are determined by the Authority on the basis of written submissions by the parties or their representatives. All concerned have been directly involved in the investigation and, as the Authority did in this case, may make only brief and general references to the events which are relevant to the outcome. Evidence is rarely if ever given in relation to costs. Rather the Authority relies on its own knowledge of events, particularly in relation to interlocutory matters and the manner in which the parties have conducted their cases.

[13] When conducting a de novo hearing of substantive issues, the Court effectively puts the Authority's determination to one side and decides the matter on the basis of the evidence adduced before it. Given the nature of the process by which costs determinations are made, however, that is simply impractical when the Court is asked to decide what costs ought to have been awarded by the Authority. The Court receives nothing from the Authority. There is no record of the investigation meeting. While it would be possible for oral evidence to be given by the parties about every aspect of the Authority's investigation and each other's conduct on which they seek to rely, that could easily lead to a hearing out of all proportion to what is at stake.

[14] It seems to me that the only practical way of deciding a challenge to a costs determination is for the Court to be primarily informed through the submissions of the parties, with the possibility that this may be supported by affidavit evidence about contentious issues. ... Inevitably, a Judge of the Court deciding a challenge can never be as well informed about events as the member of the Authority who conducted the investigation but I can see no realistic means to bridge that gap. In areas of uncertainty, the Court will need to have regard to the Authority's assessment of matters in a manner it would not do when deciding a substantive challenge by way of a hearing de novo. It may also be helpful and appropriate for the Court to have regard to the Authority's substantive determination.

[9] I agree with, and adopt, the approach identified by Judge Couch in *Metallic*

*Sweeping*.

*Is it contrary to equity and good conscience if a substantial part of the compensation awarded has to be disbursed to meet legal expenses?*

[10] The objects of the Act are set out in s 3, and include the need to address the inherent inequality of power in employment relationships.11 Mr Oldfield, counsel for the plaintiff, submits that even modestly incurred costs are a significant burden on the majority of employees, bearing in mind the median wage (which, it is said, currently stands at $844 per week). He relies on s 3(a)(ii) as a springboard for a submission that, in assessing costs, there is a need to ensure that a successful claim is

not negated by an award that does not amount to reimbursement and that:

11 Section 3(a)(ii).

To do otherwise does not acknowledge and address the inherent inequality of power in the employment relationship and would not accord with the Authority's equity and good conscience jurisdiction.

[11] Boiled down to its fundamentals, Mr Oldfield's submission is that in determining costs the Authority should be guided by the relief granted to an employee party, to ensure that it is not eroded to the point that pursuing litigation becomes a cost neutral, or cost deficit, process. The argument is one that found favour with the Court in *Harris v Nurse Maude District Nursing Association (No 2).* There the Court expressed the view that:12

... it would be grossly unfair and would offend against any principles of equity and good conscience if a substantial part of the compensation awarded to [the plaintiff] had to be disbursed to meet her expenses.

[12] As Mr Oldfield acknowledged, the Court's approach in *Harris* did not find favour with the Court of Appeal in *Aoraki Corporation Ltd v McGavin*, a case decided under the Employment Contracts Act 1991.13 However he submitted that the enactment of the 2000 Act, and its subsequent amendments in 2004, materially alters the position.

[13] Mr Oldfield made the point that the Authority's broad discretion as to costs conferred by cl 15 of sch 2 to the Act is "flavoured" by the objects of the Act and its purpose. That cannot, of itself, be a contentious proposition having regard to s 5 of the Interpretation Act 1999 which provides that the meaning of an enactment must be ascertained from its text and in light of its purpose. However, I do not accept that the provisions referred to by Mr Oldfield have the effect of overriding established, long accepted principles applying to the assessment of costs in the Authority. It is not the function of a costs award to address any perceived deficiencies in the relief otherwise awarded to a successful party, much as it is not the function of a costs award to punish an unsuccessful party.

[14] It is clear from a reading of the Act as a whole, reinforced by the 2004 amendments, that the legislative intention is for employment relationship problems

12 *Harris v Nurse Maude District Nursing Association (No 2)* [1991] NZEmpC 47; [1991] 3 ERNZ 50, at 55.

13 [1998] NZCA 88; [1998] 1 ERNZ 601 (CA) at 625. Counsel also referred to *Hoyts Cinemas (NZ) Ltd v Jacob* EMC Christchurch CC4/03, 20 February 2003 and *Nimon & Sons Ltd v Buckley* EMC Wellington WC26A/07, 20 November 2007.

generally to be resolved in a cost effective, non-technical and practical way by the Authority.14 The highly nuanced approach to assessing costs advocated for on behalf of the plaintiff (which is set out in more detail below) sits uncomfortably with this overarching imperative and the evident purposes (and benefits) of a daily tariff approach applied in the general run of cases.

[15] Ms Mayes, counsel for the defendant, observed that the Authority's daily rate is well known and should be borne in mind by litigants from the outset, in assessing the level of financial resources they wish to apply to a matter, particularly where counsel is instructed. The Authority is a specialist body which is inquisitorial, not adversarial. While acknowledging that employees and employers have a right to representation of their choice in the Authority, the former Chief of the Authority

recently observed in *Gazeley v Oceania Group (NZ) Ltd* that:15

[29] This Authority and other tribunals like it have been created as specialist court-like bodies giving access to legal decision-making that would otherwise only be available to ordinary members of the public through the courts where there is a greater need for legal representation. The class of public that the Authority can make decisions about is mainly employees and employers in an employment relationship.

[30] The inquisitorial approach the Authority may take with any investigation is recognised to be a mechanism in tribunals for ensuring that applicants and other parties do not need the assistance of a lawyer, or other advocate, or agent, in order to present their position in the normal course of events, or at least do not need the same level of assistance that before the courts may be needed from legal representatives. If people are unable to give evidence without assistance, the Authority is able to question them in order to elicit the evidence, and indeed it is under a duty to do so as an investigative body. The need for comprehensive or detailed legal submissions referring extensively to case law is much lessened, if present at all, by the fact that the Authority is a specialist tribunal which can reasonably be expected to be familiar with current statute and case law in relation to personal grievances and remedies for breach of statute or contract.

*Full day, half day, or pro rata rate?*

[16] I agree that the starting point in considering costs in this case should be the Authority's daily tariff. The parties are at odds as to whether a pro rata approach ought to be applied in the circumstances.

[17] The plaintiff submits that the investigation meeting took more than half a day, as it commenced at 9.30 am and continued through until 2.00 pm. That means that a little over half a day was consumed by the investigation. Mr Oldfield submits that where a hearing exceeds half a day the full daily tariff should apply, rather than a pro rata approach (as was applied by the Authority in the present case). He also raises broader concerns that the Authority does not appear to take a consistent approach to the issue of what constitutes a day for the purposes of the daily tariff.

[18] While the Authority Member took a pro rata approach in the present case, Mr Oldfield referred me to another determination of the Authority in *Ansley v Elite Innovation Ltd*16 where the full daily tariff was applied in respect of an investigation meeting that took place from 10.00 am to 2.00 pm. There the Authority Member observed that:17

The notional daily tariff is a daily rate. The Authority was required to sit and the parties and witnesses to be present, for longer than half a day. There is no basis for a lower starting point. Accordingly, the starting point for assessing costs in $3,500.

[19] I do not consider it necessary to adopt a hair-splitting approach to the calculation of part days in the circumstances of this case. The fact is that the investigation meeting concluded at 2.00 pm but a luncheon adjournment had already occurred. In this context I can discern no sensible basis for applying a full day approach. Rather I propose to adopt a starting point of half a day as appropriate in the particular circumstances. That leads to a starting point of $1,750.

*Pre and post investigation meeting costs*

[20] Mr Oldfield submits that, when making an assessment as to costs, consideration of the extent of preparation required for a pre-investigation meeting is necessary rather than a bald assessment of hearing time, particularly when proper preparation can reduce hearing time by providing focussed and relevant evidence. He also submits that while the Authority is often touted as a speedy and informal body it does not always operate that way in practice and, I infer, did not allegedly do

so in the present case in light of the fact that it required written briefs of evidence in advance, dealt with an application to exclude evidence and gave an opportunity for legal submissions to be filed after the investigation meeting.

[21] The first point is that it was the plaintiff who advanced an application to exclude evidence prior to the Authority's investigation meeting. Such applications come at a cost, both in terms of time and money. The second point is that a survey of

Authority determinations suggests that it is common practice for the Authority to provide the parties with an opportunity to file written submissions following the investigation meeting and for the notional daily rate to be based on the days or part days of time taken up by the investigation meeting itself, rather than pre or post investigation attendances, unless the particular circumstances require a departure

from that approach.18 This suggests that the notional daily rate applied by the

Authority, and revised from time to time, builds in a recognition of the generally applicable costs associated with progressing a claim through to completion, recognises that longer cases usually require more preparation and that aggravating and/or mitigating factors may have an impact depending on the individual circumstances of the case. I do not accept the submission that the Authority Member mischaracterised the proceedings as "straightforward". Having regard to the nature of the pleadings, and the matters in issue, that was an apt description.

[22] The plaintiff applied for the exclusion of extensive parts of the defendant's proposed evidence in advance of the Authority's investigation meeting. The Authority partially granted that application, removing less than half of the allegedly offending paragraphs. The defendant submits that it was put to unnecessary cost and expense in opposing the exclusion of the remainder of the evidence, and that (overall) it was the successful party on the application. The application was dealt with on the papers, and was able to be dispensed with in short order by the Authority. I am not persuaded that an uplift is warranted in the circumstances.

[23] The daily tariff approach has a number of advantages, including simplicity and predictability. Adopting the highly nuanced approach advanced on behalf of the

18 Although see *Kilpatrick v Air New Zealand Ltd* [2013] NZERA Auckland 280, referred to by counsel for the plaintiff, where the Authority allowed an extra half day for presentation of written submissions following the investigation meeting.

plaintiff is liable to undermine the benefits of the general approach, encouraging complex (and accordingly costly) submissions on costs. Unreasonable or unnecessary steps in the process, or unduly protracted investigation time, can be taken into account as an uplifting factor but I have been unable to identify anything in the context of these proceedings that would warrant an uplift or departure from the general daily rate on these grounds alone. The plaintiff's belated withdrawal of her claims of discrimination based on age and disability warrants a decrease, as counsel for the plaintiff acknowledges. The withdrawal of the age discrimination claim came at the beginning of the Authority's investigation meeting. The withdrawal of the disability discrimination claim came part way through the meeting, following questioning from the Authority Member, and the plaintiff's acceptance that she did not have a disability and therefore could not have been discriminated for it.

[24] The defendant also refers to the plaintiff's claim of breach of good faith, which was not actively pursued before the Authority despite a request that the issue be addressed by counsel in submissions. I accept that the defendant was put to additional and unnecessary expense in responding to the plaintiff's pleading and claim for a penalty against it, in circumstances where it was not pursued and the Authority determined that no penalty ought to be imposed. I agree with the Authority's assessment that these steps, which foisted unnecessary and avoidable costs onto the defendant, warrants a reduction of the costs that would otherwise be awarded in the plaintiff's favour. The Authority made an allowance of $300, which the plaintiff appears to agree with and which I too would allow.

*Without prejudice save as to costs offer*

[25] The plaintiff made a without prejudice save as to costs settlement offer on 31

January 2013, a reasonable time before the Authority's investigation meeting (which took place on 11 April 2013). The offer was declined by the defendant. The financial component of the offer was for a payment of $6,500 under s 123(1)(c)(i) of the Act and

$3,500 plus GST in costs. Ultimately the plaintiff was awarded $7,465.38 in lost

remuneration and $6,000 in compensation.19 The plaintiff was accordingly awarded more than she offered to settle for.

[26] Mr Oldfield's primary argument is that a party's unreasonable decision to decline a without prejudice save as to costs settlement offer ought to ordinarily be given considerable weight, consistent with equity and good conscience and the Act's objective of supporting a reduced need for judicial intervention. As I understand the defendant's submission, it accepts that an uplift is appropriate having regard to the failure to accept the settlement offer, but that the extent of any uplift should be limited having regard to the fact that the offer included other remedies beyond what the Authority could and did award.

[27] Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a "steely approach" ought to be adopted.20 No such statement of approval has yet been made by the Court of Appeal in relation

to the assessment of costs in the Authority.21 It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in *Da Cruz* that Authority awards will be "modest".22

What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.

[28] I accept that there were other (non financial) factors that weighed with the defendant in deciding to decline the offer, including the condition that the plaintiff's dismissal be re-characterised as a resignation. This was not the sort of relief that the Authority could ever grant and any reservations the defendant may have had about

accepting a settlement proposal that retrospectively sought to recreate reality are

19 [2013] NZERA Auckland 158, [37] and [41].

20 See *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) and *Bluestar Print Group (NZ) Ltd v*

*Mitchell* [2010] NZCA 385; [2010] ERNZ 446 (CA) at [20].

21 See *Da Cruz,* above n 3, at [37]-[39] where the full Court observed that the Authority is not bound by *Elmsly.*

22 At [44].

understandable. The plaintiff's costs following the rejection of the offer also included unnecessary costs, as has been acknowledged.

[29] The defendant acknowledges that an uplift is appropriate having regard to its

rejection of the plaintiff's settlement offer. I agree.

**Conclusion**

[30] Standing back and considering all matters before me, I consider that a costs

award in the plaintiff's favour of $3,200 is appropriate.

[31] The plaintiff's challenge to the Authority's determination is accordingly dismissed. The defendant is ordered to pay $3,200 by way of a contribution to costs in the Authority to the plaintiff, together with the filing fee in the Authority of $71.56. The Authority's determination is formally set aside, pursuant to s 183(2) of the Act and this judgment now stands in its place.

[32] Both parties asked that costs on the challenge be reserved. It is to be hoped that the parties can agree to costs. If that does not prove possible memoranda can be filed and served, with the defendant filing and serving any such memorandum and supporting documentation within 28 days of the date of this judgment and the plaintiff filing and serving any response within a further 14 days.

Christina Inglis

Judge

Judgment signed at 12.15 pm on 14 February 2014

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