

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 46A/10
5157188

BETWEEN DANIELLE JODY PIVOTT
Applicant

A N D ROSS MILKING LIMITED
Respondent

Member of Authority: Paul Montgomery

Representatives: Patrick O'Sullivan, Advocate for Applicant
Damien Pine, Counsel for Respondent

Submissions Received: 19 March 2010 from Applicant
26 March 2010 from Respondent

Determination: 9 April 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In the determination of the substantive issues, the Authority found for the applicant but deducted 25% for contributory conduct from the awards made in respect of her dismissal.

[2] The representatives have attempted to resolve the issue of costs but have been unable to do so and the matter falls to the Authority for determination.

[3] Mr O'Sullivan submits three calculations based on precedents and concludes, in the circumstances of this case, a contribution of between \$8,000 and \$15,000 would be a principled and equitable contribution towards costs. He bases his submission on observations from *Binnie v. Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) in respect of discretion to award full indemnity costs. Such costs can be considered only where the behaviour of the unsuccessful party can be described as *reprehensible* and therefore contribute to increased costs on the part of the successful party.

[4] For the respondent, Mr Pine submits the approach urged by Mr O'Sullivan is unsound in this case, and opines the cases cited by the advocate are clearly distinguishable on their facts and the lengths of the hearings concerned. As counsel indicates, the present matter involved an investigation meeting of some four hours compared with those cases cited by Mr O'Sullivan. Counsel's submission is that no costs be awarded in this case as part of costs claimed relate to mediation, and that an offer of settlement made immediately following mediation, an offer of \$5,000 under *Calderbank* terms, was close to what he says are the after-tax remedies awarded to the applicant.

[5] That offer was made by letter on 13 May 2009 and it was promptly rejected by the applicant who countered with an offer to settle at \$15,000. The respondent declined to accept that proposition.

[6] Despite a protracted and lively exchange between the representatives (once the respondent had appointed counsel), this is not a case where the respondent's conduct reaches the reprehensible threshold and hence I decline the order for indemnity costs. However, there was behaviour which appears to be obstructive prior to counsel being appointed. It may have been borne of inexperience, but nonetheless gave rise to extra work by the advocate to secure documents necessary for evaluation of his client's case.

[7] In the circumstances, I think it appropriate and just to vary the approach as set out in *PBO Ltd (formerly Rush Securities Ltd) v. Da Cruz* [2005] 1 ERNZ 808. Beginning with the daily tariff of \$3,000 and allowing for two days preparation for the investigation meeting which took half a day, at a charge out rate of \$125 per hour, I arrive at a figure of \$3,500. That is, 16 hours @ \$125 and \$1,500 for representation at the Authority's investigation meeting.

[8] In consideration of the extra work undertaken to secure what ought to have been readily available documents, I allow a further four hours, that is, \$500.

[9] Mr O'Sullivan also sought disbursements in the sum of \$149.50. That total included the purchase of an ink cartridge at \$30.80. That item is a general office expense so I decline reimbursement of that item. The others fall squarely within the disbursement category.

[10] Curiously, Mr O'Sullivan made an application for joinder of Mr and Mrs Ross, the principals of the respondent, who the advocate said acted in a *cavalier* fashion in respect of their obligations as company directors.

[11] The application is without merit in a costs setting. Besides, any action involving lifting the corporate veil properly relies within the jurisdiction of the Employment Court.

[12] The application for joinder is declined.

Determination

[13] The respondent is to pay the applicant the sum of \$4,000 as a contribution to her reasonably incurred costs. It is also to pay disbursements in the sum of \$118.70.

Paul Montgomery
Member of the Employment Relations Authority