IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 413
3092692

BETWEEN	HANNAH SAMUELS Applicant	
AND	SAMBA HOSPITALITY LIMITED Respondent	3121733
AND	SAMBA HOSPITALITY LIMITED Applicant	
AND	HANNAH SAMUELS Respondent	

Member of Authority:	Helen Doyle
Representatives:	Jessica Prebble, counsel for Hannah Samuels Duncan Anderson, counsel for Samba Hospitality Limited
Submissions Received:	23 July 2021 from Ms Samuels 6 August 2021 from Samba Hospitality Limited
Date of Determination:	23 September 2021

COSTS DETERMINATION OF THE AUTHORITY

A **I order Samba Hospitality Limited to pay to Hannah Samuels the sum of $1125 costs and $71.56 being reimbursement of the filing fee.**

Substantive determination

[1] In a determination dated 25 June 2021 the Authority found that Ms Samuels had not established that her resignation was in the nature of a constructive dismissal. The Authority also found that there was no basis for the orders sought by Samba Hospitality Limited in its counterclaim. Ms Samuels was found to be owed a small sum of holiday pay in the amount of $240 together with interest on that amount.

[2] The Authority reserved the issue of costs. Agreement was unable to be reached and the Authority now has submissions from counsel for both parties seeking costs.

[3] I will refer to Hannah Samuels as the applicant, and Samba Hospitality Limited (Samba Hospitality) as the respondent.

The applicant's submissions

[4] Ms Prebble applies for an award of $18,388.26 (GST exclusive) being a claim for indemnity costs in relation to the two proceedings.

[5] She submits that indemnity costs are reasonable and appropriate because there was a refusal of offers made by the applicant in the nature of "Calderbank" offers on 1 and 10 September 2020 to discontinue the claim against the respondent if the parties agree costs lie where they fall. Further that the respondent subsequently lodged a claim for orders to enforce an employment agreement clause about intellectual property notwithstanding that the applicant had already removed the material subject of the claim from her website.

[6] Ms Prebble submits that the Authority should order the respondent pay the applicant $18,388.26. In the event that indemnity costs are not awarded, the applicant seeks that increased costs, or any costs, are payable by the respondent on this basis.

The respondent's submissions

[7] Mr Anderson submits that there was a mixed measure of success with the focus of the proceeding on the applicant's unsuccessful constructive dismissal claim. He states that the vast majority of the day and a half investigation meeting was devoted to that and only a small amount of hearing time taken up with the holiday pay claim and the orders sought about intellectual property. Mr Anderson submits that the respondent has proportionately been more successful in the proceeding than the applicant and that the Authority should order that the

applicant contribute to the respondent's costs and that the quantum of contribution should be the daily tariff of $6,250 for a day and a half.

[8] Mr Anderson submits that the claim for indemnity costs is not supported by invoices and that the settlement offer described by the applicant's counsel as a Calderbank offer was not made in relation to the two proceedings before the Authority and is not a valid Calderbank offer. That is because it because it makes no mention of how pre-offer costs would be dealt with and if the offer had been accepted it would have put the respondent in a lesser position in that now it is able to recover a contribution to its costs. Further that its behaviour did not justify an award of indemnity costs and an award would be inconsistent with the cost principles in the Authority.

[9] The respondent seeks an award of costs of $6,250 in its favour with no costs to be made against it.

The Issues

[10] The Authority needs to determine the following issues:

(a) What are the principles that apply to costs in the Authority?

(b) Who was the successful party?

(c) Can a "walk-away" Calderbank offer be taken into account in the exercise of the discretion as to costs?

(e) If it can then was it unreasonable for the respondent to reject the offer at the time it was made?

(e) Is this a case for indemnity or increased costs?

(f) What is a fair and reasonable outcome for costs in the exercise of the Authority's discretion?

Costs principles in the Authority

[11] Clause 15(1) of the second schedule to the Employment Relations Act 2000 (the Act) provides that the Authority may order any party to a matter to pay to the other party such costs and expense as it sees fit.

[12] In *PBO Limited (formerly Rush Security Limited) v Da Cruz* it was recognised that the Authority is able to set its own procedure and has held to some basic tenets when considering costs. These include that there is a discretion as to whether costs will be awarded and in what amount. Costs generally follow the event. The discretion should be exercised in accordance with principle and not arbitrarily. Further to this, the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority and is to be considered on a case by case basis. Costs are not to be used as a punishment or an expression of disapproval but conduct that increases costs unnecessarily can be taken into account in inflating or reducing an award. Without prejudice costs (save as to costs) can be taken into account.[1]

Who was the successful party?

[13] Both parties were unsuccessful except for the award made for holiday pay.

[14] The Employment Court has considered costs in a case where one party was only partially successful in the Authority.[2] In that case the plaintiff had claimed in the Authority that he was owed wages, should have a penalty imposed and that he had been constructively dismissed. During final submissions the Authority was invited to consider an alternative personal grievance of disadvantage. The Authority did not find the plaintiff had been unjustifiably constructively dismissed, the claim for wages failed and the Authority declined to impose a penalty. The Authority found there was a personal grievance for unjustifiable disadvantage and awarded the plaintiff $8000. The Authority awarded costs to the defendant on the basis that the defendant was "more successful" than the plaintiff following an analysis of time spent on allegations that did not result in a positive outcome. The plaintiff challenged that.

[15] The Court found that the plaintiff was the successful party and whilst his success was limited it could not have been achieved without lodging a claim in the Authority. He was found to be entitled to an award of costs, but was only awarded costs for the first day of the investigation meeting and not the second to take the limited success into account.[3]

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[1] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.
[2] *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.
[3] At [43].

[16] *Nisha v LSG Sky Chefs New Zealand* is distinguishable.[4] In *Nisha* all of the plaintiff's pleaded claims in "complex and protracted litigation" failed except on one minor aspect due to an intervention by the Court.

[17] In this case the applicant had claimed outstanding pay for which a component was holiday pay. The claim was advanced as an unjustified disadvantage claim however the Authority considered it more appropriately resolved as a recovery of money claim. Shortly after the investigation meeting some holiday pay was paid, however a further amount was found owing as the calculation had not taken into account the full period of employment due to a view that the applicant was not an employee. The Authority resolved that problem. A claim for payment for the notice period when it was not worked was not successful.

[18] In conclusion the applicant was unsuccessful with her main claims but had limited success with the holiday pay claim. The respondent was unsuccessful in its counterclaim.

Can a "walk-away" Calderbank offer be taken into account in the exercise of the discretion as to costs?

[19] There were discussions about a "without prejudice save as to costs" offer on 28 August 2020 whereby the applicant would withdraw her proceedings on the basis that costs lie where they fall. The respondent agreed in principle to this, subject to the parties executing a record of settlement under s 149 of the Act.

[20] On 1 September 2020 the applicant's solicitor forwarded a record of settlement signed by the applicant to the respondent's solicitor.

[21] On 2 September 2020 the respondent's solicitor wanted a clause inserted about intellectual property that contained similar obligations to the obligations in the employment agreement.

[22] The applicant was not prepared to agree to that clause being inserted. In support of this, earlier emails were provided from the respondent confirming that no outstanding documents were missing. The applicant's solicitor re-sent the settlement agreement signed by the

[4] *Nisha v LSG Sky Chefs New Zealand* [2018] NZEmpC 8.

applicant with advice that if a response was not received by close of business the next day, then the applicant would proceed to the Authority and seek full indemnity costs.

[23] The settlement agreement was not signed.

[24] Subsequently the respondent lodged its counterclaim seeking orders along the same line as those it had proposed in the settlement agreement.

[25] The Employment Court has considered these type of offers.

[26] In *Foai v Air New Zealand Ltd* the plaintiff had made an offer for a discontinuance with each party paying their own legal costs. It was held that such an offer does not automatically result in a more favourable costs award and was "merely a discretionary factor".[5] There was some focus in the judgment on Australian cases referring to these types of offers as "walk away" Calderbank offers and whether the offer involves compromise or capitulation.[6]

[27] In *O'Hagan v Waitomo Adventures Limited* Judge Inglis as the Chief Judge was at that time took into account the timing of the offer.[7] It was made at a time when it was known what the determination of the Authority was and did not amount to a nil offer because the defendant agreed not to pursue a costs award made in its favour. It was referred to as a "genuine compromise." It was found to be unreasonable for the plaintiff to reject the offer of settlement and an uplift was found to be appropriate.

[28] With the knowledge that the parties have now, it would have been eminently sensible to have accepted the applicant's offer from both a practical and costs perspective. It was not however the same sort of offer in terms of its timing and nature as that in *O'Hagan* to be considered as a genuine compromise.[8]

[29] I have also considered whether the offer was unreasonably rejected by the respondent. The respondent had always wanted the applicant to sign something about intellectual property and ownership. This is notwithstanding that it accepted that the applicant had not retained any of its property. I cannot be satisfied that the reason for wanting the clause was, as Ms Prebble submits, based on allegations known to be false. I cannot fairly discount a desire to protect

[5] *Foai v Air New Zealand Ltd* [2013] NZEmpC 50.
[6] At [18].
[7] *O'Hagan v Waitomo Adventures Limited* [2013] NZEmpC 58 at [27].
[8] Above n 7.

interests. Had the settlement agreement been signed, then it would have resolved all matters and prevented any further claims between the parties including for obligations in the employment agreement that survived termination.

[30] Ultimately the respondent was unsuccessful in obtaining the orders it wanted and the applicant's claim of constructive dismissal was also unsuccessful.

[31] In all the circumstances I am not prepared to weigh the "walk away" Calderbank offer in the exercise of the discretion as to costs in all the circumstances.

Is this a case for indemnity or increased costs?

[32] I am not satisfied that the behaviour of the respondent was exceptionally bad. There were no fraud allegations. The investigation meeting was not conducted in a manner that impacted significantly on time taken. Conduct of the parties did not unduly increase the time taken for investigation. An award of indemnity costs is not justified.

[33] Given the ultimate result, I do not find a case made out for increased costs either.

What is a fair and reasonable outcome for costs in the exercise of the Authority's discretion?

[34] I find that a fair and reasonable outcome for costs is for the Authority in the exercise of its discretion to recognise the limited success the applicant had.

[35] The applicant was not able to achieve payment of the holiday pay without pursuing a claim. An award based on an adjusted daily tariff should however reflect the time taken to investigate the holiday pay claim. Most of the day and a half investigation meeting was occupied in investigating the unsuccessful claim for constructive dismissal and to a lesser degree the respondent's unsuccessful counterclaim. A fair and reasonable award would be one quarter of the daily tariff for the first day of $4,500. That is the sum of $1125.00. It is also fair and reasonable to order reimbursement to the applicant of her filing fee of $71.56.

Order

[36] I order that Samba Hospitality Limited pay to Hannah Samuels the sum of $1125.00 together with reimbursement of the filing fee of $71.56.

Helen Doyle
Member of the Employment Relations Authority