

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 180
3168301

BETWEEN

NADEEN SALEEM
Applicant

AND

MUSSELBURGH PHARMACY
(2021) LTD
Respondent

Member of Authority: Peter van Keulen

Representatives: Phillip de Wattignar, advocate for the Applicant
Malcolm MacDonald, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 4 March 2024 from the Applicant
18 March 2024 from the Respondent

Date of Determination: 28 March 2024

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 23 February 2024,¹ I found that Musselburgh Pharmacy (2021) Ltd (MPL) had unjustifiably dismissed Nadeen Saleem and I ordered MPL to pay Ms Saleem \$12,000.00. I also dismissed Ms Saleem's claims for unjustified disadvantage and a penalty.

[2] In my determination I reserved costs so that the parties could try to agree costs. The parties have not agreed costs and now Ms Saleem seeks costs.

¹ *Nadeen Saleem v Musselburgh Pharmacy (2021) Ltd* [2024] NZERA 99.

Application for costs

[3] Ms Saleem seeks an award of costs of \$6,250 together with \$71.56 for the lodgement fee and \$153.33 for hearing fees. Ms Saleem seeks this amount based on the application of the daily tariff.

[4] MPL says Ms Saleem should not be awarded any costs because:

- (a) She failed in two of her three claims.
- (b) She failed to accept an offer made by MPL or engage in good faith over that offer.
- (c) She failed to negotiate the payment of costs and applied directly for an order from the Authority.

Analysis

Costs in the Authority

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined in the Authority's practice note on costs.²

Costs follow the event

[6] The starting point is that costs should follow the event; that is the successful party should be awarded costs from the other party.

Mixed success

[7] MPL says that there has been mixed success as Ms Saleem only succeeded in one of her three claims.

² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

[8] The question of mixed success and an applicant's entitlement to costs has been resolved by the Employment Court in *William Coomer v JA McCallum and Son Limited*.³ The position is that any success for an applicant is sufficient success for the purposes of costs; it does not matter that an applicant may have lost a significantly larger or more complex claim if it was successful with any claim.

[9] Applying the principle here, Ms Saleem was successful in one claim and is entitled to an award of costs.

Applying the daily tariff

[10] The normal practice of the Authority when setting costs is to apply a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff.

[11] The current daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for every subsequent day of an investigation meeting.

[12] There is no reason to depart from this normal approach so I will calculate the award of costs based on the daily tariff.

[13] The investigation meeting for this matter took one and a half days, so the starting point for any costs award is \$6,250.

Adjusting the daily tariff

[14] The daily tariff can be adjusted for relevant factors, including any Calderbank offers and mixed success.

³ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

The Calderbank offer

[15] MPL refers to an exchange of Calderbank offers that are relevant to the question of costs.⁴

[16] Calderbank offers are relevant to the award of costs for a successful applicant where a successful applicant has rejected a Calderbank offer to settle from the respondent and has then not been awarded an amount in the subsequent determination that betters the offer. The rationale is that by continuing with its claims after rejecting the Calderbank offer, the applicant has pursued a futile and unnecessary claim because the applicant would have gained more from accepting the offer and would have avoided the ongoing costs for both parties by ending its claims at that time.

[17] The key requirements for an offer to be relevant include that the offer was unreasonably rejected by the applicant and that applicant did not get an award from the Authority that was greater than the amount of the offer.⁵

[18] The Calderbank offer in this case was an offer made by MPL on 8 February 2023. The offer was for payment of \$10,000 in full and final settlement.

[19] MPL says Ms Saleem did not negotiate in good faith; She responded to the MPL offer with a counteroffer on 13 February 2023 seeking \$18,000 plus \$8,000 for costs. This was significantly more than the \$12,000 she was awarded in my determination.

[20] Whilst there might be some merit in MPL's submission, the relevant fact for my assessment of costs is that Ms Saleem was awarded \$12,000 and when costs are added to this, she beat the MPL offer by a reasonable amount. This means as a result of pursuing her claims in the Authority Ms Saleem has received more than she would have received by settling, so

⁴ A Calderbank offer is an offer made by one party, normally a respondent, to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

⁵ *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

the offers are not relevant to my assessment of costs and are not the basis on which the tariff should be adjusted.

Mixed success

[21] Ms Saleem had three claims; unjustifiable dismissal, unjustified action causing disadvantage and a penalty for failing to provide wages and time records.

[22] For mixed success to be relevant to a reduction of the daily tariff the claims need to be distinct and separate. If all three claims had arisen from the same set of facts or allegations there would only be one employment relationship problem to be resolved. Succeeding in only one element of that problem would mean the loss of the other elements would not be relevant to my assessment of costs. Essentially all of the evidence and investigation meeting time related to the same problem, how the problem was articulated and determined does not change that.

[23] However, if the differences in the claims are clear such that the claims are not related and are separate, then it is appropriate for me to consider a reduction to the daily tariff amount.

[24] In this case the two personal grievances claims are separate; the dismissal grievance related to the end of the employment relationship and the disadvantage grievance related to a return-to-work plan part way through the employment relationship. Likewise, the alleged failure to provide wages and time records is unconnected to the dismissal grievance.

[25] So, there is mixed success that is relevant to a reduction in the daily tariff.

[26] In this case I conclude that an appropriate reduction is \$1,000 for the first day of the investigation meeting and \$500 for the second, half day.

Negotiating costs

[27] MPL refers to the failure by Ms Saleem to negotiate any costs payment. If this is true it is disappointing but it is not a recognised basis on which the daily tariff can be reduced. Therefore, it is not relevant to my assessment of costs.

Conclusion

[28] Ms Saleem was the successful party and is entitled to receive an award of costs. The daily tariff should be applied to calculate the quantum of the award but subject to a reduction of \$1,500. This means Ms Saleem is entitled to an award of costs of \$4,750.

[29] Ms Saleem is also entitled to the disbursements she has sought of \$71.55 for the filing fee and \$153.33 for the hearing fees.

Order

[30] Musselburgh Pharmacy (2021) Ltd is to pay Nadeen Saleem \$4,750 as a contribution to her costs in this matter. Musselburgh Pharmacy (2021) Ltd must also pay Nadeen Saleem \$224.88 for disbursements.

Peter van Keulen
Member of the Employment Relations Authority