

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 271  
3049392

BETWEEN                      TLN  
                                         Applicant  
  
AND                                SIAM CUISINE LIMITED  
                                         Respondent

Member of Authority:        Helen Doyle

Representatives:             Anna Oberndorfer, advocate for the Applicant  
                                         Robert Thompson, advocate for the Respondent

Submissions Received:      11 May 2020 from the Applicant  
                                         25 May 2020 from the Respondent

Date of Determination:      6 July 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A        Siam Cuisine Limited is ordered to pay to TLN the sum of \$4,750 costs and disbursements of \$224.89 for hearing and filing fees.**

**Substantive determination**

[1]        The Authority in its substantive determination dated 28 April 2020 upheld an unjustified disadvantage claim and awarded compensation in the sum of \$12,000 and reimbursement of wages in the sum of \$3,059 gross to the applicant. It did not conclude the applicant was unjustifiably constructively dismissed or that three other unjustified disadvantage claims were made out.

[2] Costs were reserved in the determination and a timetable set for an exchange of submissions.

[3] The Authority has now received submissions from both parties.

### **Non-Publication**

[4] An application by the applicant for non-publication of her name was declined. The Authority made an interim order prohibiting from publication the applicant's name for a period of 28 days from the date of the substantive determination to enable a challenge. The Authority understands there has been a challenge to the Employment Court and will extend the order for interim non-publication accordingly.

### **The applicant's submissions**

[5] Ms Oberndorfer on behalf of the applicant seeks a contribution towards legal costs for an investigation that occupied one and a half days in accordance with the daily tariff with uplift for a settlement offer in the nature of a *Calderbank* offer made on 19 September 2019.

[6] Ms Oberndorfer acknowledges that not all of the applicant's claims were successful but submits that they did not take up a disproportionate amount of the investigation meeting time. She submits that the claim for constructive dismissal was not successful but the facts relied on were the same as the unjustified disadvantage claims and therefore the respondent was not put to unreasonable additional cost.

[7] Reliance is placed on the *Calderbank* offer in the sum of \$8,000 together with costs of \$5,000 and GST put to the respondent which was rejected for uplift. Ms Oberndorfer submits that the applicant was put to additional cost of over \$16,000 as a result of the rejection of the *Calderbank* offer and that there was no reasonable basis to reject the offer. She submits that had the offer been accepted then on a conservative estimate that would have saved her more than \$7,000 costs.

[8] Ms Oberndorfer submits an uplift of \$7,000 reflecting less than 50% of actual additional costs incurred should be made referring to the detriment to an employee who is forced to proceed to the Authority where costs may outweigh any potential award.

[9] The applicant seeks \$13,250 in legal costs, \$153.33 for the hearing fees for an additional half day investigation meeting and the filing fee of \$71.56.

### **The Respondent's Submissions**

[10] Mr Thompson on behalf of the respondent does not accept it is appropriate or reasonable for the Authority to find against the respondent.

[11] He submits that the respondent had a substantial amount of success and that the applicant's primary claim related to the unjustified constructive dismissal and the respondent focussed on defending that. Mr Thompson submits that any award of costs in favour of the applicant is punitive and unreasonable. He submits that the Authority should apply its discretion and not award costs to the applicant.

[12] Mr Thompson submits that the applicant presented 18 pages of submissions and that 15 pages were dedicated to the constructive dismissal claim that was unsuccessful with one paragraph relied on for the unjustified disadvantage. He submits that the invoices attached to the submission for costs do not identify time spent on the success and says that the respondent was successful in defending the constructive dismissal claim and late request for name suppression.

[13] Mr Thompson submits that less than half a day was required to deal with the number of unjustified disadvantage claims raised and that costs should be awarded to the respondent in the sum of \$4,500 to account for the limited success of the applicant. Alternatively he submits costs should lie where they fall.

## **Analysis and conclusions**

### *Costs assessed where there is a mixed result*

[14] The outcome and level of success achieved by the applicant in this matter is not dissimilar to that in an Employment Court judgment that considered a challenge to a cost award in the Authority; *Coomer v McCallum*.<sup>1</sup> In that case a claim of constructive dismissal was pursued but during submissions to the Authority it was invited to consider an alternative personal grievance if one was thought to have occurred.<sup>2</sup> The Authority concluded that there was a personal grievance for an unjustified disadvantage arising from a meeting of 16 February 2016 and awarded compensation in the sum of \$8,000. It did not find Mr Coomer was constructively dismissed and his claim for wages and a penalty failed. When it came to determine costs the Authority found that the respondent was “more successful” than Mr Coomer and was therefore eligible for a costs award. Mr Coomer challenged that determination.

[15] The Employment Court found that Mr Coomer was the successful party and his success whilst limited could not have been achieved without lodging a claim in the Authority. The award made for costs was limited to the usual daily tariff of one day rather than two days to reflect the limited success.<sup>3</sup>

[16] The leading case on costs in the Authority is that of the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* where the Court set out the principle that apply to the Authority in exercising its discretion as to costs.<sup>4</sup>

[17] One of the principles referred to in *PBO*<sup>5</sup> is that costs generally follow the event. In this case there is an issue from the submissions about who was the successful party. It is necessary to address this at the outset.

[18] The applicant in this case established a personal grievance and was awarded compensation and lost wages for a period of sick leave. I do not find that success outweighed by that of the respondent. I find that the applicant was the successful party and is entitled to consideration of a contribution towards her costs.

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<sup>1</sup> *William Coomer v JA McCullum and Son Limited* [2017] NZEmpC 156.

<sup>2</sup> Above n 1 at [11].

<sup>3</sup> Above n 1 at [43] and [45]

<sup>4</sup> *PBO Ltd v Da Cruz* [2005] ERNZ 808 at [44]

<sup>5</sup> Above n 1 [44]

*Calderbank offer*

[19] Awards are frequently assessed in the Authority on the basis of a daily tariff which is \$4,500 for the first day of investigation and \$3,500 for each subsequent day. The investigation in this matter occupied one and a half days. A contribution towards costs assessed on the daily tariff in this matter is \$6,250 and that is the appropriate starting point.

[20] *PBO* establishes that in the exercise of the discretion as to costs without prejudice offers [save as to costs] can be taken into account. Ms Oberndorfer has asked that the Authority take into account a *Calderbank* offer headed “without prejudice save as to costs.” This offer was made on behalf of the applicant in an email dated 19 September 2019 for \$8,000 under s 123(1)(c)(i) of the Act and \$5000 plus GST for costs. It was proposed that this settlement be recorded in a record of settlement under s 149 of the Employment Relations Act 2000 (the Act) with a non-disparaging clause and signed by a mediator. The offer was put forward on the basis that it could be put before the Authority in a costs claim if the applicant received the same or more than the offer to seek uplift to the daily tariff. Mr Thompson was asked to seek instruction and advise by the end of business the next day as dates needed to be confirmed with the Authority.

[21] The next communication attached was an email from Ms Oberndorfer to Mr Thompson dated 7 October that asked if there was any progress. Mr Thompson responded on 8 October and advised his client rejected the offer and did not intend to submit any alternative offers.

[22] On the basis of the email dated 19 September 2019 and the fact that the applicant achieved more than the proposed settlement Ms Oberndorfer seeks an uplift to the daily tariff of \$7,000. This is on the basis of additional costs incurred by the applicant after that date.

[23] The Authority needs to be satisfied that the *Calderbank* offer is one that can be taken into account in the exercise of the Authority’s discretion as to costs. There are some recognised safeguards around a *Calderbank* offer because the party receiving the offer needs sufficient time to consider and weigh it and assess its reasonableness against any potential risk.

[24] Ms Oberndorfer recognising no doubt that the time to respond to the offer was the next day and the potential for the Authority to conclude that it did not allow a reasonable time to respond relies on further correspondence in October as set out above.

[25] The difficulty with that is the correspondence sits outside the *Calderbank* letter. It can of course inform whether the offer was accepted or not, but beyond that the Authority can only speculate. It is unclear to the Authority for example what if anything occurred between the 19 September offer and Ms Oberndorfer's email dated 7 October about "any progress." The response from Mr Thompson not only states that his client has rejected the offer but that they do not intend to submit an alternative offer. It is not clear when his client rejected the offer.

[26] I do not find that the *Calderbank* offer provided a reasonable and adequate time for consideration by the respondent. I do not give effect to it in those circumstances as a factor that should increase a costs award.

#### *Costs outweigh award*

[27] Ms Oberndorfer has made some general statements about the detriment to an employee who is "forced to proceed to the Authority where costs outweigh any potential award."

[28] *PBO* confirms that one of the basic tenets is that costs in the Authority are modest and usually awarded on the basis of a daily tariff.<sup>6</sup>

[29] The full Court of the Employment Court in *Fagotti v Acme & Co Limited* referred to the proportionality principle.<sup>7</sup> Mr Fagotti was successful in his claim and although the meeting lasted less than a day the Authority found he was entitled to costs in accordance with the daily tariff for one day and uplift of \$1,000 because of a *Calderbank* offer. Mr Fagotti's actual legal costs were considerably higher than the award and largely consumed any compensatory award made. The Employment Court stated about the proportionality principle to the costs' award:

...even if a significant [part of the Authority's compensatory awards to Mr Fagotti will be consumed by the costs of his legal representative, recovery of a portion of these must still be in reasonable proportion to the nature of the plaintiff's success

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<sup>6</sup> Above n 1 [44]

<sup>7</sup> *Fagotti v Acme & Co Limited* [2015] NZEmpC 135

before the Authority and the (unchallenged) awards made to him. This is not a case for indemnity costs.<sup>8</sup>

*Reduction for limited success?*

[30] I now consider whether there should be any reduction to the award of costs because of the limited success of the applicant. I have in light of Mr Thompson's submission revisited Ms Oberndorfer's submissions. They commence with a description of the grievances of unjustified constructive dismissal and unjustified disadvantage. I accept that there was a primary focus on the claim of unjustified constructive dismissal in the body of the submissions however it is clear from the submissions that alternative claims of unjustified disadvantage are based on the same facts. That is not unusual.

[31] I weigh that the most significant time spent in the investigation meeting was on the unjustified disadvantage claim that was made out. That required an evaluation of various events in July to September 2018 over the applicant's period of employment. The other disadvantage grievances were considerably more factually confined therefore occupying less time. The constructive dismissal claim was not made out nor was the application for non-publication. I accept that an adjustment should be made to tariff of \$6,250 to reflect the limited success of the applicant. I consider it appropriate for a reduction to be made of \$1,500. The applicant is also entitled to disbursements as claimed.

**Orders**

[32] I order Siam Cuisine Limited to pay to TLN the sum of \$4,750 together with disbursements of \$224.89 being hearing fees and the filing fee.

**Helen Doyle**  
**Member of the Employment Relations Authority**

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<sup>8</sup> Above n 6 at [114]