IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 181
3020872

	BETWEEN	JOANNE MCKINLAY Applicant
	AND	WELLINGTON COSMETIC CLINIC LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Peter McKenzie-Bridle, counsel for applicant Ben Sheehan, counsel for respondent
Submissions Received:	15 and 22 March 2019 from Applicant 22 March 2019 from Respondent
Date of Determination:	28 March 2019

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 7 March 2019 I issued a determination concluding Ms McKinlay had a personal grievance as she had been unjustifiably dismissed by Wellington Cosmetic Company Limited (WCCL).[1] Ms McKinlay also had success with claims she had been unjustifiably disadvantaged and not been paid the minimum wage. She was unsuccessful with a claim regarding money alleged to have been improperly deducted from her pay and one concerning non-production of an employment agreement.

[2] WCCL lodged various counterclaims and was successful with one regarding overpayment of holidays. It failed with others concerning money it alleged Ms McKinlay owed for product and services.

[1] [2019] NZERA 133

[3] Costs were reserved and Ms McKinlay now seeks a contribution toward those she incurred pursuing her claims. She does so on the basis she succeeded with her prime claim while WCCL failed with its.

[4] Normally the Authority will use a daily tariff when addressing a costs claim.[2] The current starting point is $4,500 for the first day and $3,500 a day thereafter. From there adjustment may be made depending on the circumstances.

[5] The investigation took about two and a half days which would, applying the above tariff, see a contribution in the order of $9,750 and that is what Ms McKinlay seeks.[3]

[6] In making her application Ms McKinlay notes issues arise where there are counterclaims as occurred here but says the effect is, in this instance, de minimus. That is because Ms McKinlay was successful with respect to her prime claim along with others while WCCL's success was minimal – approximately 5% of the total sought.

[7] Ms McKinlay also seeks the lifting of an order suppressing the identity of the parties on the grounds it was not sought and offends the principles of open justice.

[8] By way of reply WCCL notes that while Ms McKinlay succeeded with her dismissal claim it was not the one she brought but another reached by the application of s 122 of the Act. WCCL also says the level of success with respect to its counter claims was greater than Ms McKinlay asserts. On this it is correct though its degree of success remains outweighed by its failures.

[9] Reference is made to the fact one of the unsuccessful claims was for a penalty which was unsustainable and a Court decision reducing an Authority costs award in such circumstances is cited.[4] There is then criticism Ms McKinlay failed to properly quantify her wage claim which justifies a further reduction in any amount awarded.[5]

[10] There are then three Calderbanks made prior to the investigation along with a counteroffer from Ms McKinlay. While the figures cited in WCCL's offers indicate they are in the vicinity of that Ms McKinlay achieved as a result of the investigation I

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[2] refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808
[3] Applicant's submission of 15 March 2019 at [12]
[4] *Gini v Sturgess* [2013] NZEmpC 9 at [19]
[5] Refer *Shakeshaft v All Seasons Pet Restore Ltd* [2016] NZERA Auckland 10

conclude that is not the case as a key sum is an estimate of the debt she owed and which WCCL offered to write off. The sum mentioned is greater than that later sought in the Authority. Ms McKinlay was willing to settle for less than she was subsequently awarded though her position left the issue of alleged debt to WCCL unresolved.

[11] With respect to the suppression issue WCCL argues my decision is correct and I was required, by law, to make the orders I did.

[12] As already said Ms McKinlay seeks a contribution toward her costs in line with the current daily tariff. Her claim, however, faces a significant hurdle in that Ms McKinlay advises actual costs approximate $8,500 to date. She goes on to advise ... *final costs will not be known until the proceedings are concluded but Counsel does not anticipate they will exceed $9,000*.[6]

[13] In other words the amount sought exceeds expected expenditure. It follows the request exceeds indemnity costs and therein lies the problem. A costs award is a contribution and not full indemnification except in exceptional circumstances where the type of behaviours discussed in *Bradbury v Westpac* are present.[7] There is no suggestion such behaviours were present here as they were not.

[14] There is then the fact WCCL had a measure of success in both defending some of Ms McKinlay's claims and successfully pursuing one of its own. In considering this I am cognisant of the Court's views in decisions about mixed success. While WCCL's successes warrants some recognition their addressing did not require nearly as much hearing time as those with which Ms McKinlay was successful.[8] I also have to say the key claim, both in importance and investigation time, was that of dismissal. I do not accept the argument Ms McKinlay's success was only a result of my application of s 122. Ultimately the claim was unjustified dismissal and Ms McKinlay was found to be unjustifiably dismissed. She was also unjustifiably disadvantaged.

[15] Finally I discount the Calderbanks. The underlying principle is an offer is made which exceeds the amount ultimately achieved and the acceptance of which would have meant the avoidance of unnecessary cost. WCCL's offers failed to reach

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[6] Applicant's submission of 15 March 2019 at [13]
[7] *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400
[8] For example *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156 and *Rodionov v Ozone Technologies Ltd* [2018] NZEmpC 56

the level of Ms McKinlay's success while hers left a key component unresolved though the final outcome does mean its true value is less than she achieved.

[16] Having weighed the points above and the submissions I conclude Ms McKinlay's efforts warrant a contribution in the amount of $6,500. That should be reduced by $500 in recognition of WCCL's successes.

[17] On the issue of suppression I disagree with Mr McKenzie-Bridle on one key point and that is whether or not suppression was originally sought. My notes indicate it was sought at the commencement of the investigation during a discussion about whether or not Ms McKinlay's application to the Family Court was admissible. While I considered the application admissible I advised a decision about suppression would come later. As it transpired that was not discussed again and I subsequently granted Ms McKinlay the order she originally, though it may now be said inadvertently, sought.

[18] While I accept Ms McKinlay has the right to change her mind I also note the present disagreement between the parties as to the effect of Family Court Act 1980, even if the position each originally took is diametrically opposed to their current view. The substantive determination has been challenged and as suppression forms part of that decision it is arguable the matter is now before the Court and I should not alter it.

[19] If that is not correct but, as WCCL now asserts, my conclusions about the effect of the Family Court Act are, a lifting of the order would have the effect of frustrating the administration of justice. In the circumstances I consider it appropriate I leave the present order in place and have its ongoing status considered by the Court.

Conclusion

[20] For the above reasons WCCL Limited is ordered to pay Ms McKinlay the sum of $6,000.00 (six thousand dollars) as a contribution toward the costs she incurred in pursuing her claims.

Michael Loftus
Member of the Employment Relations Authority