IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 95
3020935

	BETWEEN	NINA NUMAN Applicant
	AND	THE ROCKPOOL LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Roland Samuels, Advocate for the Applicant James Hobcraft, Advocate for Respondent
Submissions received:	8 June 2018 from Applicant 22 June 2018 from Respondent
Determination:	27 June 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A The Rockpool Limited is ordered to pay to Nina Numan the sum of $2750 being costs together with disbursements in the sum of $71.56 for the reimbursement of the filing fee.

Substantive Determination

[1] In my determination dated 25 May 2018 I found in favour of the applicant that she was unjustifiably dismissed and awarded remedies for reimbursement of lost wages and compensation. I reserved the issue of costs and set a timetable for an exchange of submissions.

[2] Submissions have now been received on behalf of the applicant and the respondent.

The applicant's submissions

[3] Mr Samuels submits that actual costs incurred by the applicant are in the sum of $4,250 plus GST. Mr Samuels acknowledges that costs are usually awarded by the Authority on the basis of the daily tariff. He submits that notwithstanding the investigation meeting took less than one day, there were offers made to the respondent to settle the matter on a "without prejudice save as to costs" basis.

[4] The first of such offers attached to the submissions was a letter dated 19 December 2017 headed up "Without prejudice save as to costs" and offering to settle the matter for the sum of $5,500.

[5] This offer was not accepted by the respondent and a further offer to settle the matter was made on 1 March 2018 on behalf of the applicant on a "without prejudice save as to costs" basis in the sum of $7,500 under s 123 of the Employment Relations Act 2000. This was in full and final settlement of all matters relating to the applicant's employment and covering her claims of compensation and costs. It was not responded to within the timeframe in the letter. Mr Samuels seeks indemnity costs.

The respondent's submissions

[6] The respondent accepts liability for reimbursement of the filing fee, however, resists the applicant's request for an award of $4,250 plus GST. Mr Hobcraft submits that the matter was no more complex than the standard nature of cases before the Authority and there were issues for determination that were not clear.

[7] Mr Hobcraft submits that the respondent engaged in without prejudice negotiations and that at most the daily tariff should be applied representing a half-day rate. Mr Hobcraft also attaches an email to his submissions containing a without prejudice exchange. The Authority cannot have regard to that because it is without prejudice. Further it is of a standalone nature rather than falling within part of the earlier "without prejudice save as to costs" communication. I can however take into account the email from Mr Samuels dated 20 March that is headed "without prejudice save as to costs." It does not contain an offer per se but there is a rejection of an offer as too low. On that basis I can conclude an offer was made by the respondent.

[8] Mr Hobcraft submits that it was entitled to reject the pre-hearing offers and counter offer at a lower level in circumstances where it believed its trial period was valid and could be relied on.

[9] He submits that there were no extraordinary expenses incurred by either party as Mr Samuels and the applicant were connected to the investigation meeting by way of video conference.

[10] Finally, the respondent submits that the applicant received a generous award and because of that the costs should lie where they fall or, in the alternative, a minimum award of costs is appropriate.

Determination

[11] The investigation meeting commenced at 9.30am and concluded at 12.40 pm. Submissions were timetabled to be provided after the investigation meeting and some further information was also provided.

[12] Costs usually follow the event unless there is a reason that in the exercise of the Authority's discretion that should not occur. No such reason presents itself in this case. The applicant is entitled to consideration of a contribution towards her costs.

[13] Costs in the Authority are frequently assessed on the basis of a daily tariff which at the time the statement of problem was lodged is $4,500 for the first day of hearing and $3,500 for each subsequent day.

[14] In the exercise of my discretion as to costs the starting point is half of the daily tariff to reflect that the matter occupied half a day which is $2,250.00. I will then consider whether there should be an uplift or decrease to that amount.

[15] I accept Mr Hobcraft's submission that this matter was quite straightforward and essentially turned on whether or not the applicant was prevented from pursuing a claim of unjustified dismissal because of a trial period.

[16] I now consider the settlement offers made on behalf of the applicant and whether they should result in uplift to the daily tariff. The respondent did not accept the offers. The offers were made in a timely fashion and had either offer been accepted then the respondent would

have been better off because the combined award in the Authority for lost wages and compensation was $8996.68.

[17] The Employment Court has confirmed in *Stormont v Peddle Thorp Aitken Limited*[1] the approach to be taken in assessing such settlement offers in the exercise of the discretion as to costs. In that case Chief Judge Inglis stated that the focus should be on the reasonableness or otherwise of the decision to decline a settlement offer.[2] Further that such a decision to decline a settlement offer is to be assessed at the time it was rejected and the fact that the plaintiff achieved more that the defendant was prepared to offer is not the sole focus of the inquiry.[3]

[18] Ultimately the fact of a settlement offer is one of a number of factors to have regard to in the exercise of the Authority's discretion in considering whether the conduct of the parties tended to increase or contain costs. The fact of a settlement offer does not automatically result in indemnity costs.

[19] I have considered in assessing whether the respondent was unreasonable in rejecting the offer the following factors. When the offer was made the respondent was represented by one of the two directors of the company. Correspondence at the time supported the respondent was of the view that the claim was without merit because of the trial clause in the employment agreement.

[20] In the 1 March 2018 letter which contained the second settlement offer Mr Samuels set out why the trial period may not be effective. I accept that whether or not the applicant worked before she signed her employment agreement was a matter that the respondent not unreasonably wished to test further and that it was not well placed to make a realistic assessment about that. Had that been the only matter then I would not have found the declining of the offer unreasonable.

[21] There was also a notice period issue where the employment agreement provided for one week's notice but dismissal was summary in nature. This issue was set out in Mr Samuel's letter of 1 March 2018 and did not have the associated credibility issues about whether the applicant worked or not on a particular day. There was therefore a basis for a

[1] *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 159
[2] Above n 1 at [20]
[3] Above n1 at [21]

more realistic assessment by the respondent of the prospect of success and risk that the applicant may not be prevented from pursuing an unjustified dismissal claim.

[22] I find that the respondent did not consider the nature of the awards the Authority may make even taking contribution into account and on that basis did not accept the reasonable settlement offers made.

[23] I also weigh that the applicant and Mr Samuels were joined to the investigation meeting by video conference and that saved not only the costs of flights but importantly time. No issue was taken about this by the respondent. That was a matter that went toward the containment of costs.

[24] In the exercise of my discretion as to costs I find that an uplift of $500 to the daily tariff is fair and reasonable to reflect the unreasonable decline of the settlement offers by the respondent. That is a total cost award in the sum of $2750.

[25] The applicant is also entitled to reimbursement of her filing fee of $71.56.

[26] I order The Rockpool Limited to pay to Nina Numan costs in the sum of $2750 together with reimbursement of the filing fee of $71.56.

Helen Doyle
Member of the Employment Relations Authority