

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 36
3170862

BETWEEN EVA POUROVA
Applicant

AND IDEA SERVICES LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Anita Brockhouse, advocate for the Applicant
Paul McBride, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 15 December 2022 from the Applicant
20 December 2022 from the Respondent

Date of Determination: 26 January 2023

COSTS DETERMINATION OF THE AUTHORITY

The Determination

[1] In a 12 December 2022 determination, the Authority found that:

- Eva Pourova was unjustifiably disadvantaged by IDEA Services Limited addressing potential disciplinary concerns in an inappropriate manner; and that:
- IDEA Services Limited must pay Eva Pourova: \$5,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.

[2] I reserved costs and encouraged the parties to reach an agreement. No agreement was achieved. The investigation meeting took two days. I now consider the submissions of each party to assist in exercising the Authority's inherent discretion.

Submissions from the parties

[3] Ms Brockhouse's submission concentrated on a claim for full daily tariff-based costs and cited an earlier Calderbank offer made in response to one from IDEA Services Limited (discussed below). Although no amount was specified, I took this claim to be for \$4,500 to cover the first investigation meeting day and \$3,500 for the second day (the current Authority tariff approach).¹

[4] By contrast, IDEA Services' counsel, opposed the suggestion that tariff based costs be awarded and opined that the "Authority's Practice Note is not properly itself a foundation for any award of costs".

[5] Mr McBride suggested Ms Brockhouse had not properly established costs were actually incurred and went further to opine that Ms Brockhouse's inexperience was a factor that the Authority should consider, going to the reasonableness of any costs award and that Ms Brockhouse had not assisted the Authority's investigation and generally hindered the process.

¹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

[6] Addressing the merits of the costs application Mr McBride then proceeded to suggest that Ms Brockhouse had spent most of the investigation process narrowly trying to establish Ms Pourova had been bullied and was not successful in establishing this to be the case.

[7] In concluding that no costs be awarded to Ms Pourova, Mr McBride suggested that due to Ms Brockhouse's approach and conduct of the case, costs should be awarded to IDEA Services "in the light of the conduct of the case, time and effort wasted, and Culturesafe's unrealistic Calderbank offers". I note despite criticising Ms Brockhouse for not establishing actual costs incurred, Mr McBride in seeking an award for his client, advanced no evidence of the costs incurred by IDEA Services.

[8] In the alternative Mr McBride suggested costs lie where they fall.

[9] Essentially Mr McBride was asserting Ms Pourova's success was partial as her predominant claim relating to a suggestion that IDEA Services had deliberately used a disciplinary process to bully her and such actions were in breach of health and safety obligations was unsuccessful. However, the Authority did make a finding arising from the same disputed circumstances that Ms Pourova was disadvantaged by IDEA Services approach to a disciplinary investigation.

Costs principles

[10] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² including those costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.³ These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*. The principles include:

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

³ Section 160(2) Employment Relations Act 2000.

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.⁴

The dilemma of 'mixed success'

[11] To assess costs where one party as is here has only mixed success can be problematic. It is arguable that Ms Pourova's successes was partial and compensation modest as she failed to establish her predominant claim for significant compensation based on a suggestion that IDEA Services had engaged in bullying behaviour and breached statutory obligations.

[12] However, Judge Smith in *William Coomer v JA McCallum and Son Limited* noted (omitting citations):

Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any 'realistic appraisal'. That conclusion followed because they obtained a

⁴ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

monetary award It was immaterial that they had not succeeded to the full extent of their claim because' ... success on more limited terms is still success. ⁵

The settlement offers

[13] The making of a settlement offer, in the form of a 'Calderbank' offer or 'without prejudice except as to costs' may be a relevant factor when considering costs where such does not better the award made by the Authority. Whilst generally the Authority has a low-level jurisdiction hence a focus on tariff-based costs, there is authority to suggest a 'steely' approach is sometimes required in the broader public interest. ⁶

[14] Here though, a counteroffer of 20 June 2020 by IDEA Services of \$2,000 in response to an offer proffered by Ms Pourova, does not provide any vindication of Ms Pourova's situational grievances or acknowledge the distress caused by what the Authority found was a largely ill-conceived investigation. It was a wholly pragmatic offer (although I acknowledge such offers are not uncommon). Further, the offer did not address Ms Pourova's legal costs at the time. Ms Pourova's additional offer to settle of \$6,000 plus costs of \$3,500 + GST was not objectively excessive and was only \$1,000 more than the compensatory amount the Authority eventually awarded. Given that this was an ongoing employment relationship, a further degree of pragmatism by IDEA Services Limited in hindsight, would have avoided further legal costs to both parties and may have better preserved the employment relationship.

[15] If the above elements had been present in the IDEA Services Limited's only offer, I would have been more minded to find the gap between the settlement offer and the eventual outcome as being decisive but even if I do so, there is still only a relatively modest difference between the offer to settle advanced by Ms Pourova and the compensatory amount Ms Pourova achieved in litigation (around \$1,000).

⁵ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

⁶ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18] – [20].

Assessment

[16] The Authority's tariff-based approach has often been endorsed by the Employment Court as being consistent with the principles and objectives of the Employment Relations Act 2000.⁷

[17] In assessing costs overall, I make it clear that the pejorative comment Mr McBride has made about Ms Brockhouse's relative inexperience and the suggestion that the claims pursued were somehow vexatious, are matters I have not considered. This was a legitimate dispute about an existing employment relationship. Whilst viewing correspondence suggested that Ms Pourova's advocates took a very robust approach, the Authority does not, as per the principles outlined in *Fagotti*, consider using costs as a punishment is in these circumstances, appropriate.

[18] Taking all the factors identified in submissions into account including Ms Pourova's relatively modest success I consider that it is equitable to find that Ms Pourova is entitled to a cost contribution for the two days investigation meeting of \$6,000.

Awards

[19] I order IDEA Services Limited to pay Eva Pourova the sum of \$6,000 as a contribution to her legal costs.

David G Beck
Member of the Employment Relations Authority

⁷ See for example *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpoC 28.